Are my claims subject to binding arbitration?

April 01, 2021

Loss Mitigation Review Under RESPA

Hurst v. Caliber Home Loans, Inc., N.D.Ohio No. 5:19-cv-00315, 2021 U.S. Dist. LEXIS 51849 (Mar. 19, 2021)

In this matter, the Northern District of Ohio held that a loan servicer did not violate RESPA as it did not repeatedly request documents already in its possession, but rather requested documents that the borrowers repeatedly failed to properly submit.

The Bullet Point: Under Regulation X, when a loan servicer receives a loss mitigation application, it is required to promptly "review the loss mitigation application to determine" whether it is complete. 12 C.F.R. § 1024.41(b)(2)(i)(A). A complete loss mitigation application is one "with which a servicer has received all the information that the servicer requires from a borrower in evaluating applications for the loss mitigation options available to the borrower." 12 C.F.R. § 1024.41(b)(1). If the loss mitigation application is incomplete, the "servicer shall exercise reasonable diligence in obtaining documents and information to complete" it. Id. Once the borrower submits all of the missing documentation and information, the loss mitigation application is considered facially complete. 12 C.F.R. § 1024.41(c)(2)(iv). Further, even if a loan servicer later requests additional information or corrections to previously submitted documentation, the servicer must treat the application as facially complete until the borrower is given a reasonable opportunity to complete the application. Id. Here, the borrowers alleged the servicer failed to exercise reasonable diligence when it repeatedly requested 4506-T forms to complete their loss mitigation application. As explained by the court, "a servicer may fail to exercise reasonable diligence if it repeatedly requests documents it already possesses or documents that it knows or should know are not required to complete the borrower's application." However, in this case, the servicer did not repeatedly request documents it already had in its possession. On the contrary, the servicer repeatedly requested the borrowers to provide properly executed and legible 4506-T forms because each time the borrowers submitted said forms, there was an issue with completion or legibility. The court noted that each time the borrowers submitted the 4506-T forms, the forms either "reflected a modification from the previous submission, or the forms had to be resubmitted due to illegibility of previous submissions." As the borrowers repeatedly failed to provide properly completed and legible 4506-T forms, the servicer did not fail to exercise reasonable diligence in repeatedly requesting said forms in an attempt to complete the borrowers' loss mitigation application.

CSPA violation for misleading statements

Kent v. Leo's Ent., L.L.C., 8th Dist. Cuyahoga No. 109730, 2021-Ohio-946

In this appeal, the Eighth Appellate District affirmed the trial court's decision, agreeing that the defendant did not violate the Ohio Consumer Sales Practices Act as he did not make misleading statements about the scope of work to be performed.

The Bullet Point: The Ohio Consumer Sales Practices Act (the "CSPA") prohibits suppliers from committing "unfair or deceptive acts" and "unconscionable acts or practices" in consumer transactions whether they occur before, during, or after the transaction. R.C. 1435.02(A); 1345.03(A). Under the CSPA, unfair or deceptive consumer sales practices are those that mislead consumers about the nature of the product they are receiving. On the other hand, unconscionable acts or practices are those that manipulate a consumer's understanding of the nature of the transaction at issue. In this case, the plaintiff alleged the defendant violated the CSPA by making misleading statements about the scope of work to be completed as part of tree removal services. The parties entered into an oral contract and neither of the parties specified the number of trees to be cut down. The court noted that after paying for the initial work performed, the plaintiff inquired into the removal of additional trees. However, the parties never entered into an enforceable contract for the additional work. Instead, the defendant responded that there had been a misunderstanding regarding the additional work and that he never agreed to remove the additional trees. Further, the defendant made a good faith effort to resolve the dispute. The court further noted that there was nothing in the record to support the plaintiff's claim the defendant made misleading statements about the scope of work to be performed. Moreover, the defendant's statement that there was a misunderstanding about the additional tree work was not false or deceptive and was not an unconscionable act. As such, the defendant did not violate the CSPA.

Scope of Arbitration

Little Aquanauts, L.L.C. v. Makovich & Pusti Architects, Inc., 8th Dist. Cuyahoga No. 109594, 2021-Ohio-942

In this appeal, the Eighth Appellate District affirmed the trial court's decision, agreeing that the plaintiff's claims fell outside the scope of the arbitration provision as they could be asserted without reference to the underlying contract between the parties.

The Bullet Point: While Ohio recognizes a strong public policy in favor of arbitration, this presumption arises only when a disputed claim falls within the scope of the arbitration provision. When ruling on a motion to compel arbitration, the court must focus on the language and scope of the arbitration provision to determine whether the parties agreed to arbitrate the matter at issue. The Supreme Court of Ohio has held that the test for determining the arbitrability of a given dispute involves four rules: (1) that "'arbitration is a matter of contract and a party cannot be required to so submit to arbitration any dispute which he has not agreed to so submit'"; (2) that the question whether a particular claim is arbitrable is one of law for the court to decide; (3) that when deciding whether the parties have agreed to submit a particular claim to arbitration, a court may not rule on the potential merits of the underlying

claim; and (4) that when a "'contract contains an arbitration provision, there is a presumption of arbitrability in the sense that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."'" Stated simply, '"[A] proper method of analysis * * * is to ask if an action could be maintained without reference to the contract or relationship at issue. If it could, it is likely outside the scope of the arbitration agreement."' Here, the defendant filed a motion to compel arbitration, alleging that the arbitration provision contained in the Terms and Conditions agreed to between the parties was mandatory. The plaintiff argued that its claims were not subject to arbitration because, by the very language of the agreement, the arbitration clause only applied to the specific matters contained in the Terms and Conditions. Analyzing the language and scope of the agreement, the court agreed with the plaintiff that the arbitration provision was narrow in scope and solely covered disputes arising under the Terms and Conditions. The Terms and Conditions were brief and addressed only six matters, none of which contained any information related to the plaintiff's allegations. Further, the plaintiff's claims could be asserted without any reference to the Terms and Conditions. As such, the plaintiff's claims did not fall within the scope of the arbitration clause and the motion to compel arbitration was denied.

Unjust Enrichment

Deffren v. Johnson, 1st Dist. Hamilton Nos. C-200176, C-200183, 2021-Ohio-817

In this appeal, the First Appellate District reversed and remanded the trial court's decision, holding that the buyer's unjust enrichment claim against the seller's wife was fatally flawed as the wife was a stranger to the contract and the buyer conferred no benefit upon her.

The Bullet Point: Under Ohio law, the doctrine of unjust enrichment provides that in the absence of an express contract, a party who confers a benefit upon another may recover the reasonable value of the benefit rendered if denying recovery would unjustly enrich the opposing party. To succeed on a claim for unjust enrichment, a plaintiff must demonstrate that there was "(1) a benefit conferred by a plaintiff upon a defendant, (2) knowledge by the defendant of the benefit, and (3) retention of a benefit by the defendant under circumstances where it would be unjust to do so without payment of its value." As the court noted, a claim of unjust enrichment is typically available only in the absence of an enforceable contract. Further, when services are performed or benefits are conferred under an express contract, any legal action is limited to the parties of said contract. As such, the general rule is that "third-persons, even if benefitted by the work, cannot be sued * * * on unjust enrichment to pay for the benefit, because an implied contract does not arise against the one benefitted by virtue of a special contract with other persons." In this case, the buyer brought an unjust enrichment claim against the seller's wife regarding accounts receivables that were allegedly owed to the buyer under an asset purchase agreement with the seller. The court determined that as a threshold matter, the unjust enrichment claim failed against the seller's wife as she was a stranger to the express contractual relationship between the buyer and seller. The wife was not a party to the asset purchase agreement, and it imposed no duties or obligations upon her. Moreover, the court noted that the buyer failed to satisfy the first element of unjust

enrichment, as the buyer conferred no benefit on the wife. Consequently, the buyer's unjust enrichment claim was not cognizable and the wife was entitled to judgment.

Related people

Stephanie Hand-Cannane
James W. Sandy

2021 WL 1061936
Only the Westlaw citation is currently available.
United States District Court,
N.D. Ohio, Eastern Division.

CYNTHIA **HURST**, et al., Plaintiffs,
v.
CALIBER HOME LOANS, INC., Defendant.

CASE NO.: 5:19-cv-00315
|
03/19/**2021**

Judge John R. Adams, UNITED STATES DISTRICT COURT

MEMORANDUM OF OPINION AND ORDER (Resolves Docs. 28 and 29)

***1** Pending before this Court are competing motions for summary judgment along with timely filed oppositions and replies in support. (Pls.' Mot. for Summ. J., ECF No. 28; Def.'s Opp'n to Pls.' Mot. for Summ. J., ECF No. 35; Reply in Supp. of Pls.' Mot. for Summ. J., ECF No. 39. Def.'s Mot. for Summ. J., ECF No. 29; Pls.' Opp'n to Def.'s Mot. for Summ. J., ECF No. 37; Reply in Supp. of Def.'s Mot. for Summ. J., ECF No. 38.) The question before this Court is whether Defendant **Caliber Home Loans**, Inc. ("**Caliber**") violated the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601 *et seq.* ("RESPA"), and various provisions of Regulation X, 12 C.F.R. § 1024.1 *et seq.*, during **Caliber's** handling of a loss mitigation application submitted jointly by Plaintiff Cynthia **Hurst** ("**Hurst**") and Plaintiff Thomas Persell ("Persell") (collectively, "Plaintiffs") and in **Caliber's** filing foreclosure litigation against Plaintiffs. For the following reasons, as fully analyzed herein, **Caliber's** motion for summary judgment is GRANTED and Plaintiffs' motion for summary judgment is DENIED. Accordingly, this Court specifically holds that **Caliber** did not violate RESPA or Regulation X in either the handling of Plaintiffs' loss mitigation application or in filing foreclosure litigation against Plaintiffs.

I. RELEVANT FACTUAL BACKGROUND

The following relevant facts are undisputed. On April 13, 2017, Plaintiffs financed real property in Massillon, Ohio by executing a promissory note and mortgage, of which **Caliber** was the original lender and servicer. (Compl. ¶ 23, ECF No. 1; Answer ¶ 23, ECF No. 12. *See also* Pls.' Mot. for Summ. J. Ex. 4, ECF No. 28-4; Pls.' Mot. for Summ. J. Ex. 5, ECF No. 28-5; Def.'s Mot. for Summ. J. Ex. A at 17-36, ECF No. 29-2.) On March 22, 2018, **Caliber** received documentation from Plaintiffs initiating a loss mitigation application. (Compl. ¶ 24, ECF No. 1; Answer ¶ 24, ECF No. 12. *See also* Pls.' Mot. for Summ. J. Ex. 10, ECF No. 28-10; Def.'s Mot. for Summ. J. Ex. A at 40-82, ECF No. 29-2; Pls.' Mot. for Summ. J. Ex. 28 at 1, ECF No. 28-28.)

On March 23, 2018, **Caliber** sent a letter to Plaintiffs acknowledging receipt of the loss mitigation application and requesting additional information to complete it. (Def.'s Mot. for Summ. J. Ex. A at 83-87, ECF No. 29-2.)[1] **Caliber** specified that to complete the loss mitigation application Plaintiffs needed to submit their most recent two months of bank statements, a signed and dated loss mitigation application, their most recent tax returns, signed and dated 4506-T forms, an SSI letter for Persell, and three months of profit and loss statements for **Hurst**. (*Id.* at 85.) **Caliber** requested Plaintiffs submit the additional documentation within eight days. (*Id.* at 84.) On March 26, 2018, **Caliber** received the additional requested information in support of Plaintiffs' loss mitigation application. (Compl. ¶ 25, ECF No. 1; Answer ¶ 25, ECF No. 12. *See also* Def.'s Mot. for Summ. J. Ex. A at 88-170, ECF No. 29-2; Pls.' Mot. for Summ. J. Ex. 27, ECF No. 28-27; Pls.' Mot. for Summ. J. Ex. 28 at 1-3, ECF No. 28-28.)

***2** On March 28, 2018, **Caliber** sent a letter to Plaintiffs again acknowledging receipt of the loss mitigation application and again requesting additional information to complete it. (Pls.' Mot. for Summ. J. Ex. 12, ECF No. 28-12; Def.'s Mot. for Summ. J. Ex. A at 171-174, ECF No. 29-2.) **Caliber** specified that to complete the loss mitigation application Plaintiffs needed to submit Persell's most recent SSI letter, another 4506-T form for Persell, and **Hurst's** most recent letter of explanation signed and dated. (Pls.' Mot. for Summ. J. Ex. 12 at 2, ECF No. 28-12; Def.'s Mot. for Summ. J. Ex. A at 173, ECF No. 29-2.) **Caliber** requested Plaintiffs submit the additional documentation within eight days. (Pls.' Mot. for Summ. J. Ex. 12 at 1, ECF No. 28-12; Def.'s Mot. for Summ. J. Ex. A at 172, ECF No. 29-2.) On April 2, 2018, **Caliber** received **Hurst's** 4506-T, Persell's 4506-T, and an otherwise blank page containing one sentence stating **Hurst** has "no rental income," **Hurst's** signature, and the date March 30, 2018. (Pls.' Mot. for Summ. J. Ex. 29, ECF No. 28-29; Def.'s Mot. for Summ. J. Ex. A at 175-178, ECF No. 29-2;

Pls.' Mot. for Summ. J. Ex. 28 at 3, ECF No. 28-28.) Notably, Plaintiffs failed to submit Persell's most recent SSI letter as requested by **Caliber** on March 28, 2018.

On April 3, 2018, **Caliber** sent a letter to Plaintiffs acknowledging receipt of additional documents supporting Plaintiffs' loss mitigation application with the note that required documents "remain outstanding and must be submitted by the deadline previously provided." (Pls.' Mot. for Summ. J. Ex. 13 at 1-2, ECF No. 28-13; Def.'s Mot. for Summ. J. Ex. A at 179-181, ECF No. 29-2.) On April 5, 2018, Plaintiffs submitted Persell's most recent SSI letter. (Compl. ¶¶ 36-37, ECF No. 1; Answer ¶ 37, ECF No. 12. *See also* Def.'s Mot. for Summ. J. Ex. A at 182-184, ECF No. 29-2; Pls.' Mot. for Summ. J. Ex. 28 at 3, ECF No. 28-28.)

On April 9, 2018, **Caliber** sent a letter to Plaintiffs acknowledging receipt of the "additional documents necessary to proceed" with review of Plaintiffs' loss mitigation application. (Pls.' Mot for Summ. J. Ex. 14, ECF No. 28-14; Def.'s Mot. for Summ. J. Ex. A at 185-187, ECF No. 29-2.) The letter acknowledged that Plaintiffs' loss mitigation application was considered complete as of April 5, 2018, that Plaintiffs' eligibility for loss mitigation would be evaluated within thirty days of April 5, 2018, and that **Caliber** would not "commence or initiate the foreclosure process under applicable law" during the evaluation of the loss mitigation application. (Pls.' Mot for Summ. J. Ex. 14 at 1, ECF No. 28-14; Def.'s Mot. for Summ. J. Ex. A at 186, ECF No. 29-2.) The letter also informed Plaintiffs that they would be notified in writing should **Caliber** require additional documents from them and that any foreclosure protections afforded them during the evaluation of their loss mitigation application "may end" should **Caliber** not receive the additional documents requested "in the time frame provided." (Pls.' Mot for Summ. J. Ex. 14 at 1, ECF No. 28-14; Def.'s Mot. for Summ. J. Ex. A at 186, ECF No. 29-2.)

On May 1, 2018, **Caliber** sent two letters to Plaintiffs informing them that although their loss mitigation application was previously considered complete, **Caliber** required Plaintiffs submit the following documents within thirty days: (1) a letter of explanation from Persell regarding a discrepancy with his SSI income; (2) a letter of explanation from Persell regarding monthly deposits from Edward Jones; (3) Persell's March 2018 bank statements; (4) Persell's April 2018 bank statements; (5) **Hurst's** March 2018 bank statements; (6) **Hurst's** April 2018 bank statements; (7) Persell's signed 2017 tax return or filed extension; (8) **Hurst's** March 2018 profit and loss statement; (9) **Hurst's** April 2018 profit and loss statement; (10) Persell's 4506-T requesting documentation from 2016 and 2017; and (11) **Hurst's** 4506-T requesting documentation from 2016 and 2017. (Compl. ¶ 38, ECF No. 1; Answer ¶ 38, ECF No. 12. *See also* Pls.' Mot. for Summ. J. Ex. 15, ECF No. 28-15; Def.'s Mot. for Summ. J. Ex. A at 188-192, ECF No. 29-2.) On May 4, 2018, **Caliber** received the following documents from Plaintiffs: (1) a letter of explanation from Persell regarding the discrepancy in his SSI income; (2) Persell's March 2018 bank statement; (3) Persell's April 2018 bank statement; (4) **Hurst's** March 2018 business bank statement; (5) **Hurst's** April 2018 business bank statement; (6) a letter claiming Persell did not file 2017 taxes; (7) Persell's 4506-T requesting documentation from 2016 and 2017; and (8) **Hurst's** 4506-T requesting documentation from 2016 and 2017. (Compl. ¶ 39, ECF No. 1; Answer ¶ 39, ECF No. 12. *See also* Def.'s Mot. for Summ. J. Ex. A at 193-214, ECF No. 29-2; Pls.' Mot. for Summ J. Ex. 28 at 3-4, ECF No. 28-28.) Notably, Plaintiffs failed to provide: (1) a letter of explanation from Persell regarding monthly deposits from Edward Jones; (2) **Hurst's** March 2018 profit and loss statement; and (3) **Hurst's** April 2018 profit and loss statement as requested by **Caliber** on May 1, 2018.

***3** On May 8, 2018, **Caliber** sent a letter to Plaintiffs acknowledging receipt of "additional documents necessary to proceed with" the loss mitigation review with the note that required documents "remain outstanding and must be submitted by the deadline previously provided." (Pls.' Mot. for Summ. J. Ex. 13 at 3-4, ECF No. 28-13; Def.'s Mot. for Summ. J. Ex. A at 215-217, ECF No. 29-2.) On May 8, 2018, **Caliber** received: (1) an unsigned note on a blank page which stated: "This letter is to verify the deposit amount of $2000 monthly from retirement account" for Persell; (2) a combined profit and loss statement for March and April 2018 from **Hurst**. (Def.'s Mot. for Summ. J. Ex. A at 218-221, ECF No. 29-2; Pls.' Mot. for Summ J. Ex. 28 at 4, ECF No. 28-28.) Notably, Plaintiff had still not submitted requested documentation with respect to monthly deposits from Edward Jones to Persell – **Caliber** had requested specific information regarding the Edward Jones deposits, including whether the deposits were pension income, and if so, an award letter was needed. (Pls.' Mot. for Summ. J. Ex. 15 at 1, ECF No. 28-15; Def.'s Mot. for Summ. J. Ex. A at 189, ECF No. 29-2.)

On May 9, 2018, **Caliber** sent a letter to Plaintiffs acknowledging receipt of "additional documents necessary to proceed with" the loss mitigation review with the note

that required documents "remain outstanding and must be submitted by the deadline previously provided." (Pls.' Mot. for Summ. J. Ex. 13 at 5-6, ECF No. 28-13; Def.'s Mot. for Summ. J. Ex. A at 222-224, ECF No. 29-2.) On May 29, 2018, **Caliber** received an additional 4506-T each from Persell and **Hurst**, but no further communication regarding the Edward Jones income for Persell. (Pls.' Mot. for Summ. J. Ex. 17, ECF No. 28-17; Def.'s Mot. for Summ. J. Ex. A at 225-229, ECF No. 29-2; Pls.' Mot. for Summ. J. Ex. 28 at 4, ECF No. 28-28.)

On May 31, 2018, **Caliber** sent Plaintiffs two letters. (Pls.' Mot. for Summ. J. Ex. 19, ECF No. 28-19; Pls.' Mot. for Summ. J. Ex. 18, ECF No. 28-18; Def.'s Mot. for Summ. J. Ex. A at 230-237, ECF No. 29-2.) The first letter informed Plaintiffs that **Caliber** was not able to review Plaintiffs' loss mitigation application because it was incomplete. (Pls.' Mot. for Summ. J. Ex. 19 at 1, ECF No. 28-19; Def.'s Mot. for Summ. J. Ex. A at 231, ECF No. 29-2.) The letter also stated: "Please be advised of the possibility of your Mortgage...being foreclosed upon if loss mitigation is unable to be considered due to your failure to fully respond to **Caliber's** request for additional information." (Pls.' Mot. for Summ. J. Ex. 19 at 1, ECF No. 28-19; Def.'s Mot. for Summ. J. Ex. A at 231, ECF No. 29-2.) The second letter mirrored previous letters sent by **Caliber** to Plaintiffs acknowledging receipt of the loss mitigation application and requesting additional information to complete it. (Pls.' Mot. for Summ. J. Ex. 18, ECF No. 28-18; Def.'s Mot. for Summ. J. Ex. A at 233-237, ECF No. 29-2. *See also* Def.'s Mot. for Summ. J. Ex. A at 83-87, ECF No. 29-2; Pls.' Mot. for Summ. J. Ex. 12, ECF No. 28-12; Def.'s Mot. for Summ. J. Ex. A at 171-174, ECF No. 29-2.) As it had done before, **Caliber** specified that to complete the loss mitigation application Plaintiffs needed to submit the most recent two months of bank statements for Persell, the most recent quarter of profit and loss statements for **Hurst**, and signed and dated 4506-T forms from both Persell and **Hurst**. (Pls.' Mot. for Summ. J. Ex. 18 at 2, ECF No. 28-18; Def.'s Mot. for Summ. J. Ex. A at 236, ECF No. 29-2.) **Caliber** requested Plaintiffs submit the additional documentation within thirty days. (Pls.' Mot. for Summ. J. Ex. 18 at 1, ECF No. 28-18; Def.'s Mot. for Summ. J. Ex. A at 235, ECF No. 29-2.) On June 7, 2018, **Caliber** received the following additional information from Plaintiffs: (1) **Hurst's** February 2018 profit and loss statement; (2) Persell's 4506-T; and (3) **Hurst's** 4506-T. (Def.'s Mot. for Summ. J. Ex. A at 238-242, ECF No. 29-2; Pls.' Mot. for Summ. J. Ex. 20, ECF No. 28-20; Pls.' Mot. for Summ. J. Ex. 28 at 4, ECF No. 28-28.) Notably Plaintiffs did not submit the most recent two months of bank statements for Persell or **Hurst's** most recent quarter of profit and loss statements.

***4** On June 8, 2018, **Caliber** sent a letter to Plaintiffs acknowledging receipt of additional documents supporting Plaintiffs' loss mitigation application with the note that required documents "remain outstanding and must be submitted by the deadline previously provided." (Pls.' Mot. for Summ. J. Ex. 13 at 7-8, ECF No. 28-13; Def.'s Mot. for Summ. J. Ex. A at 243-245, ECF No. 29-2.)

On June 18, 2018, **Caliber** filed a foreclosure action against Plaintiffs in the Stark County Court of Common Pleas. (Compl. ¶ 42, ECF No. 1; Answer ¶ 42, ECF No. 12. *See also* Pls.' Mot. for Summ. J. Ex. 21, ECF No. 28-21; Def.'s Mot. for Summ. J. Ex. B, ECF No. 29-3.) On June 19, 2018, **Caliber** received Persell's May 2018 bank statement, **Hurst's** May 2018 profit and loss statement, and **Hurst's** May 2018 business bank statement. (Compl. ¶¶ 40-41, ECF No. 1; Answer ¶ 41, ECF No. 12. *See also* Def.'s Mot. for Summ. J. Ex. A at 246-255, ECF No. 29-2; Pls.' Mot. for Summ. J. Ex. 28 at 4-5, ECF No. 28-28.) On June 20, 2018, **Caliber** received, a form 4506-T from Persell and a form 4506-T from **Hurst**. (Def.'s Mot. for Summ. J. Ex. A at 256-260, ECF No. 29-2; Pls.' Mot. for Summ. J. Ex. 22, ECF No. 28-22.)

On June 25, 2018, **Caliber** sent a letter to Plaintiffs acknowledging receipt of the loss mitigation application and requesting additional information to complete it. (Pls.' Mot. for Summ. J. Ex. 23, ECF No. 28-23; Def.'s Mot. for Summ. J. Ex. A at 261-265, ECF No. 29-2. *See also* Compl. ¶ 43, ECF No. 1; Answer ¶ 43, ECF No. 12.) **Caliber** specified that to complete the loss mitigation application, Plaintiffs needed to submit an updated loss mitigation application because their original loss mitigation application had become outdated. (Pls.' Mot. for Summ. J. Ex. 23 at 1, ECF No. 28-23; Def.'s Mot. for Summ. J. Ex. A at 263, ECF No. 29-2.) **Caliber** also specified that both Plaintiffs needed to submit signed and dated 4506-T forms. (Pls.' Mot. for Summ. J. Ex. 23 at 1, ECF No. 28-23; Def.'s Mot. for Summ. J. Ex. A at 263, ECF No. 29-2.) **Caliber** requested Plaintiffs submit the additional documentation within thirty days. (Pls.' Mot. for Summ. J. Ex. 23 at 1, ECF No. 28-23; Def.'s Mot. for Summ. J. Ex. A at 263, ECF No. 29-2.) That same day, Persell submitted his signed and dated 4506-T form and **Hurst** submitted her signed and dated 4506-T form. (Def.'s Mot. for Summ. J. Ex. A at 266-268, ECF No. 29-2; Pls.' Mot. for Summ. J. Ex. 28 at 5, ECF No. 28-28. *See also* Compl. ¶ 44, ECF No. 1; Answer ¶ 44, ECF No. 12.) On June 28, 2018, **Caliber** received

Plaintiffs' updated loss mitigation application. (Def.'s Mot. for Summ. J. Ex. A at 269-275, ECF No. 29-2; Pls.' Mot. for Summ. J. Ex. 28 at 5, ECF No. 28-28.)

On July 2, 2018, **Caliber** sent a letter to Plaintiffs acknowledging receipt of the "additional documents necessary to proceed" with review of Plaintiffs' loss mitigation application. (Def.'s Mot. for Summ. J. Ex. A at 287-289, ECF No. 29-2.) The letter acknowledged that Plaintiffs' loss mitigation application was considered complete as of June 28, 2018, that Plaintiffs' eligibility for loss mitigation would be evaluated within thirty days of June 28, 2018, and that Plaintiffs would be notified in writing should **Caliber** require additional documentation from Plaintiffs. (Def.'s Mot. for Summ. J. Ex. A at 288, ECF No. 29-2.) That same day **Caliber** received **Hurst's** June 2018 business bank statement, **Hurst's** June 2018 profit and loss statement, and Persell's June 2018 bank statement. (Def.'s Mot. for Summ. J. Ex. A at 276-286, ECF No. 29-2; Pls.' Mot. for Summ. J. Ex. 28 at 5, ECF No. 28-28.)

***5** On July 5, 2018, **Caliber** sent a second letter to Plaintiffs acknowledging receipt of the "additional documents necessary to proceed" with review of Plaintiffs' loss mitigation application. (Def.'s Mot. for Summ. J. Ex. A at 290-292, ECF No. 29-2. *See also* Compl. ¶ 45, ECF No. 1; Answer ¶ 45, ECF No. 12.) The letter acknowledged that Plaintiffs' loss mitigation application was considered complete as of June 28, 2018, that Plaintiffs' eligibility for loss mitigation would be evaluated within thirty days of June 28, 2018, and that Plaintiffs would be notified in writing should **Caliber** require additional documentation from Plaintiffs. (Def.'s Mot. for Summ. J. Ex. A at 291, ECF No. 29-2.)

On July 12, 2018 the Stark County Court of Common Pleas referred the foreclosure action to a foreclosure mediation program. (Pls.' Mot. for Summ. J. Ex. 25, ECF No. 28-25; Def.'s Mot. for Summ. J. Ex. C, ECF No. 29-4.) The foreclosure mediation program required participation by both Plaintiffs and **Caliber** "to complete a loan modification packet." (Pls.' Mot. for Summ. J. Ex. 25 at 1-2, ECF No. 28-25; Def.'s Mot. for Summ. J. Ex. C at 2-3, ECF No. 29-4.) With respect to this requirement of the foreclosure mediation program and whether this Court may consider factual allegations, evidence, or communication between the parties which occurred after July 12, 2018, Ohio's Uniform Mediation Act applies. R.C. 2710.01-2710.10. Accordingly, under the Uniform Mediation Act, mediation communications are privileged, not subject to discovery or admissible in evidence, and a "mediation communication" is defined as "a statement, whether oral, in a record, verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation...." R.C. 2710.01(B) and 2710.03(A). Similarly, the 2016 Local Rules of the Stark County Court of Common Pleas – those applicable at the time of the foreclosure mediation – specify that all communications made during mediation "are confidential and protected from disclosure." Loc.R. 16.09 of the Court of Common Pleas of Stark County. Finally, the Stark County Court of Common Pleas stated in the referral of the foreclosure action to the foreclosure mediation program: "All written or verbal communications of any kind made during the mediation process shall be regarded as confidential and shall not be admissible or used for any purpose." (Pls.' Mot. for Summ. J. Ex. 25 at 3, ECF No. 28-25; Def.'s Mot. for Summ. J. Ex. C at 4, ECF No. 29-4.) Because communication between Plaintiffs and **Caliber** regarding the loss mitigation application continued throughout, and because of, the foreclosure mediation, this Court will restrict its consideration and analysis to evidence and events that occurred up until July 12, 2018. Any factual allegation, claim, argument, or evidence involving any communications or events associated with the loss mitigation application at issue that occurred after July 12, 2018 will not be considered or analyzed due to the protections afforded activities that occur during mediation.

On February 11, 2019, Plaintiffs commenced the action pending before this Court against **Caliber**. (Compl., ECF No. 1.) In Count One of their complaint, Plaintiffs allege **Caliber** committed the following violations of RESPA and Regulation X: (1) failure to exercise reasonable diligence in obtaining documents and information to complete Plaintiffs' loss mitigation application in violation of 12 C.F.R. § 1024.41(b)(1); (2) failure to provide Plaintiffs with the correct notices regarding the receipt of documents, the receipt of the loss mitigation application itself, and the identification of which additional documents Plaintiffs needed to submit to complete the loss mitigation application in violation of 12 C.F.R. § 1024.41(b)(2)(i)(B); (3) failure to provide Plaintiffs with notice of a reasonable date by which Plaintiffs were required to submit additional documents to complete the loss mitigation application in violation of 12 C.F.R. § 1024.41(b)(2)(ii); (4) failure to evaluate Plaintiffs' complete loss mitigation application for all available loss mitigation options within thirty days of receiving the complete loss

mitigation application in violation of 12 C.F.R. § 1024.41(c)(1)(i); (5) failure to provide Plaintiffs with notice of offered loss mitigation options within thirty days of receiving the complete loss mitigation application in violation of 12 C.F.R. § 1024.41(c)(1)(ii); (6) avoidance of the required evaluation of Plaintiffs' complete loss mitigation application by requesting documents already received or impossible to obtain in violation of 12 C.F.R. § 1024.41(c)(2)(i); (7) failure to provide Plaintiffs with notice that their loss mitigation application was complete within five days of receipt of the complete loss mitigation application in violation of 12 C.F.R. § 1024.41(c)(3)(i); and (8) filing a foreclosure action against Plaintiffs while the loss mitigation application was either complete or facially complete in violation of 12 C.F.R. § 1024.41(f)(2). (Compl. ¶¶ 74-75, ECF No. 1.)

***6** In Count Two of their complaint, Plaintiffs allege **Caliber** violated Ohio's Consumer Sales Practices Act, R.C. 1345.01, *et seq.* Each count will be fully analyzed herein.

II. LAW AND ANALYSIS

A. Summary Judgment Standard

Federal Rule of Civil Procedure 56(a) sets forth that summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (internal quotation marks omitted). This Court is not required "to search the entire record to establish that it is bereft of a genuine issue of material fact." *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479-80 (6th Cir. 1989).

Once the movant's burden is met, the burden shifts to the non-moving party to "show that there is doubt as to the material facts and that the record, taken as a whole, does not lead to a judgment for the movant." *Guarino v. Brookfield Twp. Trs.*, 980 F.2d 399, 403 (6th Cir. 1992). Of note, "[t]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Scott v. Harris*, 550 U.S. 372, 380 (2007) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)) (internal quotation marks omitted) (*emphasis* in original).

Material facts are those "that might affect the outcome of the suit under the governing law," while other irrelevant or unnecessary factual disputes do not affect the summary judgment analysis. *Anderson*, 477 U.S. at 248. Additionally, a dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id. See also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) ("Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' ") (quoting *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968)). When making these determinations, this Court cannot engage in any "'jury functions' such as making credibility determinations and weighing the evidence." *Youkhanna v. City of Sterling Heights*, 934 F.3d 508, 515 (6th Cir. 2019) (citing *Anderson*, 477 U.S. at 255). However, any "inferences to be drawn from the underlying facts...must be viewed in the light most favorable to the party opposing the motion." *Matsushita*, 475 U.S. at 587-88 (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)) (internal quotation marks omitted). Accordingly, "the inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 243 (syllabus).

B. Real Estate Settlement Procedures Act and Regulation X

***7** Plaintiffs allege **Caliber** violated RESPA and various sections of Regulation X by mishandling their loss mitigation application and by filing a foreclosure action against them. To begin, "RESPA is a consumer protection statute that regulates the real estate settlement process." *Malcolm v. Seterus, Inc.*, Case No. 5:18-cv-01937, 2020 U.S. Dist. LEXIS 50397, at *7 (N.D. Ohio Mar. 24, 2020) (quoting *Necak v. Select Portfolio Servicing, Inc.*, 1:17-cv-1473, 2019 U.S. Dist. LEXIS 71147, at *5 (N.D. Ohio Apr. 26, 2019)) (internal quotation marks omitted). "Although the 'settlement process' targeted by the statute was originally limited to the

negotiation and execution of mortgage contracts, the scope of the statute's provisions was expanded in 1990 to encompass loan servicing." *Marais v. Chase Home Fin. LLC*, 736 F.3d 711, 719 (6th Cir. 2013) (quoting *Medrano v. Flagstar Bank, FSB*, 704 F.3d 661, 665-66 (9th Cir. 2012)) (internal quotation marks omitted).

Given this expansion, pursuant to § 1022(b) of the Dodd-Frank Act, 12 U.S.C. § 5512(b), and RESPA, the Consumer Financial Protection Bureau promulgated Mortgage Servicing Rules, which are part of Regulation X. *Cooper v. Fay Servicing, LLC*, 115 F. Supp. 3d 900, 903 n.6 (S.D. Ohio 2015). *See also* 12 C.F.R. § 1024.1; 12 C.F.R. §§ 1024.30-1024.41. With respect to mortgage servicing, "Regulation X imposes certain obligations on a loan servicer with respect to loss mitigation generally and the processing of a borrower's loan modification application." *Necak*, 2019 U.S. Dist. LEXIS 71147, at *10. Borrowers may enforce the provisions of Regulation X pursuant to section 6(f) of RESPA, 12 U.S.C. § 2605(f). *Cooper*, 115 F. Supp. 3d at 903 n.6. *See also* 12 C.F.R. § 1024.41(a).

Under Regulation X, when a servicer receives a loss mitigation application the servicer is required to promptly "review the loss mitigation application to determine" whether it is complete. 12 C.F.R. § 1024.41(b)(2)(i)(A). More specifically, within five days of receiving a loss mitigation application, the servicer must notify the borrower, in writing, that the loss mitigation application was received and whether it was determined to be complete or incomplete. 12 C.F.R. § 1024.41(b)(2)(i)(B). A complete loss mitigation application is one "with which a servicer has received all the information that the servicer requires from a borrower in evaluating applications for the loss mitigation options available to the borrower." 12 C.F.R. § 1024.41(b)(1).

If the loss mitigation application is incomplete, the "servicer shall exercise reasonable diligence in obtaining documents and information to complete" it. 12 C.F.R. § 1024.41(b)(1). In that vein, the written notification that a loss mitigation application was received incomplete must include "the additional documents and information the borrower must submit to make the loss mitigation application complete" and "a reasonable date by which the borrower should submit the documents and information necessary to make the loss mitigation application complete." 12 C.F.R. §§ 1024.41(b)(2)(i)(B); 1042.41(b)(2)(ii).

When the "borrower submits all the missing documents and information as stated" in the written notification that the loss mitigation application was received incomplete and "no additional information is requested in such notice," the loss mitigation application is "considered facially complete." 12 C.F.R. § 1024.41(c)(2)(iv). *See also Necak*, 2019 U.S. Dist. LEXIS 71147, at *19 ("A loss mitigation application is considered 'facially complete' when a borrower submits all additional information as requested even if the servicer later discovers additional information is needed"). Within five days of receiving this facially complete loss mitigation application, the servicer must provide the borrower written notice that informs the borrower the loss mitigation application is considered complete, on which date the servicer received the complete loss mitigation application, that the servicer expects to evaluate the complete loss mitigation application within thirty days of receipt, that the borrower is "entitled to certain foreclosure protections because the servicer has received the complete application," and that the servicer may request additional information from the borrower and provide the borrower with reasonable opportunity to submit the requested information with the caveat that "foreclosure protections could end if the servicer does not receive the information as requested." 12 C.F.R. § 1024.41(c)(3)(i). "If the servicer later discovers that additional information or corrections to a previously submitted document are required to complete the application, the servicer must promptly request the missing information or corrected documents and treat the application as complete...until the borrower is given a reasonable opportunity to complete the application." 12 C.F.R. § 1024.41(c)(2)(iv).

***8** Finally, "[i]f a borrower submits a complete loss mitigation application...before a servicer has made the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process, a servicer shall not make the first notice or filing" unless specific events occur. 12 C.F.R. § 1024.41(f)(2). Facially complete loss mitigation applications are considered complete for the purposes of 12 C.F.R. § 1024.41(f)(2) foreclosure protections during the "reasonable opportunity" borrowers are afforded to submit the additional or corrected information requested by the servicer to complete the loss mitigation application. 12 C.F.R. § 1024.41(c)(2)(iv).

The parties do not dispute that Plaintiffs are "borrowers," **Caliber** is a "servicer," and Plaintiffs submitted a "loss mitigation application" pursuant to the statutory and common-law definitions associated with these terms pursuant

to RESPA and Regulation X. This Court will proceed with that understanding and analyze the various provisions of Regulation X Plaintiffs allege **Caliber** violated.

1. *Reasonable Diligence – 12 C.F.R. § 1024.41(b)(1)*

Plaintiffs allege **Caliber** violated 12 C.F.R. § 1024.41(b)(1) by "[f]ailing to exercise reasonable diligence in obtaining documents and information to complete [Plaintiffs'] Loss Mitigation Application." (Compl. ¶ 75(g), ECF No. 1.) While servicers are afforded "latitude in determining what information is needed in evaluating applications," Regulation X requires servicers exercise reasonable diligence in obtaining that information. *Grutsch v. Wells Fargo Bank, N.A.*, No. 2:15-cv-2583, 2017 U.S. Dist. LEXIS 42429, at *18 (S.D. Ohio Mar. 23, 2017). *See also* 12 C.F.R. § 1024.41(b)(1). Although Regulation X does not define "reasonable diligence," a servicer is said to exercise reasonable diligence by promptly reviewing a loss mitigation application and if it is found incomplete, notifying the borrower, in writing, of "the additional documents and information the borrower must submit to make the loss mitigation application complete." *See Schoen v. Bank of Am., N.A.*, No. 2:17-cv-648, 2019 U.S. Dist. LEXIS 23460, at *20 (S.D. Ohio Feb. 13, 2019); *Washington v. Green Tree Servicing LLC*, 2017 U.S. Dist. LEXIS 69330, at* 19 (S.D. Ohio May 5, 2017); 12 C.F.R. § 1024.41(b)(2)(i)(B). On the other hand, "a servicer may fail to exercise reasonable diligence if it repeatedly requests documents it already possesses or documents that it knows or should know are not required to complete the borrower's application." *Schoen*, 2019 U.S. Dist. LEXIS 23460 at *19-20 (quoting *Benner v. Wells Fargo Bank, N.A.*, No. 2:16-cv-00467, 2018 U.S. Dist. LEXIS 52716, at *30-32 (D. Me. Mar. 29, 2018)) (internal quotation marks omitted).

Plaintiffs argue **Caliber** failed to exercise reasonable diligence when it provided **Hurst** with conflicting information, particularly with respect to the 4506-T forms. (Pls. Mot. for Summ. J. 15-16, ECF No. 28.) In looking at the 4506-T forms specifically, however, no reasonable juror could find that **Caliber** failed to exercise reasonable diligence by requesting properly executed and legible 4506-T forms from Plaintiffs, even when the forms were requested repeatedly because each time Plaintiffs submitted the 4506-T forms there was an issue with completion or legibility.

In Plaintiffs' initial loss mitigation application, received March 22, 2018, they each submitted a 4506-T form dated March 21, 2018. (Def.'s Mot. for Summ. J. Ex. A at 74-75, ECF No. 29-2.) On March 26, 2018, Plaintiffs submitted the 4506-T forms dated March 21, 2018 with a modification – Persell and **Hurst** each checked the box affirming their reading of the form's attestation clause. (*Id.* at 148-149.) On April 2, 2018, Plaintiffs submitted the previously modified 4506-T forms dated March 21, 2018 with additional modifications – Persell's 4506-T form now reflected his address and indicated he was requesting a Form 1040 return transcript while **Hurst's** 4506-T form now reflected she was requesting a Form 1040 return transcript. (*Id.* at 176-177.) On May 4, 2018, Plaintiffs submitted the previously modified 4506-T forms dated March 21, 2018 with an additional modification – Persell and **Hurst** each added a request for documentation from 2017, except **Hurst's** submitted 4506-T form no longer had the box affirming her reading of the form's attestation clause checked. (*Id.* at 213-214.)

***9** On May 29, 2018, Plaintiffs resubmitted the 4506-T forms dated March 21, 2018 with all the modifications previously made after a **Caliber** representative informed **Hurst** the forms needed resubmitted with the box affirming reading of the attestation clause checked. (*Id.* at 226-229. *See also* Pls.' Mot. for Summ. J. Ex. 16 at 20180529.) On June 7, 2018, Plaintiffs resubmitted the 4506-T forms dated March 21, 2018 with all the modifications previously made after a **Caliber** representative informed **Hurst** the most recently submitted forms were improperly scanned and illegible. (Def.'s Mot. for Summ. J. Ex. A at 241-242, ECF No. 29-2. *See also* Pls.' Mot. for Summ. J. Ex. 16 at 20180606.) Finally, on June 20, 2018 Plaintiffs submitted new 4506-T forms signed and dated June 19, 2018 after a **Caliber** representative informed **Hurst** the most recently submitted forms were improperly scanned and, because they were dated March 21, 2018, would soon expire as all documents received by **Caliber** must be dated within 90 days of receipt. (Def.'s Mot. for Summ. J. Ex. A at 257-260, ECF No. 29-2. *See also* Pls.' Mot. for Summ. J. Ex. 16 at 20180619.)

This detailed summary of the 4506-T forms submitted by Plaintiffs does not demonstrate that **Caliber** repeatedly requested documents that were already in its possession. In fact, each time Plaintiffs submitted the 4506-T forms either the forms reflected a modification from the previous submission, or the forms had to be resubmitted due to illegibility of previous submissions. Furthermore, Plaintiffs have neither argued nor presented legal support to demonstrate 4506-T forms are not required to complete a loss mitigation application.

Plaintiffs take issue with **Caliber** requesting the 4506-T forms to be dated within ninety days of receipt, citing the form itself, which provides: "**Note:** This form must be received by IRS within 120 days of the signature date." (*See, e.g.*, Def.'s Mot. for Summ. J. Ex. A at 74-75, ECF No. 29-2.) Ostensibly, Plaintiffs argue that they should not have needed to resubmit the forms on June 20, 2018, and **Caliber's** request that they do so demonstrated a lack of reasonable diligence. However, in the June 19, 2018 phone call, the **Caliber** representative was clear that the 4506-T forms needed resubmitted because the previously submitted forms were improperly scanned. (Pls.' Mot. for Summ. J. Ex. 16 at 20180619.) He also suggested that Plaintiffs provide updated forms to avoid the expiration of said forms occurring while the loss mitigation application was being reviewed – indicative that the date on the forms was not the reason for rejection at the time, but could be a reason for rejection in the near future. (*Id.*) Finally, the 4506-T form also contains the following instruction: "**Caution:** Do not sign this form unless all applicable lines have been completed." (*See, e.g.*, Def.'s Mot. for Summ. J. Ex. A at 74-75, ECF No. 29-2.) In direct defiance of this instruction, Plaintiffs continually modified 4506-T forms that were previously signed and dated March 21, 2018. This Court cannot reconcile Plaintiffs' attempt to paint **Caliber** poorly for not strictly following the IRS's acknowledgement that it would accept a form dated within 120 days when Plaintiffs themselves repeatedly failed to follow the instruction written directly on the form regarding how to properly complete the form.

As a final note, Plaintiffs fail to specifically point to any other instance of **Caliber** requesting information that was already in its possession or documents that were not necessary to complete Plaintiffs loss mitigation application in support of their claim. Plaintiffs take issue with **Caliber** requesting "different or additional documents," but **Caliber** is within its rights to request additional information from Plaintiffs in seeking to complete Plaintiffs loss mitigation application and this activity does not demonstrate a lack of reasonable diligence. (Pls.' Mot. for Summ. J. 16, ECF No. 28.) In sum, the facts lay bare that **Caliber** neither repeatedly requested documents that were already in its possession nor requested documents that were not necessary to complete Plaintiffs' loss mitigation application. Accordingly, no reasonable juror could find for Plaintiffs regarding their claim that **Caliber** acted within reasonable diligence in violation of 12 C.F.R. § 1024.41(b)(1). Because no reasonable juror could find for Plaintiffs, **Caliber's** motion for summary judgment on this claim is GRANTED and Plaintiffs' motion for summary judgment on this claim is DENIED.

2. *General Adequacy of Notices and Reasonable Deadlines – 12 C.F.R. §§ 1024.41(b)(2)(i)(B); 1024.41(b)(2)(ii)*

***10** Plaintiffs allege **Caliber** violated 12 C.F.R. § 1024.41(b)(2)(i)(B) by "[r]epeatedly failing to notify [Plaintiffs] of the receipt of their Loss Mitigation Application and submitted documents" and by "[r]epeatedly failing to notify [Plaintiffs] as to what documents were needed to complete their Loss Mitigation Application." (Compl. ¶¶ 75(h)-(i), ECF No. 1.) Plaintiffs also allege **Caliber** violated 12 C.F.R. § 1024.41(b)(2)(ii) by "[r]epeatedly failing to notify [Plaintiffs] of a reasonable date by which they should submit any documents needed to complete their Loss Mitigation Application." (Compl. ¶ 75(j), ECF No. 1.)

Plaintiffs first argue **Caliber** sent generic letters which "failed to identify the additional information needed to complete" Plaintiffs' loss mitigation application in violation of 12 C.F.R. § 1024.41(b)(2)(i)(B). (Pls.' Mot. for Summ. J. 18, ECF No. 28.) The letters at issue were sent by **Caliber** to Plaintiffs on April 3, 2018, May 8, 2018, May 9, 2018, and June 8, 2018.

Regulation X defines "loss mitigation application" as "an oral or written request for a loss mitigation option that is accompanied by any information required by a servicer for evaluation for a loss mitigation option." 12 C.F.R. § 1024.31. Within five days of receiving a loss mitigation application, a servicer must notify the borrower, in writing, that the loss mitigation application was received and whether it was determined to be complete or incomplete. 12 C.F.R. § 1024.41(b)(2)(i)(B). If determined to be incomplete, the written notification must include "the additional documents and information the borrower must submit to make the loss mitigation application complete" and "a reasonable date by which the borrower should submit the documents and information necessary to make the loss mitigation application complete." 12 C.F.R. §§ 1024.41(b)(2)(i)(B); 1042.41(b)(2)(ii). While "[a] loss mitigation application is to be considered expansively," additional documents a borrower submits to complete a loss mitigation application are not themselves loss mitigation applications triggering the communication requirements of 12 C.F.R. §§ 1024.41(b)(2)(i)(B). *Kavanagh v. Specialized Loan Servicing, LLC*, No. 3:17CV892, 2020 U.S. Dist. LEXIS 46255, at *17-20 (N.D. Ohio Mar. 17, 2020).

In this case, there is no dispute that **Caliber** received Plaintiffs' loss mitigation application on March 22, 2018, and **Caliber**, in writing, acknowledged receipt and requested additional information within eight days on March 23, 2018. Between March 23, 2018 and April 2, 2018, Plaintiffs submitted some, but not all, of the additional information **Caliber** requested. **Caliber's** April 3, 2018 letter notified Plaintiffs they received the additional information with the reminder that documents remained outstanding. Between **Caliber's** proper acknowledgment of the loss mitigation application and April 3, 2018 letter, Plaintiffs did not submit an additional loss mitigation application, but rather documents required to complete their loss mitigation application. Therefore, the communication requirements of 12 C.F.R. §§ 1024.41(b)(2)(i)(B) and 1042.41(b)(2)(ii) were not triggered. In other words, the April 3, 2018 letter did not violate Regulation X.

This analysis applies to the May 8, 2018, May 9, 2018, and June 8, 2018 letters as well. Each of these letters was sent to Plaintiffs after **Caliber** had, in writing, requested additional information from Plaintiffs within a specific timeframe, and Plaintiffs had submitted some, but not all, of the additional information **Caliber** requested. Plaintiffs' submissions of additional documents required to complete their loss mitigation application were not, themselves, loss mitigation applications requiring the type of communication specified in 12 C.F.R. §§ 1024.41(b)(2)(i)(B) and 1042.41(b)(2)(ii). Accordingly, these letters also did not violate Regulation X.

***11** Plaintiffs next argue that the notices **Caliber** sent to Plaintiffs "failed to adequately describe the information it required." (Pls.' Mot. for Summ. J. 19, ECF No. 28.) Notices that fail to advise borrowers what information must be submitted to complete the loss mitigation application are not notices that "state the additional documents and information the borrower must submit to make the loss mitigation application complete." *See Kavanagh*, 2020 U.S. Dist. LEXIS 46255, at *24; 12 C.F.R. § 1024.41(b)(2)(i)(B). However, the record is clear that when **Caliber** required additional documentation, it detailed, in writing, which additional or corrected documentation was needed and by which individual. **Caliber** specified what needed explained in letters of explanation, that the 4506-T forms were repeatedly rejected and needed corrected, and which months' bank statements and profit and loss statements were needed.

In truth, Plaintiffs' argument seemingly revolves around the 4506-T forms once again. This Court has already discussed in detail that Plaintiffs' failure to submit complete and legible forms caused the repeated rejections. In other words, Plaintiffs repeatedly submitted improper forms, and **Caliber** repeatedly rejected them and requested proper 4506-T forms to complete the loss mitigation application. In this Court's view, Plaintiffs argument that **Caliber** violated 12 C.F.R. § 1024.41(b)(2)(i)(B) by failing to detail the multiple, miscellaneous failings of Plaintiffs' 4506-T forms over many months implies imposing a requirement on **Caliber** that it step-wise explain to those who submit a loss mitigation application how to properly complete each necessary document, even if the document itself contains instructions. Regulation X does not require this level of detailed involvement by a servicer, and neither will this Court.

Accordingly, given the above findings, this Court concludes that no reasonable juror could find that **Caliber** violated 12 C.F.R. §§ 1024.41(b)(2)(i)(B) or 1024.41(b)(2)(ii). **Caliber** properly and timely responded when it received a loss mitigation application from Plaintiffs. The generic letters Plaintiffs take issue with were not in response to a loss mitigation application, but rather were in response to additional documentation provided by Plaintiffs supporting their loss mitigation application, which does not trigger the communication requirements of 12 C.F.R. § 1024.41(b)(2)(i)(B). Additionally, **Caliber's** written communications with Plaintiffs appropriately specified and adequately described which additional or corrected documents **Caliber** needed to complete Plaintiffs' loss mitigation application. Because no reasonable juror could find for Plaintiffs, **Caliber's** motion for summary judgment on these claims is GRANTED and Plaintiffs' motion for summary judgment on these claims is DENIED.

3. *Notice for Complete Loss Mitigation Application – 12 C.F.R. § 1024.41(c)(3)(i)*

Plaintiffs allege **Caliber** violated 12 C.F.R. § 1024.41(c)(3)(i) by "[r]epeatedly failing to send [Plaintiffs] a notice of complete application within 5 days after [**Caliber**] received [Plaintiffs'] complete loss mitigation applications." (Compl. ¶ 75(o), ECF No. 1.) This section of Regulation X, 12 C.F.R. § 1024.41(c)(3)(i), tests the sufficiency of a written notice sent to a borrower after the servicer receives a facially complete loss mitigation application. A loss mitigation application is facially complete when a borrower has submitted all the

missing documents and information the servicer requested in response to receiving an incomplete loss mitigation application. *See* 12 C.F.R. § 1024.41(b)(2)(i)(B) and 12 C.F.R. § 1024.41(c)(2)(iv). Within five days of receiving a facially complete loss mitigation application, the servicer must notify the borrower, in writing, that the loss mitigation application is considered complete, on which date the servicer received the complete loss mitigation application, that the servicer expects to evaluate the complete application within thirty days of receipt, that the borrower is "entitled to certain foreclosure protections because the servicer has received the complete application," and that the servicer may request additional information from the borrower and provide the borrower with reasonable opportunity to submit the requested information with the caveat that "foreclosure protections could end if the servicer does not receive the information as requested." 12 C.F.R. § 1024.41(c)(3)(i). "If the servicer later discovers that additional information or corrections to a previously submitted document are required to complete the application, the servicer must promptly request the missing information or corrected documents and treat the application as complete...until the borrower is given a reasonable opportunity to complete the application." 12 C.F.R. § 1024.41(c)(2)(iv). In short, 12 C.F.R. § 1024.41(c)(3)(i) sets forth what information must be included in the written notification by the servicer that a facially complete loss mitigation application was received while 12 C.F.R. § 1024.41(c)(2)(iv) defines a facially complete loss mitigation application and affords foreclosure protections to facially complete loss mitigation applications for a reasonable time.

***12** Accordingly, Plaintiffs claim that **Caliber** violated 12 C.F.R. § 1024.41(c)(3)(i) may only look to the sufficiency of **Caliber's** written notices, not any foreclosure protections or the timing of the foreclosure action against Plaintiffs. This Court finds that **Caliber's** written notices were proper. Plaintiffs' loss mitigation application was only facially complete on two occasions: on April 5, 2018 and June 28, 2018. Upon receipt of the April 5, 2018 facially complete loss mitigation application, **Caliber** sent a letter to Plaintiffs notifying them that the loss mitigation application was considered complete as of April 5, 2018, that Plaintiffs' eligibility for loss mitigation would be evaluated within thirty days of April 5, 2018, that **Caliber** would not begin foreclosure against Plaintiffs under applicable law while evaluating the loss mitigation application, and that Plaintiffs would be notified in writing should **Caliber** require more information from them with the caveat that any foreclosure protections afforded them during the evaluation process may end if **Caliber** did not receive the additionally requested information within a specific time frame. This written notification directly follows the requirements of 12 C.F.R. § 1024.41(c)(3)(i).

Upon receipt of the June 28, 2018 facially complete loss mitigation application, **Caliber** sent a letter to Plaintiffs notifying them that the loss mitigation application was considered complete as of June 28, 2018, that Plaintiffs' eligibility for loss mitigation would be evaluated within thirty days of June 28, 2018, and that Plaintiffs would be notified in writing should **Caliber** require additional documents from Plaintiffs. This letter did not include information regarding foreclosure protections because the foreclosure action against Plaintiffs had already been initiated. Because foreclosure protections were not applicable at the time of this written notification, it also directly follows the requirements of 12 C.F.R. § 1024.41(c)(3)(i).

Because this Court finds that **Caliber** did not violate the requirements of 12 C.F.R. § 1024.41(c)(3)(i) when it received facially complete loss mitigation applications from Plaintiffs, and, therefore, no reasonable juror could find for Plaintiffs, **Caliber's** request for summary judgment on this claim is GRANTED and Plaintiffs' request for summary judgment on this claim is DENIED.

4. *Filing of Foreclosure Action – 12 C.F.R. § 1024.41(f)(2)*

Plaintiffs allege **Caliber** violated 12 C.F.R. § 1024.41(f)(2) when it "filed a foreclosure action against [Plaintiffs] after their Loss Mitigation Application was complete or facially complete." (Compl. ¶ 74, ECF No. 1.) Plaintiffs argue that because **Caliber** considered their loss mitigation application complete as of April 5, 2018, **Caliber** was prohibited from filing the foreclosure action against them until **Caliber** either notified Plaintiffs they were ineligible for a loss mitigation option, or Plaintiffs rejected all loss mitigation options offered by **Caliber**, or Plaintiffs failed to perform under an agreement on a loss mitigation option. (Pls.' Mot. for Summ. J. 13-14, ECF No. 28 (quoting 12 C.F.R. § 1024.41(f)(2)(i)-(iii)).) While Plaintiffs are correct that complete loss mitigation applications are afforded these specific protections against foreclosure, Plaintiffs' loss mitigation application was never complete prior to June 18, 2018.

Caliber originally received Plaintiffs' loss mitigation application, determined it to be incomplete, and notified Plaintiffs, in writing, which documents it needed to complete Plaintiffs' loss mitigation application. After Plaintiffs

submitted all the additionally required documentation, Plaintiffs' loss mitigation application was facially complete. *See* 12 C.F.R. § 1024.41(c)(2)(iv). **Caliber** was, therefore, required to provide notice to Plaintiffs that the loss mitigation application was considered complete and, given that status, certain foreclosure protections applied. *See* 12 C.F.R. §§ 1024.41(c)(2)(iv); 12 C.F.R. § 1024.41(c)(3)(i). **Caliber** did just that. When **Caliber** later discovered it required additional information from Plaintiffs, it sent a letter to Plaintiffs. The written letter, dated May 1, 2018, requested the additional information **Caliber** needed, provided Plaintiffs with a reasonable time of thirty days to supply the information, and continued to consider Plaintiffs' loss mitigation application as complete during that thirty-day period to afford Plaintiffs foreclosure protections. *See* 12 C.F.R. §§ 1024.41(c)(2)(iv); 1024.41(f)(2).

***13** There is no genuine issue of material fact that Plaintiffs did not comply with **Caliber's** request for additional information. The May 1, 2018 letter was clear that **Caliber** requested a letter of explanation from Persell regarding monthly deposits from Edward Jones – **Caliber** specifically asked, "what is that? Is that pension income? If so, we need award letter." (Pls.' Mot. for Summ. J. Ex. 15 at 1, ECF No. 28-15; Def.'s Mot. for Summ. J. Ex. A at 189, ECF No. 29-2.) Plaintiffs failed to provide a letter of explanation, or to even answer **Caliber's** simple questions, regarding a monthly deposit to Persell from Edward Jones. An unsigned blank page, devoid of letterhead or any detail besides one sentence purportedly serving "to verify the deposit amount of $2000 monthly from retirement account" does not, objectively, fulfill **Caliber's** request for information.

When the reasonable thirty-day window passed without Plaintiffs providing all the additional information **Caliber** requested, the loss mitigation application was no longer facially complete and foreclosure protections were no longer applicable. The loss mitigation application became incomplete as of May 31, 2018, and **Caliber** notified Plaintiffs, in writing on that day, that their loss mitigation application was considered incomplete and which documents it needed to complete Plaintiffs' loss mitigation application as required by 12 C.F.R. § 1024.41(b)(2)(i)(B). As of June 18, 2018, Plaintiffs did not submit the additionally requested information to make their loss mitigation application facially complete again.

Although 12 C.F.R. § 1024.41(f)(2) "generally prohibits a servicer from filing for foreclosure if a complete loss mitigation application is pending," a complete, or even facially complete, loss mitigation application was not pending in this matter at the time of the filing of the foreclosure action. *See Malcolm v. Seterus, Inc.*, No. 5:18-CV-01937, 2020 U.S. Dist. LEXIS 50397 at * 8 (N.D. Ohio Mar. 24, 2020). Because an incomplete loss mitigation application does not carry foreclosure protections, the foreclosure action filed on June 18, 2018 was not improper. Therefore, because no reasonable juror could find for Plaintiffs, **Caliber's** motion for summary judgment on this claim is GRANTED and Plaintiffs' motion for summary judgment on this claim is DENIED.

5. *Evaluation for and Notice of Loss Mitigation Options – 12 C.F.R. § 1024.41(c)(1)(i)-*

(ii)

Plaintiffs allege **Caliber** violated 12 C.F.R. § 1024.41(c)(1)(i) by "[r]epeatedly failing to evaluate [Plaintiffs] for loss mitigation options within 30 days after receiving [Plaintiffs'] complete loss mitigation applications" and by "[r]epeatedly failing to evaluate [Plaintiffs] for all loss mitigation options available to them." (Compl. ¶ 75(k)-(l), ECF No. 1.) Plaintiffs additionally allege **Caliber** violated 12 C.F.R. § 1024.41(c)(1)(ii) by "[r]epeatedly failing to send [Plaintiffs] notice in writing stating [**Caliber's**] determination or which loss mitigation options it would offer within 30 days after receiving [Plaintiffs'] loss mitigation applications." (Compl. ¶ 75(m), ECF No. 1.) **Caliber** argues that because Plaintiffs' loss mitigation application was never complete for any thirty-day period, no reasonable juror could find for Plaintiffs on these claims. (Mem. in Supp. of Def.'s Mot. for Summ. J. 2, 16, ECF No. 29-1.) This Court agrees.

Within thirty days of receiving a complete loss mitigation application, the servicer must "[e]valuate the borrower for all loss mitigation options available to the borrower" and "[p]rovide the borrower with a notice in writing stating the servicer's determination of which loss mitigation options, if any, it will offer to the borrower." 12 C.F.R. §§ 1024.41(c)(1)(i)-(ii). A complete loss mitigation application is one "with which a servicer has received all the information that the servicer requires from a borrower in evaluating applications for the loss mitigation options available to the borrower." 12 C.F.R. § 1024.41(b)(1).

***14** However, Plaintiffs' loss mitigation application was never complete prior to July 12, 2018 – the time period this Court may consider – it was only ever facially complete as thoroughly discussed and analyzed throughout

this Memorandum of Opinion. Accordingly, no reasonable juror could find that Caliber violated 12 C.F.R. §§ 1024.41(c)(1)(i)-(ii) because Plaintiffs' loss mitigation application did not meet the required "complete" status for evaluation. Therefore, Caliber's motion for summary judgment on this claim is GRANTED and Plaintiffs' motion for summary judgment on this claim is DENIED.

C. Ohio Consumer Sales Practices Act

Plaintiffs' complaint included a claim under the Ohio Consumer Sales Practices Act. (Compl. ¶¶ 82-99, ECF No. 1.) Plaintiffs subsequently informed this Court that they no longer wished to pursue this claim. (Mot. to Amend 1, ECF No. 16.) Caliber moved for summary judgment on the Ohio Consumer Sales Practices Act claim arguing there is no dispute Plaintiffs withdrew and abandoned the claim. (Mem. in Supp. of Def.'s Mot. for Summ. J. 11, ECF No. 29-1.) This Court agrees that there is no dispute Plaintiffs withdrew or abandoned their Ohio Consumer Sales Practices Act. Therefore, Caliber's request for summary judgment on this claim is GRANTED.

III. AMENDED COMPLAINT

On July 1, 2019, Plaintiffs filed a motion for leave to amend their complaint. (Mot. to Amend, ECF No. 16.) In their motion Plaintiffs indicated they wished to amend their complaint to clarify why they ceased paying their mortgage, to clarify their RESPA claims after receiving documents in discovery, and to simplify the case by removing their state law claim. (*Id.* at 3.) Plaintiffs were clear that their amended complaint did not "add any additional parties or counts" to the matter. (*Id.*) Plaintiffs also provided the amended complaint "does not change the substance of the claims against Caliber...does not alter the substance of the original allegations, does not change the theory of liability, and does not expand allegations to reach new and unrelated misconduct." (*Id.* at 5.) Caliber opposed Plaintiffs' request to amend their complaint arguing the amendment would be futile and prejudicial. (Opp'n to Mot. to Amend 3-4, ECF No. 18.)

Plaintiffs' desired factual amendments contained in the proposed amended complaint have been fully considered through evidentiary submissions supporting the pending motions for summary judgment. Given Plaintiffs' admission that their proposed amendments do not add parties or claims, and do not alter the existing claims, theories, or allegations, this Court finds it has fully addressed any additional material Plaintiffs wished to include in their complaint throughout this Memorandum of Opinion. Therefore, Plaintiffs' Motion to Amend is DENIED AS MOOT.

IV. CONCLUSION

For all the foregoing reasons, Caliber's motion for summary judgment is GRANTED. (Def.'s Mot. for Summ. J., ECF No. 29.) Plaintiffs' motion for summary judgment is DENIED. (Pls.' Mot. for Summ. J., ECF No. 28.) This Court specifically holds that Caliber did not violate RESPA or various provisions of Regulation X.

IT IS SO ORDERED.

DATE: March 19, 2021 /s/ John R. Adams

Judge John R. Adams

UNITED STATES DISTRICT COURT

All Citations

Slip Copy, 2021 WL 1061936

Footnotes

1 Plaintiffs attached an exhibit to their motion for summary judgment in support of this undisputed fact. (Pls.' Mot. for Summ. J. Ex. 11, ECF No. 28-11.) The pages of Plaintiffs' submitted exhibit are Bates numbered "CHL-0023," "CHL-0024," "CHL-0025," and "CHL-0026." (*Id.*) Prior to the submission of either of the pending motions for summary judgment, the parties stipulated to the truth, accuracy, and admissibility of certain documents containing specific Bates numbers – the Bates numbers of Plaintiffs' submitted exhibit in support of this undisputed fact were not part of the stipulation. (Stipulation, ECF No. 22.) Without comment regarding the truth, accuracy, or admissibility of Plaintiffs' submitted exhibit, this Court will refer only to Caliber's

submitted exhibit supporting this undisputed fact for simplicity and ease of reference as its Bates numbers were part of the stipulation. (*See* Def.'s Mot. for Summ. J. Ex. A at 83-87, ECF No. 29-2; Stipulation, ECF No. 22.)

End of Document

[Cite as *Kent v. Leo's Ent., L.L.C.*, 2021-Ohio-946.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JILL KENT,	:	
Plaintiff-Appellant,	:	No. 109730
v.	:	
LEO'S ENTERPRISE, L.L.C., ET AL.,	:	
Defendants-Appellees.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: March 25, 2021

Civil Appeal from the South Euclid Municipal Court
Case No. CVF 1800352

Appearances:

Fanger & Davidson L.L.C., Jeffrey J. Fanger, and Gerry Davidson, *for appellant.*

Harvey B. Bruner Co., L.P.A., and Harvey B. Bruner, *for appellees.*

SEAN C. GALLAGHER, P.J.:

{¶ 1} Plaintiff-appellant Jill Kent ("Kent") appeals the decision of the trial court that adopted the magistrate's decision, over her objections, and granted

judgment in favor of defendants-appellees Leo's Enterprise, L.L.C., and Anthony Turner ("Turner"). Upon review, we affirm.

Background

{¶ 2} On July 20, 2018, Kent filed an amended complaint that raised claims against appellees and other defendants for breach of contract and violation of the Ohio Consumer Sales Practices Act ("CSPA").[1] Kent alleged that on or about July 13, 2017, she entered an oral contract with appellees for tree trimming and removal on her property, that the parties agreed upon a price of $2,200 cash, and that appellees failed to complete the work. Kent sought compensatory damages in the amount of $1,601.25.

{¶ 3} Kent filed a motion for summary judgment that was opposed by appellees. The trial court denied the motion for summary judgment, and the case proceeded to trial before a magistrate.

{¶ 4} Turner testified that when he receives a job, he sends others to do the work. For Kent's job, he initially sent Darrell Hutchinson Jr. ("Hutchinson") of Hutchinson Lawn Care to assess the work to be done. Turner never went to Kent's property. Turner stated that after conferring with Hutchinson and receiving pictures of the job, he quoted Kent for the tree work. He testified that Kent never provided a number of trees and there was no written agreement specifying the

[1] The other named defendants included Darrin Hutchinson Jr. and Hutchinson Lawn Care L.L.C., against whom default judgment was obtained in the amount of $6,600; and Brandon Tree Service and "Unknown Principle [sic]" of Brandon Tree Service, who later were dismissed for failure to perfect service.

number of trees to be cut down. After initial work was performed by Hutchinson Lawn Care, Kent contacted Turner to express her dissatisfaction and her refusal to pay.

{¶ 5} According to Turner, the parties reached an agreement that Kent would pay $2,200 and that the scope of work was to include the removal of a number of trees on the side of her property up to the air conditioner plus the removal of a large tree. Kent brought Brandon Tree Service ("Brandon") onto the job to perform the work the next day. Turner testified that Kent paid the $2,200 after the work was completed, that the job was finished, and that he believed Kent was satisfied because she paid. Turner stated that he took a $100 loss on the job because he owed $2,300 to Hutchinson and Brandon. Turner testified that days later, Kent contacted him and told him there were additional trees she wanted cut down. Turner quoted Kent $1,200 for the additional tree work. No further payment was made, and no additional tree work was performed.

{¶ 6} The evidence at trial revealed that prior to contacting Turner, Kent received an estimate from Anywhere Tree Service for the removal of 15 trees and a large pine for approximately $3,200. According to Kent, after contacting Turner, Hutchinson came to look around and they discussed the work that needed to be done. She claimed this was the same work she had quoted by Anywhere Tree Service and included cutting flush to the ground a very large pine tree and trees along the side of her house back to her neighbor's garage, and trimming back trees over her driveway that were hitting her roof. She testified that Hutchinson took pictures of

the trees she wanted cut down that were sent to Turner. She testified that Turner gave her a quote of $2,200, which included $700 for the large pine tree and $1,500 for the rest of the work. Kent conceded during her testimony that she never told appellees a specific number of trees she wanted cut down and there was never any written proposal from appellees.

{¶ 7} Kent testified that after her initial dissatisfaction, she agreed to pay $2,200 for the trees to be cut flush to the ground, the removal of the large pine tree, and trimming. She confirmed that she exchanged text messages with Turner. She testified that Brandon cut down the large tree on her property and several trees on the side of the house back to the air conditioning unit, which was "maybe 10 trees."

{¶ 8} Kent further claimed that when she made the $2,200 payment, the job was not completed. She testified that she contacted Turner and asked about the rest of the trees. Kent testified that Turner asked her to pay the money and he would send someone out the next week. She stated that because Brandon had done "a good portion of the work," she paid the $2,200 for the whole job with the understanding that they would be back the following week "to finish the rest of the trees and then trim on the side of my driveway." Kent stated that her daughter wrote on a receipt the work that was left to be done and that Hutchinson signed this receipt.

{¶ 9} Photographs were introduced that depicted a very large pine tree on the property and several trees along the side of the house. Copies of text messages exchanged by the parties, requests for payment, a receipt, and estimates were also introduced. The text messages show that after the initial work was completed by

Hutchinson Lawn Care, Kent expressed her dissatisfaction. Turner stated his desire to get everything straightened out the following day. The next morning, he sent a message to Kent stating that "Brandon will be over * * * today to finish the job cut down the big tree in the front and all the ones that he didn't cut down yesterday $2,200 when the job is finished." Kent agreed. Several days later, Kent sent a message to Turner asking who would be there to finish the job, including "[t]he rest of the trees on right side of the house and cutting back the tree over the house and drive on the left side?" Turner responded that the additional trees were not included in the original job and that the additional tree work would be another $1,200. Kent insisted the job was not completed and claimed that when the $2,200 was paid she understood they would be back the following week to complete the job. Turner continued to express that the additional tree work was not part of the parties' agreement, stating "there's been a misunderstanding Hutchinson cut down a bunch of trees three truckloads full that was [$]1,500 you would not pay him Brandon cut down the big tree I charge you $700 you would not pay you said $2,200 * * *." The requests for payment Kent received from Hutchinson Lawn Care reflected a price of $2,200 for the work that had been performed. There was a notation from Kent on a receipt regarding work left to be done. There also was an estimate from Anywhere Tree Care for $1,601.25 for the work Kent claims remained to be finished.

{¶ 10} On April 30, 2019, the magistrate issued a decision finding in favor of appellees. Kent filed objections to the magistrate's decision and a request for findings of fact and conclusions of law. The trial court ordered the parties to submit

proposed findings of fact and conclusions of law, and the parties complied. On January 24, 2020, the magistrate issued findings of fact and conclusions of law that stated as follows: "The Court accepts and incorporates in part and rejects in part portions of the Parties' proposals." Although the magistrate did not specify which parts of the proposals were accepted or rejected, the magistrate included his own findings and conclusions "based on the evidence submitted at trial and the credibility of the witnesses" that stated in part:

> That the $2,200 paid by Plaintiff to Defendant was the extent to which there was a contractual obligation and a meeting of the minds and thus the contract covered. There was no meeting of the minds and thus no contract for the additional tree removal work performed subsequent to the initial contract, and thus Plaintiff is not entitled to any damages.

{¶ 11} Kent filed supplemental objections to the magistrate's decision. On April 7, 2020, upon review and consideration of the matter, the trial court approved the magistrate's decision and adopted the recommendations therein, over Kent's objections. The trial court rendered judgment in favor of appellees.

{¶ 12} Kent timely filed this appeal.

Law and Analysis

{¶ 13} Kent raises twelve assignments of error for our review. We shall address them out of order and group them together as conducive to our analysis.

{¶ 14} Kent's tenth and twelfth assignments of error challenge the trial court's findings of fact and conclusions of law. Under her tenth assignment of error, Kent claims the trial court erred by not properly setting forth findings of fact and conclusions of law and violated Civ.R. 52 and her due process rights by failing to

specifically list the "incorporated" findings of fact and conclusions of law. Under her twelfth assignment of error, Kent claims the trial court's failure to include any findings of fact and conclusions of law on the CSPA claim is plain error.

{¶ 15} "[A] magistrate's decision may be general unless findings of fact and conclusions of law are timely requested by a party or otherwise required by law." Civ.R. 53(D)(3)(a)(ii). "'[I]f a magistrate has not prepared findings of fact * * *, the burden is on the party objecting to request findings of fact from the magistrate pursuant to Civ.R. 52 and Civ.R. 53(D)(3)(a)(ii).'" *Foster v. Foster*, 10th Dist. Franklin No. 15AP-1157, 2017-Ohio-4311, ¶ 60, quoting *Casper v. Casper*, 12th Dist. Warren No. CA2012-12-128, 2013-Ohio-4329, ¶ 39. When a timely request is made, the magistrate may require any or all of the parties to submit proposed findings of facts and conclusions of law. Civ.R. 53(D)(3)(a)(ii); *see also* Civ.R. 52.

{¶ 16} The purpose of separate findings of fact and conclusions of law is "'to aid the appellate court in reviewing the record and determining the validity of the basis of the trial court's judgment.'" *In re Adoption of Gibson*, 23 Ohio St.3d 170, 172, 492 N.E.2d 146 (1986), quoting *Werden v. Crawford*, 70 Ohio St.2d 122, 124, 435 N.E.2d 424 (1982). "Ohio courts have determined that when a magistrate's decision substantially complies with Civ.R. 53, in the absence of prejudice, the failure to issue additional findings of fact and conclusions of law is not reversible error." *Slosser v. Supance*, 10th Dist. Franklin No. 20AP-15, 2021-Ohio-319, ¶ 13, quoting *In re Citywide Ambulance Servs., Inc. v. Ohio Dept. of Human Servs.*, 10th Dist. Franklin No. 96APE08-1119, 1997 Ohio App. LEXIS 1551 (Apr. 17, 1997). When

the contents of the magistrate's decision, considered with the rest of the record, forms an adequate basis to decide the issues presented on appeal, it substantially complies with Civ.R. 53(D)(3)(a)(ii). *Id.* at ¶ 14-15. The same holds true when findings of fact and conclusions of law are made by a trial court pursuant to Civ.R. 52. *See Ferrari v. Ohio Dept. of Mental Health & Mental Retardation*, 69 Ohio App.3d 541, 545, 591 N.E.2d 284 (10th Dist.1990).

{¶ 17} In this case, the magistrate issued a general decision that granted judgment in favor of appellees on all claims. Kent timely requested findings of fact and conclusions of law, the trial court required the parties to submit proposed findings of fact and conclusions of law, and the magistrate issued a decision that substantially complied with Civ.R. 53(D)(3)(a)(ii). Although no specifics were provided regarding the accepted portions of the parties' proposals, the magistrate proceeded to set forth findings and conclusions that were determinative in the matter. The magistrate found "the $2,200 paid by Plaintiff to Defendant was the extent to which there was a contractual obligation and a meeting of the minds and thus the contract covered." Further, the magistrate found "there was no meeting of the minds and thus no contract for the additional tree removal work performed subsequent to the initial contract, and thus Plaintiff is not entitled to any damages." Thereafter, Kent filed supplemental objections. The trial court, upon its review and consideration of the matter, adopted the magistrate's decision over Kent's objections and entered judgment for appellees.

{¶ 18} Our review reflects that the magistrate's decision substantially complied with Civ.R. 53(D)(3)(a)(ii), and we find that additional findings of fact and conclusions of law were not necessary. Kent fails to cite any authority to show that a due process violation occurred. The trial court's decision, when considered with the rest of the record, forms an adequate basis for our review. Therefore, no reversible error occurred. Kent's tenth and twelfth assignments of error are overruled.

{¶ 19} Under her first, second, third, sixth, eighth, and eleventh assignments of error, Kent challenges the trial court's judgment on her breach of contract claim. Kent claims the judgment is against the manifest weight of the evidence and challenges the trial court's findings, or implicit findings, that a contract did not exist between the parties, that a meeting of the minds had not occurred, that appellees were not in breach of contract, and that Kent was not harmed by the breach. Kent also claims that the trial court abused its discretion by not properly determining the factual issues in dispute and that the trial court did not appropriately apply the law to the facts of the case.

{¶ 20} The Supreme Court of Ohio has stated that the standard of review for manifest weight in a criminal case, which was set forth in *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541, also applies in a civil case. *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 17. In conducting a review on manifest weight, the reviewing court "'weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines

whether in resolving conflicts in the evidence, the [finder of fact] clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed and a new trial ordered.'" *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). Moreover, this court must make every reasonable presumption in favor of the trial court's judgment and findings of facts and, if the evidence is susceptible of more than one construction, we must give it that interpretation which is consistent with the trial court's judgment. *Eastley* at ¶ 21, citing *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn. 3.

{¶ 21} "'Essential elements of a contract include an offer, acceptance, contractual capacity, consideration * * *, a manifestation of mutual assent and legality of object and of consideration.'" *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58, ¶ 16, quoting *Perlmuter Printing Co. v. Strome, Inc.*, 436 F.Supp. 409, 414 (N.D.Ohio 1976). "'A meeting of the minds as to the essential terms of the contract is a requirement to enforcing the contract." *Rayess v. Educational Comm. for Foreign Med. Graduates*, 134 Ohio St.3d 509, 2012-Ohio-5676, 983 N.E.2d 1267, ¶ 19, quoting *Kostelnik* at ¶ 16. Furthermore, "to be enforceable, 'the contract must be definite and certain.'" *Id.*, quoting *Episcopal Retirement Homes v. Ohio Dept. of Indus. Relations*, 61 Ohio St.3d 366, 369, 575 N.E.2d 134 (1991).

{¶ 22} In this case, the trial court found that the parties had an oral contract for the tree work that was performed, but never had an enforceable contract for the additional tree work that Kent claims appellees failed to complete. Turner's

testimony was that Kent agreed to pay $2,200 for the removal of trees along the side of her property plus a large pine tree on the property. The text messages show that Kent agreed to the work and that payment was to be made when the job was finished. The record also shows that ten trees and the large pine tree were removed and the requests for payment from Hutchinson Lawn Care set forth the work that was completed for the price of $2,200. Kent paid the $2,200 after this work was completed. Appellees maintained that they did not agree to remove any additional trees.

{¶ 23} Although Kent claims it was her understanding that the parties' oral contract was for all of the trees and that the additional tree work was within the scope of the contract, she never told appellees the specific number of trees she wanted cut down and there was never any written proposal specifying the number of trees. We also recognize the written estimate that Kent received from Anywhere Tree Service for the removal of fifteen trees, the large pine, and trim work was for $3,202.50, which was $1,000 more than she paid for the work that was performed, and the estimate for the work that Kent claimed was unfinished was for $1,601.25.

{¶ 24} The record further shows that Turner quoted Kent $1,200 for the additional work, which included five trees. When Kent inquired with Turner about the rest of the work, Turner informed Kent that there had been a misunderstanding regarding the additional tree work. The record demonstrates there was no meeting of the minds with regard to the additional tree work. Also, the fact that Kent's daughter made a notation regarding work to be performed on a receipt signed by

Hutchinson does not establish that the additional tree work was within the scope of the parties' oral contract, nor did this constitute the formation of a new contract.

{¶ 25} In conducting our review, we must make every reasonable presumption in favor of the trial court's judgment and findings of facts. *See Eastley* 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, at ¶ 21. In doing so, we agree that the additional tree work was not covered by the parties' oral contract and that the parties never subsequently entered an enforceable contract for the additional tree work. Moreover, the record reflects that there was no meeting of the minds or a definite and certain contract for the additional tree work. Therefore, no breach occurred and Kent is not entitled to damages. After reviewing the entire record, weighing the evidence and all reasonable inferences, and considering the credibility of witnesses, we do not find the trial court clearly lost its way in resolving conflicts in the evidence and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered.

{¶ 26} Finally, we find no merit to Kent's remaining challenges regarding her claim for breach of contract. Our review reflects that the trial court properly determined the factual issues and that the trial court appropriately applied the law to the facts of the case. The trial court explicitly found a meeting of the minds existed as to the contract for $2,200 made between the parties, which was the extent of any contractual obligation, but the court found there was no meeting of the minds and no contract existed as to the additional tree work requested by Kent. The trial court never determined, as Kent suggests, that a partial meeting of the minds existed.

That Kent disagrees with the findings and conclusions of the trial court does not mean that the trial court erred.

{¶ 27} Accordingly, the assignments of error relating to the claim for breach of contract are overruled.

{¶ 28} Under her fourth, fifth, seventh, and ninth assignments of error, appellant challenges the trial court's judgment on her claim that appellees were in violation of the CSPA, R.C. 1435.01 et seq. Kent claims that the trial court's judgment on the CSPA claim was against the manifest weight of the evidence and challenges the implicit findings that appellees were not in violation of the CSPA and that Kent was not harmed by the alleged violation. Kent also claims that the trial court abused its discretion by not properly applying the law to the facts of the case and by failing to properly determine the factual issues in dispute.

{¶ 29} "The CSPA prohibits unfair or deceptive acts and unconscionable acts or practices by suppliers in consumer transactions whether they occur before, during, or after the transaction." *Williams v. Spitzer Autoworld Canton, L.L.C.*, 122 Ohio St.3d 546, 2009-Ohio-3554, 913 N.E.2d 410, ¶ 10, citing R.C. 1345.02(A) and 1345.03(A). "In general, the CSPA defines 'unfair or deceptive consumer sales practices' as those that mislead consumers about the nature of the product they are receiving, while 'unconscionable acts or practices' relate to a supplier manipulating the consumer's understanding of the nature of the transaction at issue." *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278, 2005-Ohio-4985, 834 N.E.2d 791, ¶ 24.

{¶ 30} The record in this case does not support a finding that any violation of the CSPA occurred. The record reflects that appellees provided an oral estimate for tree work upon Kent's request and made a good faith effort to resolve the issues with Turner when she expressed her dissatisfaction. The parties agreed upon a price that was to be paid when the work was finished. The work that was agreed to by the parties was completed, and Kent paid the $2,200. The record does not support Kent's claim that appellees made misleading statements about the scope of the work. Kent confirmed she never told appellees the number of trees she wanted cut down and there was no written proposal specifying the number of trees. The record also demonstrates that the parties never entered an enforceable contract for the additional tree work. Appellees quoted Kent $1,200 for the additional tree work, which was consistent with the other estimates Turner received. Also, Turner's statement that there was a misunderstanding and his position that appellees were not obligated to perform the additional work were not false or deceptive statements or unconscionable acts. *See Heisler v. Mallard Mechanical Co., L.L.C.*, 10th Dist. Franklin No. 09AP-1143, 2010-Ohio-5549, ¶ 28.

{¶ 31} Our review reflects no violation of the CSPA occurred, Kent was not entitled to damages on this claim, and the trial court's judgment in favor of appellees on her CSPA claim was not against the manifest weight of the evidence. We also find no merit to Kent's remaining challenges regarding her CSPA claim. Kent's assignments of error relating to her claim for violation of the CSPA are overruled.

{¶ 32} Judgment affirmed.

It is ordered that appellees recover from 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 municipal 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.

_____
SEAN C. GALLAGHER, PRESIDING JUDGE

ANITA LASTER MAYS, J., and
EILEEN A. GALLAGHER, J., CONCUR

[Cite as *Little Aquanauts, L.L.C. v. Makovich & Pusti Architects, Inc.*, 2021-Ohio-942.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

LITTLE AQUANAUTS, L.L.C.,	:	
Plaintiff-Appellee,	:	No. 109594
v.	:	
MAKOVICH & PUSTI ARCHITECTS, INC., ET AL.,	:	
Defendants-Appellants.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: March 25, 2021

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-19-926299

Appearances:

Harvey + Abens, Co., L.P.A., David L. Harvey III, and Matthew B. Abens, *for appellee*.

Shumaker, Loop & Kendrick, L.L.P., Nicholas T. Stack, and Nicholas A. Huckaby, *for appellant*.

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellant Endless Pools, Inc. ("Endless Pools") challenges the trial court's judgment entry denying its motion to compel arbitration or, alternatively,

motion to dismiss with memorandum in support. After a thorough review of the law and facts, we affirm the judgment of the trial court.

I. Factual and Procedural History

{¶ 2} Appellee Little Aquanauts, L.L.C. ("Aquanauts") is in the business of teaching water self-rescue training to children. Aquanauts leased space for its business, but the premises did not have a pool, so Aquanauts looked into installing an endless pool. In fall 2016, Aquanauts initiated conversations with Endless Pools regarding purchasing and installing one of their pools. Aquanauts alleged that it relied on representations made by Endless Pools in selecting a pool design that would be appropriate for and work in Aquanauts' premises.

{¶ 3} Aquanauts ultimately purchased the pool on Endless Pools' website. As part of the finalization process, Aquanauts was given an opportunity to view the Terms and Conditions of Sale ("Terms and Conditions") that would apply to the purchase. The pertinent sections of the Terms and Conditions state as follows:

> 1. Terms and Conditions:
> Any terms and conditions are limited to those contained in these Terms and Conditions of Sale. By finalizing your order and choosing the I Accept option, you are agreeing to the terms contained herein. * * * These Terms and Conditions of Sale constitute the full and entire agreement between the customer and Endless Pools pertaining to this sale.
>
> 2. Governing Law:
> The Laws of the Commonwealth of Pennsylvania will govern this sale and these Terms and Conditions of Sale between Endless Pools and the customer without regard to conflicts of laws or rules. Any arbitration or litigation will be conducted in Delaware County, Pennsylvania. The customer consents to the jurisdiction of the Federal and State courts located in Pennsylvania, and submits to the jurisdiction thereof and

> dismisses the right to change venue. The customer also consents to the application of personal jurisdiction by any such court with respect to such proceeding.
>
> 3. Limitation of Liability:
> * * * Endless Pools shall not be responsible for any permits, fees, licenses, and authorizations necessary to comply with local or state codes or requirements. Endless Pools takes no responsibility for any site preparation, including, but not limited to, preparing any slab or foundation. Any Endless Pools product installed above grade must be placed on a properly engineered structure.
>
> * * *
>
> 6. Disputes:
> Any disputes arising under these Terms and Conditions of Sale must be submitted to binding arbitration before a JAMS arbitrator in Philadelphia, Pennsylvania. The party in whose favor a judgment is rendered in arbitration shall be reimbursed for its legal fees and costs by the other party, in addition to any other damages awarded by the arbitrator.

{¶ 4} Construction and installation of the pool commenced, and, as it was nearing completion, Aquanauts learned that the Cuyahoga County Board of Health was required to inspect the pool and corresponding systems. Upon contacting the Board of Health, Aquanauts was informed that it should have sought the approval of the Board of Health prior to the pool's construction and installation. Aquanauts attempted to submit the paperwork belatedly, but it was rejected. Aquanauts was informed that its pool was not compliant with the state of Ohio's regulations.

{¶ 5} Aquanauts was never able to use the pool and therefore was never able to open for business; Aquanauts was forced to vacate its leased space.

{¶ 6} Aquanauts filed suit against Endless Pools, along with the architect of the project and the contractor who installed the endless pool. Pertinent to this

appeal, Aquanauts alleged claims against Endless Pools for negligent misrepresentation and violation of Ohio's Deceptive Trade Practices Act.

{¶ 7} Endless Pools moved to compel arbitration or, in the alternative, to dismiss the case, arguing that Aquanauts had agreed to arbitrate any claims. Aquanauts opposed the motion, asserting that its claims fell outside of the scope of the arbitration provision in the Terms and Conditions. The trial court denied Endless Pools' motion without analysis. Endless Pools then filed the instant appeal, raising one assignment of error for our review:

> The trial court erred in denying Endless Pools' motion to dismiss [Aquanauts'] claims against Endless Pools or, alternatively, to stay the action and compel [Aquanauts] to re-assert its claims in arbitration.

II. Law and Discussion

{¶ 8} This court applies a de novo standard of review when evaluating the scope of an arbitration agreement, that is, whether a party has agreed to submit a certain issue to arbitration. *Seyfried v. O'Brien*, 2017-Ohio-286, 81 N.E.3d 961, ¶ 18 (8th Dist.), citing *McCaskey v. Sanford-Brown College*, 8th Dist. Cuyahoga No. 97261, 2012-Ohio-1543, ¶ 7. Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983).

{¶ 9} Aquanauts does not dispute that it agreed to the Terms and Conditions, which contained the arbitration provision. Endless Pools argues that the arbitration provision is broad and covers any dispute "arising from" the Terms and Conditions. Further, Endless Pools asserts that, even if the arbitration provision were not so all-

encompassing, Aquanauts' claims would still be covered because Endless Pools argues that Aquanauts' claims are for breach of contract, but are creatively pled as negligent misrepresentation and violation of Ohio's Deceptive Trade Practices Act.

{¶ 10} In addition, Endless Pools contends that Aquanauts' claims directly involve a provision from the Terms and Conditions, to wit: "Endless Pools shall not be responsible for any permits, fees, licenses, and authorizations necessary to comply with local or state codes or requirements." Consequently, Endless Pools maintains that arbitration of Aquanauts' claims is mandatory.

{¶ 11} In opposition, Aquanauts argues that its claims are not subject to the arbitration provision because, by the very language of the Terms and Conditions, the arbitration clause is quite narrow. Aquanauts maintains that its claims do not arise from the Terms and Conditions, but instead are premised upon representations by Endless Pools that occurred prior to entering the purchase. Aquanauts is not alleging any issues with the subjects included in the Terms and Conditions. Rather, its allegations stem from the duty of Endless Pools to communicate, prior to the sale, correct and relevant information to guide or assist Aquanauts in its business decision. Aquanauts asserts that Endless Pools' duty to convey accurate information about its pools existed independently of the Terms and Conditions.

{¶ 12} Ohio recognizes a "strong public policy" in favor of arbitration and the enforcement of arbitration provisions. *Hayes v. Oakridge Home*, 122 Ohio St.3d 63, 2009-Ohio-2054, 908 N.E.2d 408, ¶ 15; *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶ 24; R.C. 2711.01(A). When

ruling on a motion to compel arbitration, however, the "proper focus" is on whether the parties actually agreed to arbitrate the matter at issue, i.e., the language and scope of the arbitration provision, not the general policies of the arbitration statutes. *Taylor v. Ernst & Young, L.L.P.*, 130 Ohio St.3d 411, 2011-Ohio-5262, 958 N.E.2d 1203, ¶ 20.

{¶ 13} A "presumption favoring arbitration" arises when a claim in dispute "falls within the scope of the arbitration provision." *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 471, 700 N.E.2d 859 (1998); *Taylor Bldg.* at ¶ 27; *Natale v. Frantz Ward, L.L.P.*, 2018-Ohio-1412, 110 N.E.3d 829, ¶ 9 (8th Dist.). Although a party cannot be compelled to arbitrate a dispute the party has not agreed to submit to arbitration, *Council of Smaller Ents. v. Gates, McDonald & Co.*, 80 Ohio St.3d 661, 665, 687 N.E.2d 1352 (1998), "[a]ny doubts regarding arbitrability should be resolved in favor of arbitration," *Natale* at ¶ 9, citing *Academy of Medicine of Cincinnati v. Aetna Health, Inc.*, 108 Ohio St.3d 185, 2006-Ohio-657, 842 N.E.2d 488, ¶ 14.

{¶ 14} The threshold question is whether the parties agreed to arbitrate the issues. In *Aetna Health, Inc.*, the Supreme Court of Ohio reiterated that the test for determining the arbitrability of a given dispute involves four rules:

> (1) that "'arbitration is a matter of contract and a party cannot be required to so submit to arbitration any dispute which he has not agreed to so submit'"; (2) that the question whether a particular claim is arbitrable is one of law for the court to decide; (3) that when deciding whether the parties have agreed to submit a particular claim to arbitration, a court may not rule on the potential merits of the underlying claim; and (4) that when a "'contract contains an arbitration

> provision, there is a presumption of arbitrability in the sense that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.""

Id. at ¶ 5, quoting *Cohen v. PaineWebber, Inc.*, 1st Dist. Hamilton No. C-010312, 2002-Ohio-196, ¶ 9, quoting *Council of Smaller Ents.* at 665-666, citing *AT&T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 650, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986). "'[A] proper method of analysis * * * is to ask if an action could be maintained without reference to the contract or relationship at issue. If it could, it is likely outside the scope of the arbitration agreement.'" *Aetna Health, Inc.* at ¶ 6, quoting *Fazio v. Lehman Bros., Inc.*, 340 F.3d 386, 395 (6th Cir.2003).

{¶ 15} "[W]hile torts may sometimes be covered by arbitration clauses where the allegations underlying the claims touch matters covered by the arbitration agreement, tort claims that may be asserted independently, without reference to the contract, fall outside of the scope of an arbitration provision." *Arnold v. Burger King*, 2015-Ohio-4485, 48 N.E.3d 69, ¶ 32 (8th Dist.), citing *Fazio* at ¶ 6; *see also Complete Personnel Logistics, Inc. v. Patton*, 8th Dist. Cuyahoga No. 86857, 2006-Ohio-3356, ¶ 15 ("[T]ort claims that may be asserted independently, without reference to the contract, fall outside the scope of the arbitration provision.").

{¶ 16} We agree with Aquanauts that the arbitration provision in this matter is narrow in scope and covers solely disputes "arising under these Terms and Conditions of Sale." The document containing the Terms and Conditions is brief and only addresses the following areas: Aquanauts' acceptance and the extent of the

terms and conditions contained therein, the governing law, limitation of liability, payments, international shipments, and disputes.

{¶ 17} Aquanauts' claims allege that Endless Pools represented that the selected pool would comply with all applicable codes and laws, that Endless Pools supplied false information regarding the suitability and appropriateness of its product for Aquanauts' space, and that the pool was of a particular standard and quality necessary for approval which it, in fact, was not. The Terms and Conditions do not contain any information relating to the sale or specifics regarding the pool, and as such, do not pertain to the claims alleged by Aquanauts. Accordingly, Aquanauts' claims can be asserted without any reference to the Terms and Conditions.

{¶ 18} Endless Pools argues that Aquanauts' claim that Endless Pools represented that the pool would be installed according to all applicable codes and laws directly implicates Section 3 of the Terms and Conditions, "Limitation of Liability" ("Endless Pools shall not be responsible for any permits, fees, licenses, and authorizations necessary to comply with local or state codes or requirements."). However, Endless Pools' argument is misplaced. Aquanauts' claims are not alleging that Endless Pools failed to obtain a permit, fee, license, or authorization, and thus do not fall under the asserted provision.

{¶ 19} Finally, Endless Pools' argument that the parties agreed to submit any issue of arbitrability to the arbitrator is without merit. "'Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to

arbitrate is to be decided by the court, not the arbitrator.'" *Pappas v. Richmond Towers L.L.C.*, 8th Dist. Cuyahoga No. 94558, 2011-Ohio-5249, ¶ 14, quoting *Belmont County Sheriff v. FOP, Ohio Labor Council, Inc.*, 104 Ohio St.3d 568, 2004-Ohio-7106, 820 N.E.2d 918, ¶ 13, citing *Council of Smaller Ents.*, 80 Ohio St.3d at 666, 687 N.E.2d 1352.

{¶ 20} Endless Pools argues that Aquanauts agreed to have the arbitrator determine the issue of arbitrability because the arbitration clause provides that dispute will be submitted to a JAMS arbitrator, and JAMS' rules state that such questions shall be determined by the arbitrator, but this is insufficient. Any agreement for arbitrability to be decided by the arbitrator rather than the court must be spelled out in the arbitration clause itself. *See Pappas* at ¶ 16. The arbitration clause in the Terms and Conditions is silent as to jurisdiction; accordingly, the parties did not unmistakably provide that the issue of arbitrability was to be determined by the arbitrator. The issue was therefore properly determined by the court.

{¶ 21} The trial court properly denied the motion to compel arbitration, and Endless Pools' assignment of error is overruled.

III. Conclusion

{¶ 22} Aquanauts' claims do not fall within the scope of the arbitration clause. Thus, the trial court did not err in denying Endless Pools' motion to compel

arbitration or, alternatively, motion to dismiss. Endless Pools' sole assignment of error is overruled, and the judgment of the trial court is affirmed.

{¶ 23} Judgment affirmed.

It is ordered that appellee recover from appellant 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.

FRANK D. CELEBREZZE, JR., JUDGE

ANITA LASTER MAYS, P.J., and
KATHLEEN ANN KEOUGH, J., CONCUR

[Cite as *Deffren v. Johnson*, 2021-Ohio-817.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

RICHARD DEFFREN,	:	APPEAL NOS. C-200176 C-200183
and	:	TRIAL NO. A-1800227
DEFFREN MACHINE TOOL SERVICE, INC.	:	*O P I N I O N.*
Plaintiffs-Appellees/Cross-Appellants,	:	
vs.	:	
DONNA JOHNSON,	:	
KATHY POPP,	:	
and	:	
BRIAN JOHNSON,	:	
Defendants-Appellants/Cross-Appellees.	:	

Civil Appeals From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: March 17, 2021

Jeffrey A. Burd, for Plaintiffs-Appellees/Cross-Appellants,

Robin D. Miller, Ulmer & Berne LLP, for Defendants-Appellants/Cross-Appellees.

BERGERON, Presiding Judge.

{¶1} An asset purchase agreement to sell the assets of a family-run business forms the centerpiece of this appeal. Long after the transaction (and the buyer's hiring some of the seller's family), the parties' relationship soured, with the buyer alleging a pilfering of assets. The seller (the sole shareholder of the business), however, had passed away by this point, and he was the only signatory to the agreement. Confronted with this obstacle, the buyer accordingly tried to hold both the seller's wife liable for unjust enrichment and her son and daughter liable for breaching their employment agreements. After a bench trial, the court sided with the buyer, but we are compelled to reverse. The purchase agreement governed the sale of the assets, and the buyer cannot skirt that agreement and hold the seller's wife accountable on an unjust enrichment theory on these facts because the buyer never conferred a benefit upon her. Nor did he establish a breach of any employment agreement. We accordingly sustain the relevant assignments of error.

I.

{¶2} In 2012, plaintiff-appellee Richard Deffren purchased the assets of Akro Tool Company (a family-run business), from its sole owner, Kenneth Johnson. Kenneth's wife, Donna[1], worked as the company's office manager, responsible for keeping the books, processing customer payments, and managing payroll. Their two children—Kathy and Bryan—were also involved in varying roles. Consequently, as part of the sale, Mr. Deffren hired Kathy and Bryan to continue working in the business—Kathy as the new office manager and Bryan in an unspecified capacity. Mr. Deffren also briefly hired Donna to show Kathy the ropes on how to run the basic

[1] We will use first names to avoid confusion.

accounting functions. Kathy and Bryan worked for Mr. Deffren for five years or so until conflict developed between the parties. In 2018, Mr. Deffren sued all four family members, alleging a misappropriation of company funds. More specifically, Mr. Deffren targeted Kenneth and Donna with respect to accounts receivables that he believed should have been transferred pursuant to the Asset Purchase Agreement (the "Agreement"), and he sued Kathy and Bryan to recover overpayment of Bryan's wages.

{¶3} Mr. Deffren's claims against Kenneth and Donna focused on accounts receivables that came in immediately after closing. Donna deposited $43,631.61 in customer payments, for work done *prior to* closing, into Akro's account instead of turning those amounts over to Mr. Deffren (this includes a late-arriving rebate check from Duke Energy). After Akro's dissolution, those funds were transferred from Akro's bank account into a joint account owned by Kenneth and Donna, because Kenneth, as sole shareholder, had the rights to any assets not transferred to Mr. Deffren. Donna recalled that the parties had discussed this arrangement at the time of the transaction and had agreed that these accounts receivables belonged to Akro. But Mr. Deffren begged to differ, insisting that the Agreement dictated that all of Akro's accounts receivables belonged to him.

{¶4} Soon after Mr. Deffren filed this suit, however, Kenneth passed away. And the trial court ultimately dismissed all claims against Kenneth (and his estate) because Mr. Deffren failed to properly present an estate claim pursuant to R.C. 2117.06. That statutory provision requires that any creditor of an estate must present its claims within six months (with certain exceptions not relevant here), otherwise the claims will be time-barred both against the estate and any beneficiaries

of the estate. Mr. Deffren does not appeal that ruling, so we have no occasion to reconsider any claims against Kenneth.

{¶5} With Kenneth out of the litigation picture, Mr. Deffren continued the suit against Donna, seeking recovery under several theories, including breach of the Agreement, breach of an employment contract, unjust enrichment, theft, fraud, and conspiracy. After a bench trial, the court entered judgment in Donna's favor on all counts except one—the unjust enrichment claim. The trial court held that Mr. Deffren could not recover for breach of the Agreement because Donna was not a party to that agreement, nor did she have any ownership stake in Akro. It also refused to apply any type of "piercing the corporate veil" theory that might have collapsed Akro's corporate form. Nevertheless, the trial court concluded that the Agreement dictated that Akro's accounts receivables belonged to Mr. Deffren and that it would therefore be unjust for Donna to now retain those funds. Mr. Deffren cross-appealed only two of the adverse decisions regarding Donna, and therefore, the appeal with respect to her is confined to theories of unjust enrichment and breach of an employment contract.

{¶6} As to the claims against the children, Mr. Deffren sought to recover overpayments of Bryan's wages that occurred in 2015 and 2017. In 2015, Kathy overpaid Bryan $4,032 for vacation time, 192 hours more than allotted. And in 2017, she overpaid Bryan $2,000 in carry-over vacation time and another $2,000 due to an inadvertent clerical error. Mr. Deffren presented nearly all the same theories of recovery against Kathy and Bryan as he framed against Donna. And again, the trial court similarly dismissed all of the claims except one—breach of an employment contract. Although no written contract existed, the court deemed Kathy and Bryan

subject to implied employment contracts and characterized the overpayments as a bad-faith derogation of that implied agreement.

{¶7} Donna, Kathy, and Bryan (the "Johnson Family") bring three assignments of error in their appeal: (1) that Mr. Deffren's claim against Donna was time-barred; (2) that Mr. Deffren never purchased Akro's accounts receivables; and (3) that Kathy and Bryan were never subject to implied employment contracts. Mr. Deffren also offers three assignments of error in his cross-appeal, claiming: (1) that the court should have awarded prejudgment interest; (2) that Donna was also subject to an employment contract; and (3) that the court miscalculated Kathy's damages. Ultimately, we conclude that the trial court erred in entering judgments against the Johnson Family and reverse. We accordingly sustain the Johnson Family's first and third assignments of error, while dismissing their second as moot. We also overrule Mr. Deffren's three cross-assignments of error.

II.

{¶8} Although the trial court made various factual findings after the trial, the parties don't meaningfully challenge any of them. Instead, they frame legal challenges to the given set of facts in this appeal, which implicates de novo review. *See Bowling v. Stafford & Stafford Co., L.P.A.*, 1st Dist. Hamilton No. C-090565, 2010-Ohio-2769, ¶ 8 ("For purely legal questions, the appellate court applies a de novo standard of review.").

{¶9} In the Johnson Family's first assignment of error, Donna characterizes Mr. Deffren's claim as essentially a claim against Kenneth (really, his estate), which should be time-barred at this point, and more broadly attacks the viability of any unjust enrichment claim. Pointing to the language of R.C. 2117.06(C), she insists

that the six month time bar should resolve this case: "a claim that is not presented within six months after the death of the decedent shall be forever barred as to all parties * * * ." We would be inclined to agree with Donna if Mr. Deffren were pursuing Kenneth, but he has (at this point) abandoned any such theories. The unjust enrichment claim is not against Kenneth or his estate, it is against *her*. Thus, the legitimacy of this claim must rise or fall on its own, regardless of the time bar of R.C. 2117.06(C).

{¶10} Nevertheless, we agree with Donna's related argument that Mr. Deffren's unjust enrichment theory is fatally flawed. The doctrine of unjust enrichment provides that "a party may recover the reasonable value of services rendered in the absence of an express contract if denying such recovery would unjustly enrich the opposing party." *In re Estate of Popov*, 4th Dist. Lawrence No. 02CA26, 2003-Ohio-4556, ¶ 26; *see Estate of Neal v. White*, 1st Dist. Hamilton No. C-180579, 2019-Ohio-4280, ¶ 9 ("The elements of a quasi-contract are (1) a benefit conferred by a plaintiff upon a defendant, (2) knowledge by the defendant of the benefit, and (3) retention of a benefit by the defendant under circumstances where it would be unjust to do so without payment of its value."). Unjust enrichment, of course, sounds in equity, and it is generally only available in the absence of an enforceable contract. *See Ryan v. Rival Mfg. Co.*, 1st Dist. Hamilton No. C-810032, 1981 WL 10160, *1 (Dec. 16, 1981) ("It is clearly the law in Ohio that an equitable action in quasi-contract for unjust enrichment will not lie when the subject matter of that claim is covered by an express contract or a contract implied in fact."). Furthermore, "[a]s a general rule, when services are performed under an express contract, legal action is confined to the parties to the contract." *Nationwide Heating*

& Cooling, Inc. v. K & C Const., Inc., 10th Dist. Franklin No. 87AP-129, 1987 WL 16802, *2 (Sept. 10, 1987). "Consequently, third-persons, even if benefitted by the work, cannot be sued * * * on unjust enrichment to pay for the benefit, because an implied contract does not arise against the one benefitted by virtue of a special contract with other persons." *Id.*

{¶11} That is not to say that a claim for unjust enrichment can never be brought against a third party to a contract. "Circumstances may exist to support an unjust enrichment claim against a noncontracting third-party who benefits from the uncompensated work of one of the parties to the contract." *Grdn. Technology, Inc. v. Chelm Properties, Inc.*, 8th Dist. Cuyahoga No. 80166, 2002-Ohio-4893, ¶ 10, quoting *Nationwide Heating* at *2. But such circumstances are limited, typically arising where a subcontractor sues a property owner for payment not received from a general contractor. *See Steel Quest, Inc. v. City Mark Const. Services, Inc.*, 1st Dist. Hamilton No. C-960994, 1997 WL 674614, *1 (Oct. 31, 1997) ("[T]his court has held that a subcontractor may pursue a claim of unjust enrichment against a property owner * * *," provided the owner has not paid the contractor in full); *Reisenfeld & Co. v. Network Group, Inc.*, 277 F.3d 856, 861 (6th Cir.2002) (holding that sub-agent could recover unpaid leasing commissions from landowner because landowner had not paid the primary agent).

{¶12} We find, as a matter of law, that an unjust enrichment claim is not cognizable against Donna on the facts of this case. As a threshold matter, she was a stranger to the contractual relationship between Kenneth and Mr. Deffren embodied in the Agreement. The Agreement imposed no duties or obligations upon her. If Kenneth breached the Agreement by capturing the receivables at issue (and we

assume, for sake of argument, that he did), Mr. Deffren's remedy lies against Kenneth, or now his estate. Mr. Deffren cannot simply resort to unjust enrichment against Donna after failing to successfully bring his contract claim against Kenneth. *See, e.g., Donald Harris Law Firm v. Dwight-Killian*, 166 Ohio App.3d 786, 2006-Ohio-2347, 853 N.E.2d 364, ¶ 14 (6th Dist.) ("Absent fraud or illegality, a party to an express agreement may not bring a claim for unjust enrichment."). Of course, we can imagine various theories by which Mr. Deffren could reach Donna here (such as fraud, theft, or conspiracy), but the facts did not validate any of those, as the trial court recognized.

{¶13} Moreover, when we consider the elements of unjust enrichment, we fail to see how Mr. Deffren can even get past the first element: "a benefit conferred by a plaintiff upon a defendant." *Estate of Neal*, 1st Dist. Hamilton No. C-180579, 2019-Ohio-4280, at ¶ 9. Mr. Deffren conferred no benefit on Donna at all. To the contrary, with respect to the receivables at issue here, several Akro customers tendered payment to Akro. Neither Mr. Deffren nor Donna sit on either side of that equation. True, Akro eventually dissolved and turned those funds over to Kenneth (as sole shareholder), and those funds were eventually placed in a joint bank account with Donna, but such facts are too slender a reed on which to construct an unjust enrichment claim. By that logic, any downstream recipient of funds would risk liability for unjust enrichment. We are aware of no caselaw, and Mr. Deffren has pointed us to none, that would enable an unjust enrichment claim to succeed under such circumstances. As we emphasized above, that does not mean that a party in Mr. Deffren's situation is foreclosed from all remedies—but he simply failed to

substantiate any of those alternative theories on this record (nor does he question them in this appeal).

{¶14} At the end of the day, Mr. Deffren's unjust enrichment claim against Donna is akin to the proverbial square peg in a round hole—it simply doesn't fit. We thus sustain the first assignment of error as modified to reflect the failure of the unjust enrichment claim as a matter of law.

III.

{¶15} The Johnson Family's third assignment of error and Mr. Deffren's second cross-assignment of error both relate to whether the Johnson Family breached any employment contracts. While the trial court concluded that Donna did not have an employment contract, it ruled that Kathy and Bryan *were* subject to implied employment agreements and that they ran afoul of those contracts' corresponding duties of good faith. Kathy and Bryan portray the trial court's good-faith analysis as fundamentally flawed because an employment contract never existed in the first place. Mr. Deffren, for his part, maintains that the trial court did not go far enough and should have found Donna subject to an employment agreement.

{¶16} " 'A contract is generally defined as a promise, or a set of promises, actionable upon breach.' " *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58, ¶ 16, quoting *Perlmuter Printing Co. v. Strome, Inc.*, 436 F.Supp. 409, 414 (N.D.Ohio 1976). And the " '[e]ssential elements of a contract include an offer, acceptance, contractual capacity, consideration * * *, a manifestation of mutual assent and legality of object and of consideration.' " *Kostelnik* at ¶ 16, quoting

Perlmuter Printing Co. at 414. "A meeting of the minds as to the essential terms of the contract is a requirement to enforcing the contract." *Id.*

{¶17} "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.). Here, the trial court found that Kathy and Bryan were subject to agreements implied in fact. As the name suggests, an implied-in-fact contract contains no express provision defining its terms. Instead, "the court must construe the facts and circumstances surrounding the offer and acceptance to determine the terms of the agreement." *Id.*

{¶18} While "[t]he presumption is that all employment is at will," *Reasoner v. Bill Woeste Chevrolet, Inc.*, 134 Ohio App.3d 196, 198, 730 N.E.2d 992 (1st Dist.1999), that presumption can be overcome by the existence of an express or implied contract. *Id.* at 200; *see Lunsford v. Sterilite of Ohio, L.L.C.*, Slip Opinion No. 2020-Ohio-4193, ¶ 26 (noting that "this court has recognized other exceptions to the at-will-employment doctrine, including * * * breach of an implied contract."). Thus, "[i]n certain contexts, evidence of customs, company policies, employee handbooks, and oral representations may be used to establish the existence of an implied employment contract or an implied term of that contract." *Fennessey v. Mt. Carmel Health Sys., Inc.*, 10th Dist. Franklin No. 08AP-983, 2009-Ohio-3750, ¶ 8, citing *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100, 101, 483 N.E.2d 150 (1985), paragraph two of the syllabus; *see Alexander v. Columbus State Community College*, 2015-Ohio-2170, 35 N.E.3d 949, ¶ 19 (10th Dist.) ("Employer policies and oral representations can constitute evidence of an implied employment contract removing a plaintiff from a set of at-will employees.").

{¶19} "There is, however, a heavy burden on the party relying on an implied contract to 'demonstrate the existence of each element necessary to the formation of a contract including, inter alia, the exchange of bilateral promises, consideration and mutual assent.' " *Sagonowsky v. The Andersons, Inc.*, 6th Dist. Lucas No. L-03-1168, 2005-Ohio-326, ¶ 14, quoting *Bowes v. Toledo Collision—Toledo Mechanical, Inc.*, 6th Dist. Lucas No. L-00-1017, 2000 WL 1161695 (Aug. 18, 2000). For example, an employee handbook cannot form the basis of an implied contract unless "both parties [] intended for the language in handbooks or manuals to be legally binding." *Smiddy v. Kinko's, Inc.*, 1st Dist. Hamilton No. C-020222, 2003-Ohio-446, ¶ 20. "As in all contracts, express or implied, both parties must intend to be bound." *Id.*

{¶20} Here, the trial court concluded that the employment handbook did not create any contractual obligations. And we agree. Indeed, the handbook expressly disavowed any binding force: "The provisions of this Employee Handbook are not intended to create contractual obligations * * * ." Beyond that, the handbook clarified that Mr. Deffren could change it on a whim, reserving the right to modify it "at any time without further notice." Moreover, the handbook specified that all employees were at-will. And where the "employee handbook specifically provided that [its employees] [were] at-will * * * * we must look to sources other than the handbook to determine if an implied contract existed." *Reasoner* at 200–01. To be sure, the handbook here contained various restrictions on vacation time and pay that Kathy and Bryan ran afoul of, but Mr. Deffren needed to find some other basis beyond the handbook to hold them accountable.

{¶21} Despite finding that the handbook was not contractual, the trial court nonetheless found: (1) that Kathy and Bryan were subject to implied-in-fact employment agreements; and (2) that they violated their duties of good faith and loyalty by falling short of Mr. Deffren's expectation as outlined in the handbook. It must be noted that the trial court did not specify the terms of the implied-in-fact agreement, nor did it find that Kathy or Bryan breached any of those terms. Rather, the trial court pivoted to—and solely based its finding of liability upon—the duty of good faith and loyalty.

{¶22} Based on Mr. Deffren's arguments on appeal that focus on this duty of good faith and loyalty, we need not decide whether an implied-in-fact contract existed. This is because we have recognized that "[a]n employee's duty of good faith and loyalty exists regardless of whether an employment agreement exists." *See Retirement Corp. of Am. v. Henning*, 1st Dist. Hamilton No. C-180643, 2019-Ohio-4589, ¶ 36. The common-law duty of good faith and loyalty is not, however, meant to conjure up contractual terms that the parties failed to negotiate or memorialize—it generally applies in limited contexts, such when an employee actively competes with the employer. *See id.* ("This common-law duty [of good faith and loyalty] is breached when an employee engages in competition with the employee's present employer while still employed."); *Berge v. Columbus Community Cable Access*, 136 Ohio App.3d 281, 326, 736 N.E.2d 517 (10th Dist.1999) ("[O]rdinarily employees are considered to be in breach of their duty of loyalty if they compete with their employer."); *Staffilino Chevrolet, Inc. v. Balk*, 158 Ohio App.3d 1, 2004-Ohio-3633, 813 N.E.2d 940, ¶ 45 (7th Dist.) ("Another example of a breach [of the duty of good

faith and loyalty] is where an employee gives away company property, uses company funds as his own, and takes kickbacks.").

{¶23} Mr. Deffren essentially attempts to wield the common law duty of good faith and loyalty to transform nonbinding handbook terms into binding ones. This reasoning is circular and risks eviscerating the extant case law about employee handbooks. Mr. Deffren can't have it both ways—he can't disavow the existence of a contract by telling employees that the handbook is unenforceable, and then try to render the handbook enforceable (under the auspices of "good faith") when it suits him. He must point to facts outside of the handbook to substantiate the terms of an implied contract or he must independently establish a breach of the duty of good faith and loyalty. And we can search the record in vain for evidence of a violation of the duty of good faith and loyalty consistent with how Ohio courts apply that concept.

{¶24} Further bolstering this conclusion is the trial court's assessment of the evidence, where it specifically found that the "evidence demonstrate[s] that the overpayments were accidental or inadvertent and were not done with an intent to deprive the rightful owner of the property." An inadvertent violation of nonbinding terms of an employment handbook does not rise to the level of the purposeful behavior required to breach an employee's duty of good faith and loyalty. *See, e.g.*, *MNM & MAK Ent., LLC v. HIIT Fit Club, LLC*, 2019-Ohio-4017, 134 N.E.3d 242, ¶ 31 (10th Dist.) (holding that intentional misappropriation of trade secrets constituted a breach of the duty of good faith and loyalty). If innocent mistakes by employees can constitute violations of the duty of good faith and loyalty, our court system would be flooded with such litigation. Much like the claims against Donna, Mr. Deffren

potentially had other, more legally-appropriate paths to pursue these alleged transgressions against Kathy and Bryan, but the trial court ruled against him on those grounds and he has not appealed.

{¶25} As a result, we find that the trial court erred as a matter of law in holding that Kathy and Bryan violated some duty of good faith and loyalty. And, for much the same reasons, we accordingly agree with the trial court that Donna was not subject to an employment contract. We therefore sustain the Johnson Family's third assignment of error and overrule Mr. Deffren's second assignment of error.

IV.

{¶26} Mr. Deffren presents two additional assignments of error in his cross-appeal. First, Mr. Deffren argues that the trial court erred by not awarding prejudgment interest on his judgments against the Johnson Family. Because we reverse those judgments, we overrule this assignment of error since he is not entitled to damages. Relatedly, Mr. Deffren maintains in his third assignment of error that the trial court miscalculated damages for Kathy's breach of her employment contract. Because we have concluded that no employment contract existed, we also overrule this assignment of error.

* * *

{¶27} In light of the foregoing analysis, we sustain the Johnson Family's first assignment of error as modified and their third assignments of error, and find their second assignment of error moot. We also overrule Mr. Deffren's three assignments of error on his cross-appeal. We therefore reverse the trial court's judgment in part, affirm in part, and remand with instructions to enter judgment in favor of the Johnson Family.

Judgment reversed in part, affirmed in part, and cause remanded.

CROUSE and **WINKLER, JJ.,** concur.

Please note:

The court has recorded its entry on the date of the release of this opinion