[Cite as *Kopsky v. MURrubber Technologies, Inc.*, 2022-Ohio-511.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

JOHN F. KOPSKY Appellant v. MURRUBBER TECHNOLOGIES, INC. Appellee	C.A. No. 29867 29984 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV-2019-04-1543

DECISION AND JOURNAL ENTRY

Dated: February 23, 2022

CARR, Judge.

{¶1} Plaintiff-Appellant John F. Kopsky appeals the judgments of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} Beginning in 1995, Mr. Kopsky began working for Paratech as a rubber consultant. Over the years in his work for Paratech, Mr. Kopsky developed formulas and mixing procedures. A company called Polymerics would use Mr. Kopsky's formulas and methods to mix rubber ordered by Paratech. That rubber then needed to be calendered in order to be used by Paratech. Calendering is a process that flattens a slab of rubber.

{¶3} Mr. Kopsky alleged that, in 1996, he entered into an oral agreement with Jim Bedell, who was an owner of Bedell-Kraus Flexographic and Pharmaceutical Rubber, Inc. ("Bedell-Kraus"). Mr. Kopsky asserted that for affording Bedell-Kraus the opportunity to do the calendaring for Paratech, Bedell-Kraus would pay Mr. Kopsky 25 cents a pound for all of the

rubber using his formulas that Polymerics, or another entity, would mix and send to Bedell-Kraus. Mr. Kopsky maintained that there was no length of time stated for the agreement. There was no discussion on how long the agreement would last or how it could be ended.

{¶4} In August 2016, Canyon Advisors, which is 100% owned by Anthony Murru, purchased all of the stock and real estate assets of Bedell-Kraus and its affiliates. Bedell-Kraus ultimately became known as Defendant-Appellee MURrubber Technologies, Inc. ("MURrubber"). At the time of the acquisition, there was a liability to Mr. Kopsky recorded in Bedell-Kraus' accounts payable ledger. That liability was paid. In addition, Mr. Murru was aware that, under Bedell-Kraus, there was a history of payments to Mr. Kopsky. However, no contracts or agreements were presented for Mr. Kopsky. It was Mr. Murru's understanding that Bedell-Kraus was paying Mr. Kopsky amounts for processing material for Paratech; however, Mr. Murru did not understand why those payments were being made. Office personnel who worked for Bedell-Kraus, and continued working for the company when it was acquired, indicated that Mr. Kopsky would present statements requesting payment and they would be paid at the direction of one of the owners of Bedell-Kraus. Mr. Murru believed that any relationship that existed ended with the acquisition in August 2016.

{¶5} MURrubber, however, continued to make payments to Mr. Kopsky. Mr. Murru believed that MURrubber properly paid the liability to Mr. Kopsky it assumed at the time of acquisition but maintained that other payments were made in error. Mr. Murru asserted that employees just continued to pay Mr. Kopsky as they had done in the past. The last payment made to Mr. Kopsky was on January 17, 2018.

{¶6} The record contains an August 29, 2017 email from Mr. Murru to Mr. Kopsky. Therein, Mr. Murru states that he has "been reviewing our business relationship and am having a

difficult time justifying the benefits." He went on to request a meeting to discuss the situation. Mr. Murru closed the email by stating that, "[a]t this time any future economic benefits to you associated with various products will cease until a new arrangement is worked out." A meeting was held days later, however, Mr. Murru and Mr. Kopsky differed about the result of that meeting. Mr. Kopsky maintained that Mr. Murru agreed to continue paying Mr. Kopsky 25 cents a pound until a new arrangement was made. Mr. Murru on the other hand testified no agreement was reached and Mr. Kopsky was prohibited from the company's premises effective August 29, 2017. In September 2017, Mr. Kopsky alleges he was informed he was no longer welcome at MURrubber facilities. In an April 2018 email, Mr. Kopsky informed an individual at Paratech that he "ha[s] not been affiliated with M[UR]rubber since August of 2017." Mr. Kopsky explained the email at his deposition by saying that he probably should have said that he was banned from MURrubber not that he was no longer affiliated with it. Mr. Kopsky averred that he believed that the oral agreement prevents Mr. Murru from independently seeking out Paratech as a customer.

{¶7} In April 2019, Mr. Kopsky filed a two-count complaint against MURrubber asserting claims for breach of contract and unjust enrichment. MURrubber filed an answer and counterclaim. MURrubber asserted a claim for unjust enrichment for the payments mistakenly made to Mr. Kopsky since August 2016.

{¶8} Ultimately, both sides filed motions for summary judgment. The trial court denied Mr. Kopsky's motion and granted MURrubber's motion. The trial court then held a trial to determine the amount of damages that MURrubber was entitled to receive for its unjust enrichment claim. Following the trial, the trial court determined that MURrubber was entitled to $2,689.03. At the time of the ruling, MURrubber had filed a motion for prejudgment interest and

the trial court granted time for the parties to brief the issue. While briefing was pending, Mr. Kopsky filed a notice of appeal (appeal no. 29867) and MURrubber filed a cross-appeal.

{¶9} This Court stayed the appeal and remanded the matter to the trial court to rule on the issue of prejudgment interest. The trial court awarded MURrubber prejudgment interest in the amount of 5% per annum from the filing of the answer and counterclaim to the date judgment was entered. Mr. Kopsky then moved to appeal that judgment entry (appeal no. 29984). MURrubber moved to dismiss its cross-appeal and the motion was granted. Thereafter, Mr. Kopsky's appeals were consolidated.

{¶10} Mr. Kopsky has raised four assignments of error in appeal no. 29867 and two in appeal no. 29984. Some of the assignments of error will be addressed out of sequence to facilitate our review.

II.

ASSIGNMENT OF ERROR II CASE NO. 29867

> THE TRIAL COURT ERRED AS A MATTER OF LAW GRANTING SUMMARY JUDGMENT FOR MURRUBBER BASED ON THE STATUTE OF FRAUDS.

{¶11} Mr. Kopsky argues in his second assignment of error in case no. 29867 that the trial court erred in awarding MURrubber summary judgment on its breach of contract claim based upon the Statute of Frauds.

{¶12} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). This Court applies the same standard as the trial court, viewing the facts in the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.*, 13 Ohio App.3d 7, 12 (6th Dist.1983).

{¶13} Pursuant to Civ.R. 56(C), summary judgment is proper if:

> (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc., 50 Ohio St.2d 317, 327 (1977).

{¶14} The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293 (1996). Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). *Id*. Once a moving party satisfies its burden of supporting its motion for summary judgment with acceptable evidence pursuant to Civ.R. 56(C), Civ.R. 56(E) provides that the non-moving party may not rest upon the mere allegations or denials of the moving party's pleadings. *Id*. at 293. Rather, the non-moving party has a reciprocal burden of responding by setting forth specific facts, demonstrating that a "genuine triable issue" exists to be litigated at trial. *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 449 (1996).

{¶15} In its motion for summary judgment, MURrubber argued that Mr. Kopsky's breach of contract claim was barred by the Statute of Frauds. The trial court agreed with MURrubber's argument.

{¶16} R.C. 1335.05 provides in relevant part that, "[n]o action shall be brought whereby to charge the defendant * * * upon an agreement that is not to be performed within one year from the making thereof; unless the agreement upon which such action is brought, or some

memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized."

{¶17} This provision has been narrowly construed by the courts. *Sherman v. Haines*, 73 Ohio St.3d 125, 127 (1995). "The provision applies only to agreements which, by their terms, cannot be fully performed within a year, and not to agreements which may possibly be performed within a year. Thus, where the time for performance under an agreement is indefinite, or is dependent upon a contingency which may or may not happen within a year, the agreement does not fall within the Statute of Frauds." *Id.*

{¶18} Even if a contract could be *terminated* within a year, the possibility of "wrongful termination is not * * * the same as the possibility of performance within the statutory period." *Sibbring v. Columbus Fin. Planning Agency, Inc.*, 10th Dist. Franklin No. 81AP-26, 1982 WL 3981, *7 (Feb. 18, 1982). "[T]ermination is not performance, but rather the destruction, of the contract * * * where there is no provision authorizing either or both of the parties to terminate as a matter of right." (Internal quotations and citations omitted). *Id.* In the case of a personal services contract, where "a defendant['s] obligation to perform is contingent upon the future acts of a third party and will continue for an indefinite time in the future[,] the contract falls within the Statute of Frauds. *Id.*

{¶19} There is no dispute that Mr. Kopsky's alleged agreement was not in writing. Moreover, despite Mr. Kopsky's argument to the contrary, we conclude that any agreement that existed was one for personal services. Mr. Kopsky, who had a business relationship with Paratech and had expertise in the rubber manufacturing industry, afforded Bedell-Kraus the opportunity to calender rubber for Paratech. In addition, this situation is somewhat unique in that whether Bedell-Kraus would have to perform its part of the alleged agreement was based

upon whether a third party, Partech, would have rubber mixed using Mr. Kopsky's formula sent to Bedell-Kraus to be calendered. Thus, we conclude the fact pattern before us is similar to that in *Sibbring*. *See also Daup v. Tower Cellular, Inc.*, 136 Ohio App.3d 555 (10th Dist.2000), and *Fleck v. Hammer*, 9th Dist. Summit No. 23533, 2007-Ohio-3998. Like *Sibbring*, this case involves a personal services agreement of indefinite duration that was dependent upon the will of a third party. *Sibbring* at *6-7.

{¶20} Accordingly, this Court agrees with the trial court's conclusion that any alleged oral agreement was barred by the Statute of Frauds. *See id.*; *see also Daup* at 565-566; *Fleck* at ¶ 14.

{¶21} Mr. Kopsky argues that he fully performed his portion of the contract and thus his agreement should fall outside of the Statute of Frauds. However, Mr. Kopsky points to no Ohio case law in support of his argument. Instead, Ohio Supreme Court law indicates that, an oral contract incapable of being performed within a year is unenforceable under the Statute of Frauds; nonetheless, where one party fully performed and the other defaulted under the agreement a quasi-contract may arise upon which the performing party may maintain an action against the defaulting party under a theory of unjust enrichment or quantum meruit. *See Hummel v. Hummel*, 133 Ohio St. 520 (1938), paragraph one of the syllabus; *see also Akron v. Baum*, 9th Dist. Summit No. 29882, 2021-Ohio-4150, ¶ 17 ("A claim for unjust enrichment, or quantum meruit, is an equitable claim based on a contract implied in law, or a quasi-contract and the elements of [the claims] are identical.") (Internal quotations omitted.).

{¶22} Mr. Kopsky's second assignment of error in case no. 29867 is overruled.

ASSIGNMENT OF ERROR I CASE NO. 29867

THE TRIAL COURT ERRED DENYING KOPSKY'S MOTION FOR SUMMARY JUDGMENT FOR BREACH OF CONTRACT AND ERRED

GRANTING MURRUBBER'S MOTION FOR SUMMARY JUDGMENT ON THAT CLAIM.

{¶23} Mr. Kopsky argues in his first assignment of error that the trial court erred in ruling on the motions for summary judgment with respect to the breach of contract claim. In so doing, Mr. Kopsky argues about the underlying merits of the cause of action. However, as the alleged agreement was barred by the Statute of Frauds, as discussed above, Mr. Kopsky cannot succeed on the merits of that cause of action.

{¶24} Mr. Kopsky's first assignment of error in appeal no. 29867 is overruled.

ASSIGNMENT OF ERROR III CASE NO. 29867

THE TRIAL COURT ERRED AS A MATTER OF LAW GRANTING SUMMARY JUDGMENT TO MURRUBBER ON ITS COUNTERCLAIM BY DETERMINING THAT BECAUSE ENFORCEMENT OF THE ORAL CONTRACT WAS BARRED BY THE STATUTE OF FRAUDS, AND "ALLEGEDLY GOVERNED BY AN EXPRESS AGREEMENT, THE EQUITABLE THEORY OF UNJUST ENRICHMENT IS NOT AVAILABLE."

{¶25} Mr. Kopsky argues in his third assignment of error that the trial court erred in granting summary judgment on his claim and on MURrubber's counterclaim.

{¶26} "A claim for unjust enrichment, or quantum meruit, is an equitable claim based on a contract implied in law, or a quasi-contract and the elements of [the claims] are identical." *Baum*, 2021-Ohio-4150, at ¶ 17. "To succeed on a claim for unjust enrichment, a plaintiff must show that (1) [the plaintiff] conferred a benefit upon the defendant; (2) the defendant knew of the benefit; and (3) the defendant retained the benefit under circumstances where it would be unjust to do so without payment." (Internal quotations and citation omitted.) *Hurlburt v. Klein*, 9th Dist. Lorain No. 20CA011607, 2021-Ohio-2167, ¶ 18.

{¶27} With respect to Mr. Kopsky's unjust enrichment claim, he argues that the trial court erred in concluding that, because Mr. Kopsky alleged there was an express agreement, he

could not recover under a theory of unjust enrichment. Mr. Kopsky points to *Hummel*, wherein the Supreme Court held that:

> An oral contract which is incapable of being performed within a year of the making thereof is unenforceable by reason of the statute of frauds, section 8621, General Code; but where one party thereto fully performs on his part and the other contracting party, to his unjust enrichment, receives and refuses to pay over money which, under the unenforceable contract, he agreed to pay to the party who has fully performed, a quasi contract arises, upon which the performing party may maintain an action against the defaulting party for money had and received.

Hummel, 133 Ohio St. 520 at paragraph one of the syllabus.

{¶28} Nonetheless, the trial court also determined that even if Mr. Kopsky's claim did not fail on that ground, Mr. Kopsky was unable to satisfy the elements of the claim. Specifically, the trial court stated:

> There is no evidence that Anthony Murru and MURrubber had knowledge of the purported oral handshake agreement between Plaintiff and Jim Bedell in 1996. Further, there is no evidence that Anthony Murru or MURrubber agreed to make payments to Plaintiff beyond the disclosed account payable of $13,980.00 that was paid in full by August of 2017 and there is no evidence that Plaintiff provided any benefit or value to MURrubber after the stock purchase in August 2016.

{¶29} On appeal, Mr. Kopsky only challenges the finding that there was no evidence that he provided any benefit or value to MURrubber. As the trial court's other quoted findings are also related to its conclusion that Mr. Kopsky could not succeed on his claim for unjust enrichment, Mr. Kopsky's argument on appeal fails as Mr. Kopsky has not demonstrated that the other findings would not support the trial court's ruling.

{¶30} With respect to Mr. Kopsky's assertion that the trial court erred in granting summary judgment to MURrubber on its unjust enrichment claim, Mr. Kopsky has not fully developed an argument. Instead, he merely states that because the damages were contractual, MURrubber was not entitled to damages based upon unjust enrichment. In so doing, Mr. Kopsky points to the trial court's judgment entry resolving the issues before it at trial – i.e. the amount of

damages – not the trial court's ruling on the summary judgment motions. Any complaint about the damages awarded MURrubber is outside the scope of Mr. Kopsky's stated assignment of error as it relates to the trial of the matter and not the trial court's summary judgment ruling. Accordingly, Mr. Kopsky has not demonstrated that the trial court erred.

{¶31} Mr. Kopsky's third assignment of error is overruled.

ASSIGNMENT OF ERROR IV CASE NO. 29867

> THE TRIAL COURT ERRED AS A MATTER OF LAW GRANTING MURRUBBER SUMMARY JUDGMENT BY NOT IMPOSING SUCCESSOR LIABILITY ON MURRUBBER FOR AN UNSATISFIED DEBT OWED TO KOPSKY.

{¶32} Mr. Kopsky appears to assert in his fourth assignment of error that the trial court erred in failing to impose continuing successor liability on MURrubber. Essentially, Mr. Kopsky makes an additional argument as to why he should have succeeded on his breach of contract claim. However, this assignment of error fails for the same reason his first assignment of error failed: the alleged agreement is barred by the Statute of Frauds. Accordingly, Mr. Kopsky's fourth assignment of error is overruled on that basis.

ASSIGNMENT OF ERROR I CASE NO. 29984

> THE TRIAL COURT ERRED BY GRANTING MURRUBBER TECHNOLOGIES PREJUDGMENT INTEREST ON ITS UNJUST ENRICHMENT CLAIM FROM THE DATE MURRUBBER FILED ITS COUNTERCLAIM INSTEAD OF CALCULATING THE OVERPAYMENT FROM THE DATE OF EACH ALLEGED OVERPAYMENT.

{¶33} Mr. Kopsky argues in his first assignment of error in appeal no. 29984 that the trial court erred in calculating MURrubber's prejudgment interest from the date of the filing of the counterclaim as opposed to the date of the alleged overpayment.

{¶34} Mr. Kopsky cannot succeed on this assignment of error because Mr. Kopsky has not been aggrieved by the perceived error in the trial court's award of prejudgment interest to

MURrubber. In fact, any alleged error present benefits him. "To demonstrate reversible error, an aggrieved party must demonstrate both error and resulting prejudice." *Princess Kim, L.L.C. v. U.S. Bank, N.A.*, 9th Dist. Summit No. 27401, 2015-Ohio-4472, ¶ 18.

{¶35} Mr. Kopsky's first assignment of error in appeal no. 29984 is overruled on that basis.

ASSIGNMENT ERROR II CASE NO. 29984

THE TRIAL COURT ERRED BY GRANTING MURRUBBER TECHNOLOGIES PREJUDGMENT INTEREST ON ITS UNJUST ENRICHMENT CLAIM WHEN THE UNDERLYING JUDGMENT WAS ERRONEOUS.

{¶36} Mr. Kopsky argues in his second assignment of error that the trial court erred in granting MURrubber prejudgment interest. Mr. Kopsky asserts "[b]ecause the October 7, 2020 judgment against [Mr.] Kopsky was erroneous, any award of prejudgment interest to MURrubber was also erroneous." He has not developed any further argument. Irrespective, Mr. Kopsky did not demonstrate the trial court erred in the other appeal. Therefore, he also has not demonstrated that the trial court erred in awarding prejudgment interest to MURrubber.

{¶37} Mr. Kopsky's second assignment of error in appeal no. 29984 is overruled on that basis.

III.

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

Judgment affirmed.

There were reasonable grounds for this appeal.

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

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

Costs taxed to Appellant.

DONNA J. CARR
FOR THE COURT

HENSAL, P. J.
TEODOSIO, J.
CONCUR.

APPEARANCES:

BRADLEY S. LEBOEUF, Attorney at Law, for Appellant.

JOHN S. KLUZNIK and SHAWN M. MAESTLE, Attorneys at Law, for Appellee.

[Cite as *Talmadge Crossing, L.L.C. v. Andersons Inc.*, 2022-Ohio-645.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Talmadge Crossings, LLC	Court of Appeals No. L-21-1113
Appellant	Trial Court No. CI0202002127
v.	
The Andersons, Inc., et al.	**DECISION AND JUDGMENT**
Appellee	Decided: March 4, 2022

* * * * *

Marvin A. Robon, Zachary J. Murry, for appellant.

Gerald R. Kowalski and Jennifer A. McHugh,
for appellee

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, Talmadge Crossing, LLC, appeals from a decision by the Lucas County Court of Common Pleas granting summary judgment in favor of appellee, The Andersons, Inc. For the reasons that follow, we affirm the judgment of the trial court.

Statement of the Case and the Facts

{¶ 2} Appellee closed its West Toledo retail store in 2017, and soon after began to market the property for sale. The property to be sold included several buildings, with more than 150,000 square feet "under roof."

{¶ 3} On July 3, 2018, appellee accepted an offer from Marino Design Group, LLC ("Marino") to purchase the property for $5,200,000. A purchase contract was entered into between the parties, with Joseph Swolsky acting as the principal for Marino. Marino subsequently assigned its interest in the purchase contract to Talmadge Crossing, LLC, an entity in which Swolsky is an owner. It is undisputed that appellant is a "sophisticated" party, and understood that it was purchasing a facility that had been unoccupied and vacant for months.

{¶ 4} Section 2(h) of the purchase contract expressly permitted appellant, as the buyer, to inspect and tour the facility, stating:

> Premises Access: Buyer will have reasonable access to the Premises for purposes of engineering, survey, soil testing and environmental review, and such other physical due diligence investigations and analyses as Buyer deems reasonably necessary. Buyer will request each access to the Premises from Seller no less than two (2) business days in advance and will enter the Premises only with Seller's advance written consent, which consent shall not be unreasonably withheld. Buyer will comply with any

Seller rules, regulations and insurance requirements while on the Premises and repair and restore any damage to the Premises due to such investigations.

{¶ 5} Appellant accessed the facility pursuant to Section 2(h) at least twice after signing the purchase contract and concedes that during the last walk-through prior to closing, "all aspects of the building and property were in the same condition they were in when the offer to purchase was originally made in July 2018."

{¶ 6} The closing occurred on November 15, 2018, and appellant acquired the deed to the subject property. A day later, appellant's representative, Fred Khechen, walked through the facility with appellee's representative, Jon Zabowski. During the walk-through, it was discovered that, at some point after appellant's final inspection, unknown third parties had entered the building and committed acts of vandalism to the property, and, further, had stolen copper and other saleable materials.

{¶ 7} Appellant filed its complaint on May 11, 2020, alleging claims against appellee for breach of contract, negligence, fraudulent concealment, fraudulent representation and inducement, conspiracy, and agency liability. On February 1, 2021, appellant filed a motion for partial summary judgment on its breach of contract claim. On March 8, 2021, appellee filed a consolidated opposition to appellant's motion and cross-motion for summary judgment on all of the claims set forth against it in appellant's complaint. On May 20, 2021, the trial court issued an opinion and judgment entry granting summary judgment for appellee on the entirety of the complaint and denying

appellant's motion for partial summary judgment. Plaintiff timely filed an appeal from the trial court's decision.

Assignment of Error

{¶ 8} In this appeal, appellant sets forth the following assignment of error:

> I. The trial court committed reversible error by denying Plaintiff-Appellant's Motion for Partial Summary Judgment and entering summary judgment in favor of the Defendant-Appellee on Plaintiff's breach of contract claim.

Analysis

{¶ 9} Appellate court review of a trial court's judgment granting a motion for summary judgment is *de novo*. *K&D Mgt., L.L.C. v. Jones*, 8th Dist. Cuyahoga No. 110262, 2021-Ohio-4310, ¶ 16. Thus, an appellate court "examine[s] the evidence to determine if as a matter of law no genuine issues exist for trial." *Brewer v. Cleveland Bd. of Edn.*, 122 Ohio App.3d 378, 383, 701 N.E.2d 1023 (8th Dist. 1997). In doing so, an appellate court must "consider all facts and inferences drawn in a light most favorable to the nonmoving party." *Glemaud v. MetroHealth Sys.*, 8th Dist. Cuyahoga No. 106148, 2018-Ohio-4024, ¶ 50.

{¶ 10} Summary judgment is properly granted where: (1) "there is no genuine issue as to any material fact," (2) "the moving party is entitled to judgment as a matter of law," and (3) "reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made." *Harless*

v. Willis Day Warehousing Co., 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978); see also Civ.R. 56(C).

{¶ 11} The moving party has the initial burden of identifying "those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential elements of the nonmoving parties claims." *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). If the moving party fails to meet this burden, summary judgment is not appropriate. *Id.* But if the moving party meets this burden, the non-moving party then "has a reciprocal burden * * * to set forth specific facts showing that there is a genuine issue for trial." *Id.*

{¶ 12} We find the doctrine of "merger by deed" to be applicable to appellant's claim of breach of contract under the purchase agreement. "The doctrine of merger by deed holds that 'when a deed is delivered and accepted without qualification pursuant to a sales contract for real property, the contract becomes merged into the deed and no cause of action upon said prior agreement exits.'" *Wasserman v. Copsey*, 6th Dist. Sandusky No. S-12-008, 2013-Ohio-1274, ¶ 7, quoting *Parahoo v. Mancini*, 10th Dist. Franklin No. 97APE08-1071, 1998 WL 180539 (Apr. 14, 1998), citing *Fuller v. Drenberg*, 3 Ohio St.2d 109, 111, 209 N.E.2d 417 (1965). As noted by the Fourth District Court of Appeals, in *Newman v. Group One*, 4th Dist. Highland No. 04CA18, 2005-Ohio-1582:

> 'In reality, this doctrine is merely an application of the contract doctrine of integration. Under this doctrine, all prior documents are considered to be integrated into the final contract, and only the provisions contained in the

> final contract are part of the agreement. This doctrine is the combined result of the parol evidence rule and the rule of interpretation which seeks to determine the intentions of the parties. Thus, if it can be shown that the parties actually intended that the provisions of a prior agreement continue in force, then the provisions do so continue. Similarly, the merger doctrine should only be applied as a canon of construction that attempts to arrive at the true intention of the parties to a deed. *Thus, if there is a specific survival clause in the prior contract of sale, or in a contemporaneous document delivered at the same time as the deed, which states that its provisions are to survive the delivery of the deed, then the merger doctrine does not apply. * * *.*'

Id. at ¶ 13, quoting 14 Powell on Real Property (1995) 81A-136, Section 81A.07[1][d] (emphasis in original).

{¶ 13} Here, appellant accepted the deed without qualification on November 15, 2018, with no protest or reservation of rights and, therefore the doctrine of merger by deed is applicable. Upon closing, the purchase agreement merged with the deed, thereby precluding appellant's breach of contract claim.

{¶ 14} Arguing against this conclusion, appellant reads three specific provisions in the purchase agreement to mean, either alternately or together: (1) that appellee "warranted that the condition of the premises upon closing and delivery of the deed would be the same as the condition it was in at the time that the contract was executed";

and (2) this "warranty and contractual obligation" survived closing and did not merge with the deed.

{¶ 15} In considering appellant's claim, we are mindful that "[t]he construction and interpretation of written contracts involves issues of law that an appellate court reviews de novo." *Lill v. Ohio State Univ.*, 2019-Ohio-276, 132 N.E.3d 148, ¶ 26 (10th Dist.) (quotation omitted). In interpreting a contract, a reviewing court must read the contract "as a whole and presume that the intent of the parties is reflected in the language used by the parties in a contract." *Mynes v. Brooks*, 4th Dist. Scioto No. 08CA3211, 2009-Ohio-5017, ¶ 28. The words in a contract "will be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument." *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146 (1978), paragraph two of the syllabus. In addition, [w]here the drafters showed they knew how to include specific language in one provision, it must be concluded they intended to exclude that from a parallel provision where it is omitted." *Lill* at ¶ 26; *see also Continental Tire N.Am. v. Titan Tire Corp.*, 6th Dist. Williams No. WM-09-010, 2010-Ohio-1355, 2010 WL 1223981, ¶ 54 (holding that where express reference to "attorney fees" or "legal proceedings" was present in one section of the contract but noticeably absent from the one upon which appellee specifically relied, appellee's claim for attorney fees must fail.).

{¶ 16} In the instant case, appellant relies on contractual provisions set forth in sections 15(h) and (i) and 6 (f). Sections 15(h) and (i) are properly read independently of the other provisions in section 15, and provide as follows:

> (h) *Until Closing*, Seller bears all risk of loss due to fire or other casualty at the Premises. If the Premises is damaged or destroyed by fire or casualty before Closing, then Purchaser will receive all proceeds made payable to Seller under insurance policies covering the Premises on Closing.
>
> (i) *As of Closing* and delivery of the Deed to the Premises, Buyer is purchasing and acquiring title to the Premises in its current "AS IS" condition and "WHERE IS". Time is of the essence.

(Emphasis added.)

{¶ 17} Unlike sections 15(h) and (i), section 6(f) is more appropriately read within the context of the whole of section 6, which provides as follows:

> 6. *Seller represents and warrants to Buyer that*:
>
> (a) Seller has all requisite power to enter this Agreement and to perform the terms, covenants and conditions hereof.
>
> (b) The execution and delivery of this Agreement by Seller has been duly authorized by all necessary persons or entities, and when executed and delivered, this Agreement will be a legal, valid and binding obligation of Seller, enforceable against Seller in accordance with its terms, and that each

individual signatory on behalf of Seller is duly authorized and empowered to execute this Agreement on behalf of Seller.

(c) To the knowledge of the Seller officer executing this Agreement, Seller has received no written notice within the past year of any condemnation proceedings against the Premises (the Premises does not include the City Parcel), nor of any contemplated improvements to the Premises by public or governmental authority, the cost of which is to be assessed as special taxes against the Premises in the future.

(d) As of the Acceptance Date, there is no pending, and Seller, to the knowledge of the Seller officer executing this Agreement, has received no written notice of any threatened litigation or administrative proceeding affecting title to or the transfer of the Premises, except as specifically disclosed in this Agreement.

(e) The Property is not subject to any pending appeal requesting a change in the assessed value of the Property.

(f) *Each of the representations and warranties of Seller contained in this Agreement is made as of the date of Closing and shall survive the Closing for* ***Ninety (90) days*** *and shall not be merged into the deed.*

(Emphasis in italics added; emphasis in bold in original.)

{¶ 18} Appellant urges this court to read sections 15(h) and (i) as providing that appellant was to acquire the property "in the condition it was in when the contract was

executed in July 2018." We disagree with appellant's interpretation, inasmuch as section 15(i) clearly and unambiguously provides that appellant purchased and acquired title to the facility in its current "AS IS" and "WHERE IS" condition "[a]s of Closing and delivery of the Deed to the Premises." Nothing in section 15(i) references a purchase contract signature date, and nothing in the provision can be reasonably read to imply a seller's duty to "preserve the premises" during the period of time that elapsed between execution of the contract and closing.

{¶ 19} Regarding the survival of the seller's responsibility under section 15(h), we note that although section 15(h) does provide that the seller "bears all risk of loss due to fire or other casualty" "before closing," it also specifies that the seller bears the risk of loss only "[u]ntil closing." By contrast, under section 6(f), "[e]ach of the representations and warranties of Seller contained in this Agreement is made *as of the date of closing.*" (Emphasis added.) As the obligations of section 15(h) expressly terminate at closing, we are disinclined to read section 6(f) to mean that section 15(h) survives closing.

{¶ 20} In addition, under section 6(f), only "the representations and warranties of Seller" shall survive closing and not be merged into the deed.[1] Here, the purchase agreement sets forth the seller's representations and warranties by way of enumeration in

[1] Although section 6(f) only speaks to "representations and warranties of Seller," we note that other terms of the contract reference specifically and separately "obligations," "covenants," and "agreements" that are to be performed by the seller. *See, e.g.,* section 11 of the purchase agreement (addressing the seller's failure to comply with "any or all obligations, covenants, warranties or agreements).

sections 6(a) through (e). Sections 15(h) and (i) are simply not included in the list of the seller's representations and warranties.

{¶ 21} In reaching this conclusion, we are not unaware of the provision set forth in section 15(e), which provides that "[t]he captions in this Agreement are for convenience only and shall not be considered a part of or affect the construction or interpretation of any provision of this Agreement." As explained through our analysis above, however, we have determined -- irrespective of the captioning of the agreement -- that there are no representations or warranties in the contract outside of those found in sections (a) through (e) that would avoid application of the merger by deed doctrine.

{¶ 22} For all of the foregoing reasons, it must be concluded that sections 15(h) and (i) were never intended to be "representations and warranties," and, thus, they do not survive closing. *See Lill*, 2019-Ohio-276, 132 N.E.3d 148, at ¶ 26. Accordingly, we find appellant's sole assignment of error not well-taken, and the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Christine E. Mayle, J. _____
JUDGE

Gene A. Zmuda, J. _____
CONCUR.
JUDGE

[Cite as *Midland Funding, L.L.C. v. Colvin*, 2022-Ohio-572.]

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
HANCOCK COUNTY

MIDLAND FUNDING, LLC,

PLAINTIFF-APPELLANT, **CASE NO. 5-21-04**

v.

CASSANDRA COLVIN, ET AL., **O P I N I O N**

DEFENDANTS-APPELLEES.

Appeal from Hancock County Common Pleas Court
Trial Court No. 2013 CV 00459

Judgment Affirmed

Date of Decision: February 28, 2022

APPEARANCES:

H. Toby Schisler **for Appellant**

Ronald L. Frederick **for Appellee**

SHAW, J.

{¶1} Plaintiffs/counterclaim-defendants-appellants, Midland Funding LLC ("Midland"), Midland Credit Management ("Midland Credit") and Encore Capital Group, Inc. ("Encore"), collectively (the "Midland parties"), appeal the January 19, 2021 judgment of the Hancock County Common Pleas Court granting the motion for class certification filed by defendant/counterclaim-plaintiff-appellee, Cassandra Colvin ("Colvin").

Background

{¶2} Midland is a "debt collector" as defined in 15 U.S.C. § 1692a(6) of the Federal Debt Collection Practices Act ("FDCPA"). Generally, Midland purchases consumer debt from other entities and attempts to collect it. Midland operates throughout the United States and it has filed thousands of collection actions in Ohio alone.[1]

{¶3} On April 22, 2013, Midland filed a complaint against Colvin in the Hardin County Municipal Court alleging that Colvin had defaulted on a Chase Bank credit-card account, that Midland had purchased Colvin's delinquent account from Chase Bank, and that, despite Midland's informal efforts to collect the amount owed, Colvin failed to pay the balance due.

[1] Colvin alleged that in the year prior to Midland filing suit against her, Midland filed approximately 11,000 lawsuits in Ohio. For the sake of argument, the Midland parties used the 11,000 figure as an average number of yearly filings in their motion against class certification.

{¶4} Attached to the complaint was Colvin's former Chase account summary showing Colvin's address as "7850 US Route 30 #30" in "Forest, OH 45843-8845." (Doc. No. 8). The Village of Forest, Ohio, is located in Hardin County.[2] In the complaint that Midland filed in the Hardin County Municipal Court, Midland requested judgment against Colvin in the amount of $950.60 along with other related relief.[3]

{¶5} On June 5, 2013, Colvin filed a motion to dismiss Midland's complaint alleging that she "lives in Hancock County, Ohio, and has *never* lived in Hardin County, Ohio." (Emphasis added.) (*Id*.) Colvin contended that while the Village of Forest was located in "the Northwest corner of Hardin County," her actual residence was outside of Forest, in *Hancock* County. (Doc. No. 115). Further, Colvin noted that Midland "made no allegation that there was any contract signed in Hardin County, or any other connection to Hardin County." (*Id*.) Colvin thus argued that the Hardin County Municipal Court did not have subject-matter jurisdiction over Midland's action because Midland's action did not have a territorial connection to the court. On June 14, 2013, Midland filed a memorandum in opposition to Colvin's motion to dismiss citing the fact that Colvin's listed address on her Chase account

[2] The "General Definitions" in Forest, Ohio's Codified Ordinances define "County" as "Hardin County, Ohio." 101.02(e). Accessible online at: https://codelibrary.amlegal.com/codes/forest/latest/forest_oh/0-0-0-512.
[3] Midland alleged that Colvin owed $929.18 along with $21.42 in interest, totaling $950.60.

was in Forest, Ohio, and the action had been filed in Hardin County, where Forest was located.

{¶6} On June 27, 2013, the Hardin County Municipal Court issued its ruling on Colvin's motion to dismiss determining that Colvin "at all times relevant lived in Hancock County, Ohio" and that "there does not appear to be any nexus to the territory over which [the Hardin County Municipal Court] has jurisdiction." (Doc. No. 8). However, the Hardin County Municipal Court did not dismiss Midland's action outright; rather, the court transferred Midland's action to the Findlay Municipal Court at Midland's cost.

{¶7} On September 3, 2013, after the case had been transferred to the Findlay Municipal Court, Colvin filed a combined answer to Midland's complaint, counterclaim against Midland, and third-party complaint adding third-party defendants-appellees, Midland Credit and Encore, as third-party defendants.[4] In her counterclaim and third-party complaint, Colvin alleged that the Midland parties violated FDCPA provision 15 U.S.C. § 1692i(a) when Midland filed suit against her in the Hardin County Municipal Court because she did not reside within the territorial jurisdiction of the Hardin County Municipal Court at the time Midland

[4] Although Midland was the only plaintiff named in the complaint filed against Colvin in the Hardin County Municipal Court, Colvin alleges that Midland, Midland Credit, and Encore "operate as a de facto single business interest, and jointly plan all significant operations and business activities, including but not limited to, debt collection and litigation of collection lawsuits in Ohio * * *." (Doc. No. 8). The Midland parties adamantly dispute this allegation.

filed its complaint and she did not sign the contract underlying her alleged debt to Chase Bank within the territorial jurisdiction of the Hardin County Municipal Court.[5]

{¶8} Colvin further maintained that the Midland parties "regularly file[] collection actions against Ohio residents in counties where the defendant does not live and did not sign a contract, including * * * instances where [the Midland parties] used the city or village of defendants' postal address without determining the physical location of the address," in violation of the FDCPA. (Doc. No. 8). Accordingly, Colvin asserted claims on behalf of a class of plaintiffs who were injured by the Midland parties' alleged violations of the FDCPA. Colvin referred to this class of plaintiffs as the "FDCPA Class." (*Id.*) Colvin requested a declaration that the Midland parties violated the FDCPA when they brought suit against class members in improper venues, actual and statutory damages as provided for by 15

[5] 15 U.S.C. 1692i reads:

> **(a) Venue**
>
> **Any debt collector who brings any legal action on a debt against any consumer shall—**
>
> **(1) in the case of an action to enforce an interest in real property securing the consumer's obligation, bring such action only in a judicial district or similar legal entity in which such real property is located; or**
>
> **(2) in the case of an action not described in paragraph (1), bring such action only in the judicial district or similar legal entity—**
>
> **(A) in which such consumer signed the contract sued upon; or**
>
> **(B) in which such consumer resides at the commencement of the action.**

U.S.C. § 1692k(a)(1)-(2)[6], and costs of the action and reasonable attorney's fees as provided for by 15 U.S.C. § 1692k(a)(3).

{¶9} Due to the fact that the amount of recovery Colvin was seeking exceeded the jurisdictional limit of the Findlay Municipal Court the case was subsequently transferred to the Hancock County Common Pleas Court.

{¶10} On November 7, 2013, the Midland parties filed their joint answer to Colvin's counterclaim and third-party complaint. The answer was amended December 5, 2013.[7]

{¶11} In March 2015, Colvin moved to consolidate her case with case number 2015-CV-94, Caitlin Gilbert v. Midland Funding LLC ("Gilbert"). *See Gilbert v. Midland Funding, L.L.C.*, 3d Dist. Hancock No. 5-19-11, 2019-Ohio-5295, ¶ 5. On May 21, 2015, the trial court ordered that Colvin's case be consolidated with Gilbert *for purposes of discovery*.

{¶12} On February 22, 2016, with leave of the trial court, Colvin filed an amended counterclaim/third-party complaint. On March 4, 2016, the Midland parties filed their answer to Colvin's amended counterclaim/third-party complaint.

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[6] Pursuant to 15 U.S.C. 1692k(a)(2)(B), in the case of a class action, recovery is "not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector[.]"

[7] In its amended answer, Midland noted that Colvin's zip code "falls within three different counties." (Doc. No. 23). Because of the unusual zip code, Midland asserted, *inter alia*, the affirmative defense of "Bona Fide error" to Colvin's claims, arguing that the mistake was not intentional, which would prevent liability under 15 U.S.C. § 1692k(c), which reads "A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."

{¶13} On June 1, 2017, Colvin filed a motion for class certification pursuant to Civ.R. 23. Colvin sought to certify a class defined as:

> **a. All persons who have been sued in Ohio Courts by [the Midland parties] from April 22, 2012 until the time this class is certified;**
>
> **b. where the address on the face of the complaint and/or the address at which the Defendant was served are not within the geographical limits of the court where the suit was filed; or**
>
> **c. where [the Midland parties] filed suit in a court where the contract was not signed; and**
>
> **d. the debt alleged by [the Midland parties] was incurred for personal, family or household use.**

(Doc. No. 106). On June 22, 2017, the Midland parties filed their memorandum in opposition to Colvin's motion for class certification.

{¶14} On June 12, 2018, the trial court filed an entry analyzing Colvin's motion for class certification. The trial court set forth the appropriate legal authority, including the 7 requirements for class certification under Civ.R. 23, which *all* had to be satisfied in order for a class action to proceed. *Cullen v. State Farm Mut. Auto. Ins. Co.*, 137 Ohio St.3d 373, 2013-Ohio-4733, ¶ 16; *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 71 (1998). These 7 requirements include the following:

> **(1) an identifiable class must exist and the definition of the class must be unambiguous; (2) the named representatives must be members of the class; (3) the class must be so numerous that joinder of all members is impracticable; (4) there must be**

> **questions of law or fact common to the class; (5) the claims or defenses of the representative parties must be typical of the claims or defenses of the class; (6) the representative parties must fairly and adequately protect the interests of the class; and (7) one of the three Civ.R. 23(B) requirements must be met.**

Hamilton at 71, citing Civ. R. 23(A) and (B); *Warner v. Waste Mgt., Inc.*, 36 Ohio St.3d 91 (1988).[8]

{¶15} In conducting its analysis on the class certification issue, the trial court first concluded that the proposed class definition was identifiable and unambiguous (satisfying requirement 1), that Colvin was a member of the proposed class (satisfying requirement 2), and that the proposed class was sufficiently numerous with over 150 purported examples of people who could be class members (satisfying requirement 3). Thus the trial court found that the first 3 of the 7 class requirements were met.

{¶16} However, in proceeding to address the "commonality," "typicality," and "adequacy-of-representation" requirements (numbers 4-6 above, respectively), the trial court determined that there were significantly different questions of law and fact between Colvin and the proposed class members. The trial court reasoned that Colvin's suit was transferred to the correct jurisdiction unlike other potential class members, that Colvin had not had a judgment rendered against her unlike other class members, and that Colvin was only seeking statutory damages, whereas some

[8] Importantly, as argued in this case under Civ.R. 23(B)(3), the 7th requirement broken into two parts: "predominance" and "superiority."

potential class members might be entitled to actual damages as well. Based on these issues, the trial court found that the proposed class did not meet all the requirements for certification, failing requirements 4, 5, and 6. The trial court thus denied Colvin's motion for class certification, never reaching the 7th requirement for certification due to its finding that requirements 4 through 6 were not met.

{¶17} Colvin appealed the trial court's denial of class certification to this Court in *Midland Funding LLC v. Colvin*, 3d Dist. Hancock No. 5-18-15, 2019-Ohio-5382 ("*Colvin I*") arguing that the trial court abused its discretion by determining that the "commonality," "typicality," and "adequacy-of-representation" requirements were not met in this matter. We analyzed each requirement in turn, first determining that Colvin met the "commonality" requirement because, "provided that the Midland parties did in fact file suit against Colvin and the rest of the proposed class in improper venues, Colvin and the rest of the proposed class suffered the exact same, complete injury as soon as suit was filed against them." *Colvin I* at ¶ 23.

{¶18} Further, we rejected the trial court's argument that Colvin's claims were not common or typical of the class because her damages were only statutory while other potential class members might have actual damages, finding that the trial court should not dispose of a class certification *solely* on that basis. Further, we noted that an examination of differing damages was "more appropriately

addressed in the analysis of Civ.R. 23(B)(3)'s predominance and superiority requirements," which is the 7th requirement for class certification—the requirement that the trial court never reached. *Id*. at ¶ 24. Unlike the "commonality" requirement, the "predominance inquiry is far more demanding" and the damages issue raised by the trial court could have been particularly relevant there. *Williams v. Countrywide Home Loans, Inc.*, 6th Dist. Lucas No. L-01-1473, 2002-Ohio-5499, ¶ 35, citing *Jackson v. Motel 6 Multipurpose, Inc.* (C.A.11, 1997), 130 F.3d 999, 1005. However, we found that using damages as the primary disqualifier in what was effectively a lower bar to the commonality requirement was improper.

{¶19} Whereas the trial court focused on the differences between potential class members with respect to the commonality requirement (requirement 4), we focused on the shared attributes between Colvin and the proposed class, finding that commonality was met in this matter. The shared attributes included the allegations that Midland engaged in a pattern of filing suit against individuals in jurisdictions where the individuals did not reside at the time the suit was filed and where the individuals did not sign the contracts underlying the alleged debts. "[T]he common issue of law is whether the Midland parties' pattern of filing suit in such jurisdictions, if proven, resulted in violations of the FDCPA." *Id*. at ¶ 27. Thus we determined that Colvin had satisfied the commonality requirement.

{¶20} With the requirement of "commonality" satisfied (requirement 4), we next addressed the issue of "typicality" (requirement 5), finding that the trial court erred by determining that Colvin's injury was atypical of the other members of the class. We reasoned that Colvin and the other class members had the same injury because "[b]eing sued in the improper venue *is* the injury." *Id*. at ¶ 30. We determined that even if some members of the class would be seeking actual damages in addition to statutory damages, typicality was not defeated in this matter. After conducting a lengthy review of the "typicality" requirements and the parties' arguments regarding them, we summarized that:

> **although Colvin is claiming only statutory damages, her claims are not atypical of the claims of class members who may be entitled to both statutory damages and actual damages. Furthermore, the fact that Colvin is not subject to the defense of res judicata does not make her atypical of the class because res judicata is likely inapplicable to many members of the proposed class as well. Similarly, the bona fide error defense that the Midland parties may assert against Colvin is not atypical of the bona fide error defenses that the Midland parties may assert against class members who were sued by the Midland parties' internal legal department. Ultimately, Colvin's FDCPA fair-venue claim arises from the same alleged conduct that gives rise to the fair-venue claims of absent class members, and Colvin's claim is based on the same legal theory. *See Tedrow* [*v. Cowels*, S.D. Ohio No. 2:06-cv-637], 2007 WL 2688276, *7; *Holloway* [*v. Pekay*, N.D. Ill. No. 94 C 3418], 1995 WL 736925, *2. Moreover, at least concerning class members who were sued by the Midland parties' internal legal department, we have been unable to identify any express conflict between Colvin and the class. For these class members at least, Colvin will advance their interests and claims. *Tedrow* at *7 ("The proofs that are required for [the class representatives'] claims to prevail are those necessary for**

> **the putative class to prevail. That is, all interests are advanced by proving that Defendant has a policy and/or practice of bringing civil actions against debtors in violation of federal * * * law."). Accordingly, we conclude that the trial court erred by holding that Colvin completely fails to satisfy Civ.R. 23(A)(3)'s typicality requirement.**

Id. at ¶ 45.

{¶21} With our determination that the 4th and 5th requirements for class certification had been satisfied in the trial court (commonality and typicality, respectively), we considered the trial court's determination with respect to the "adequacy-of-representation" requirement in Civ.R. 23(A)(4) (requirement 6). In our analysis, we determined that the trial court improperly focused solely on whether the record established that Colvin was an adequate representative for her class rather than whether Colvin's counsel was adequate. We determined that Colvin's counsel was adequate and that Colvin was an adequate representative. Further, we found that many of the same reasons the trial court used to disqualify the commonality and typicality requirements, such as differing damages between Colvin and other class members, were not sufficient to disqualify Colvin under the adequacy-of-representation requirement.

{¶22} Thus, after determining that the trial court erred by denying class certification on the basis of the 4th, 5th, and 6th requirements for class certification, we reversed the trial court's judgment, finding that the trial court would need to proceed to address the 7th class certification requirement in the first instance:

namely whether the proposed class met any of the requirements of Civ.R. 23(B). However, we specifically stated that we offered no opinion as to whether the trial court should ultimately certify Colvin's proposed class.

{¶23} The Midland parties appealed our decision to the Supreme Court of Ohio and the Court declined to accept jurisdiction. *Midland Funding, L.L.C. v. Colvin*, 158 Ohio St.3d 1489, 2020-Ohio-1634 (Kennedy and DeWine, J.J., dissenting). After the Supreme Court of Ohio declined jurisdiction, with the case officially remanded, the trial court held a "Zoom" hearing to discuss the impact of this Court's reversal. The trial court indicated that the remaining issue to be decided with respect to class certification was whether Colvin had satisfied the 7th certification requirement, which required Colvin to establish the presence of one of the factors of Civ.R. 23(B). Colvin argued that the class should be certified specifically under Civ.R. 23(B)(3), which required her to establish that "questions of law or fact common to class members *predominate* over any questions affecting only individual members, and that a class action is *superior* to other available methods for fairly and efficiently adjudicating the controversy." (Emphasis added.) Civ.R. 23(B)(3).[9]

{¶24} The trial court allowed the parties to submit written memoranda regarding class certification in order to make its determination on remand. Initially,

[9] In short, we will refer to the Civ.R. 23(B)(3) requirements as "predominance" and "superiority."

the Midland parties submitted a memorandum arguing that another case released by this Court the week before *Colvin* was decided—by the same panel of judges—*Gilbert v. Midland Funding LLC*, 3d Dist. Hancock No. 5-19-11, 2019-Ohio-5295, should prevent the certification of Colvin's class, regardless of Civ.R. 23(B)(3) factors. In essence, the Midland parties argued that our decision in *Gilbert*, which interpreted the Supreme Court of Ohio's decision in *Lingo v. State*, 138 Ohio St.3d 427, 2014-Ohio-1052, established that it would be improper for the Hancock County Common Pleas Court to determine the validity of other court's final judgments, thus the class in that case could not be certified.

{¶25} Colvin disagreed with Midland's reading of *Gilbert*, arguing that to some extent we had already rejected the Midland parties' arguments in *Colvin I*,[10] and further that an FDCPA claim concerned the *method* of collecting debt, not whether the underlying debt in other courts was valid. Thus Colvin argued that both *Gilbert* and *Lingo* were inapplicable.

{¶26} With *Gilbert* and *Lingo* addressed in separate memoranda, the parties then submitted memoranda specifically as to the issue of the remaining class certification requirements in Civ.R. 23(B)(3). Importantly, Colvin's memorandum stated that in light of our decision in *Colvin I*, the proposed class had "reconsidered the relief sought and available in the FDCPA matter," stating that the proposed class

[10] *Gilbert* was not mentioned in *Colvin I* other than to indicate the cases were consolidated for discovery purposes. *Lingo* was not mentioned at all.

now sought to amend the prayer for relief to seek *only* statutory damages on behalf of the entire class, rather than statutory *and* actual damages. (Doc. No. 133). Colvin argued that with this amendment to the damages being sought, any arguments that the Midland parties made that differing damages among class members should prevent a finding of predominance or superiority were, effectively, moot.

{¶27} In response, the Midland parties argued that even if Colvin met all 6 of the other requirements for class certification, which Midland still disputed despite our holding on appeal, Colvin could not meet the predominance and superiority requirements in Civ.R. 23(B)(3) because of the various differences between Colvin and the class members. The Midland parties contended that the differences required a significant amount of individual analysis in each case, especially with respect to different defenses like "bona-fide error" and "statute of limitations." Moreover, the Midland parties emphasized that even if Colvin had passed the lower bar of the class certification requirement of commonality, "A predominance inquiry is far more demanding than the Civ.R. 23(A) commonality requirement and focuses on the legal or factual questions that qualify each class member's case as a genuine controversy." *Williams v. Countrywide Home Loans, Inc.*, 6th Dist. Lucas No. L-01-1473, 2002-Ohio-5499, ¶ 35, citing *Jackson v. Motel 6 Multipurpose, Inc.* (C.A.11, 1997), 130 F.3d 999, 1005.

{¶28} On January 19, 2021, the trial court filed its "Decision on Remand" readdressing Colvin's motion for class certification in light of this Court's determination in *Colvin I*. The trial court indicated that the remaining issue before it was to determine whether Colvin satisfied the 7th requirement for certification, specifically Civ.R. 23(B)(3). In order to do so, Colvin had to establish the "predominance" and "superiority" requirements. With regard to predominance, the trial court held as follows:

> **In making this [predominance] determination, the Court cannot ignore the findings of the Appellate Court on the question of commonality addressed in its Civ.R. 23(A) analysis. * * ***
>
> **This Court's focus on the damages question as the difference maker was rejected. With that distinction eliminated from the equation, the Court cannot find a basis under Civ.R. 23(B) to deny certification. Upon review of the basic underlying legal and factual issues they remain essentially the same for all members, i.e. were they sued in the wrong jurisdiction? *See generally Schmidt v. Avco Corp.*, 15 Ohio St.3d 310, 473 N.E.2d 822.**
>
> **The Court further notes that, unlike in [*Gilbert*], a similar case to this, the class action will not fail on the grounds that it violates the precedent set by *Lingo v. State of Ohio*, 138 Ohio St.3d 427, 2014-Ohio-1052. Here, Colvin makes clear that the only damages she now seeks are for statutory damages that arise under the FDCPA as a result of the alleged violations by Midland of the fair-venue provision. *See* 15 U.S.C. § 1692i.**
>
> **Colvin does not seek equitable relief in the form of disgorgement of proceeds collected as a result of these actions. As a result, and unlike in Gilbert, this Court would not be tasked with determining the validity of other Court's judgments, rather, the only determination would be whether the fair-venue provision**

> **of the FDCPA was violated, and if so, award appropriate damages under the federal statute.**

(Doc. No. 135). Thus the trial court determined that "predominance" was satisfied here.

{¶29} After finding that the "predominance" requirement was satisfied, the trial court proceeded to the "superiority" requirement, determining that

> **[t]here is a significant benefit to all the proposed class members to have this matter litigated collectively. The evidence suggests there are many individual claims across the four corners of this state. This presents a great difficulty to adequately address these issues and makes likely the prospect of uneven or even conflicting legal responses. Moreover, as many of the potential class members never had their day in court and in some cases not been served personally with the complaint and summons, they may not even be aware of the potential injury. A broad based attempt to notify class members would provide an opportunity for the potentially aggrieved to participate. For these reasons, a class action would be the superior method of addressing these claims.**

(*Id.*)

{¶30} Finally, after rejecting other arguments made by the Midland parties, the trial court found that Colvin's motion for class certification was well-taken. The Midland parties appealed from the trial court's determination, asserting the following assignment of error for our review.[11]

[11] In its decision, the trial court ordered "Counsel for Plaintiff" to prepare an appropriate final entry. Before a final entry could be filed, the Midland parties filed a notice of appeal. This Court administratively noted the issue of the lack of a final appealable order since a judgment entry had not been filed, and a judgment entry was subsequently filed reflecting the trial court's decision. Notably, the judgment entry granted the motion for class certification and incorporated the decision as if by reference as if it were fully restated.

Assignment of Error

The trial court erred by granting Colvin's Motion for Class Certification.

{¶31} In their assignment of error, the Midland parties argue that the trial court abused its discretion by certifying the class in this matter. Specifically, the Midland parties argue that the predominance and superiority requirements of Civ.R. 23(B)(3) were not established.

Standard of Review

{¶32} At the trial court level, the party seeking to maintain a class action has the burden to demonstrate that the factual and legal prerequisites to class certification have been met. *Blue Ash Auto, Inc. v. Progressive Cas. Ins. Co.*, 8th Dist. Cuyahoga No. 104251, 2016-Ohio-7965, ¶ 11. However, once a trial court has made its determination with regard to class certification, that "'determination will not be disturbed absent a showing of an abuse of discretion.'" *Stammco, L.L.C. v. United Tel. Co. of Ohio*, 136 Ohio St.3d 231, 2013-Ohio-3019, ¶ 25 quoting *Marks v. C.P. Chem. Co., Inc.*, 31 Ohio St.3d 200, 201 (1987); *Colvin I* at ¶ 15. "[T]he appropriateness of applying the abuse-of-discretion standard in reviewing class action determinations is grounded not in credibility assessment, but in the trial court's special expertise and familiarity with case-management problems and its inherent power to manage its own docket." *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 70 (1988). "'Abuse of discretion has been defined as more than an

error of law or judgment; it implies an attitude on the part of the trial court that is unreasonable, arbitrary, or unconscionable.'" *Stammco* at ¶ 25, quoting *Marks* at 201. "'A finding of abuse of discretion, particularly if the trial court has refused to certify, should be made cautiously.'" *Id.*, quoting *Marks* at 201.

{¶33} Notably, the trial court's discretion, while expansive, "'is not unlimited, and indeed is bounded by and must be exercised within the framework of Civ.R. 23. The trial court is required to carefully apply the class action requirements and conduct a rigorous analysis into whether the prerequisites of Civ.R. 23 have been satisfied.'" *State ex rel. Davis v. Pub. Emps. Retirement Bd.*, 111 Ohio St.3d 118, 2006-Ohio-5339, ¶ 20, quoting *Hamilton* at 70.

Analysis

{¶34} This appeal requires us to determine whether the trial court abused its discretion by finding that Colvin established the final requirement of class certification pursuant to Civ.R. 23(B)(3). CivR. 23(B)(3) reads as follows:

> **(B) * * * A class action may be maintained if Civ.R. 23(A) is satisfied, and if:**
>
> *** * ***
>
> **(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:**

> **(a) the class members' interests in individually controlling the prosecution or defense of separate actions;**
>
> **(b) the extent and nature of any litigation concerning the controversy already begun by or against class members;**
>
> **(c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and**
>
> **(d) the likely difficulties in managing a class action.**

{¶35} With regard to analyzing Civ.R. 23(B)(3), the Supreme Court of Ohio has stated,

> **While Civ.R. 23(B)(3) sets forth the general rule, clear guidance as to its meaning and application has been elusive. *Schmidt,* 15 Ohio St.3d at 313, 15 OBR 439, 473 N.E.2d 822. However, we have held that "it is not sufficient that common questions merely exist; rather, the common questions must represent a significant aspect of the case and they must be able to be resolved for all members of the class in a single adjudication. And, in determining whether a class action is a superior method of adjudication, the court must make a comparative evaluation of the other procedures available to determine whether a class action is sufficiently effective to justify the expenditure of judicial time and energy involved therein." Id**.

In re Consol. Mtge. Satisfaction Cases, 97 Ohio St.3d 465, 2002-Ohio-6720, ¶ 8.

{¶36} Some case authority has developed further guidance. For example, numerous Ohio Appellate Courts have stated that "*A predominance inquiry is far more demanding than the Civ.R. 23(A) commonality requirement* and focuses on the legal or factual questions that qualify each class member's case as a genuine controversy." (Emphasis added.) *Repede v. Nunes*, 8th Dist. Cuyahoga No. 87277,

2006-Ohio-4117, ¶ 13,citing *Williams v. Countrywide Home Loans, Inc.*, 6th Dist. Lucas App. No. L-01-1473, 2002-Ohio-5499; *Haas v. Behr Dayton Thermal Prods., L.L.C.*, 2d Dist. Montgomery No. 21586, 2007-Ohio-571, ¶ 27; *Assn. for Hosp. & Health Sys. v. Ohio Dept. of Human Serv.*, 10th Dist. Franklin No. 04AP-762, 2006-Ohio-67, ¶ 25.

{¶37} In its decision on the matter, the trial court recited the controlling authority then proceeded to analyze whether Civ.R. 23(B)(3) was met here. With regard to predominance, the trial court noted that in its original decision that was reversed by this Court, it had found that Colvin's claims were not common or typical of other class members largely due to Colvin seeking only statutory damages, while other class members would be seeking statutory and actual damages. The trial court found this to be a significant difference that was the primary factor in defeating class certification. We disagreed with the trial court that the issue of differing damages defeated the commonality or typicality requirements, and reversed the trial court. After remand, the trial court stated that we had removed "damages" from the equation "as the difference maker" in *Colvin I*, thus intimating that differing damages could not prevent class certification.

{¶38} The trial court's statement in its decision is not precisely accurate, as we stated in *Colvin I* that the differing damage issue did not prevent the "commonality" requirement from being satisfied; however, we specifically stated

that the issue of "differing damages" was more "appropriately addressed" in the analysis of Civ.R. 23(B)(3)'s predominance and superiority requirements. *Colvin I* at ¶ 18. Thus the different damages cited by the trial court in its first decision prior to *Colvin I* could have been particularly relevant in the predominance analysis before us.

{¶39} However, after *Colvin I* remanded the case to the trial court, Colvin indicated that the *entire class was no longer seeking actual damages*; rather, the entire class was only seeking statutory damages. In its decision certifying the class, the trial court emphasized this change in the damages being sought by Colvin, stating that "Colvin makes clear that the only damages she now seeks are for statutory damages that arise under the FDCPA as a result of the alleged violations by Midland of the fair-venue provision." (Doc. No. 135). Thus while the differing damages could have been particularly relevant to the predominance issue, the class members elected only to seek statutory damages, largely removing the issue of damages from the analysis as the trial court ultimately stated.

{¶40} With differing damages removed from the equation, the trial court found that the underlying factual and legal issues remained the same for all class members: "i.e. were they sued in the wrong jurisdiction?" (*Id*.) Thus the trial court determined that predominance was satisfied in this case.

{¶41} The Midland parties attempt to undermine the trial court's finding that common questions of law and fact predominate in this matter by arguing, *inter alia*, that the Midland parties have different defenses with respect different members of the class. The Midland parties argue that in some cases, including Colvin's, they would have a very viable defense of bona-fide error under 15 U.S.C.A. 1692k(c). In other cases, the Midland parties argue that they have a res judicata defense, or a statute of limitations defense.

{¶42} Contrary to their argument, the Midland parties cite no controlling authority showing that defenses against members of the class should prevent certification of the class. While the Midland parties may have some defenses to some or all of the class members, we cannot find that the trial court abused its discretion in determining that the issue of defenses does not prevent certification. This is particularly true where, as the trial court stated, the factual and legal issues remain essentially the same, that being whether the class members were sued in the wrong jurisdiction. "[C]lass action treatment is appropriate where the claims arise from standardized forms or *routinized procedures*, notwithstanding the need to prove reliance."[12] (Emphasis added.) *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 84 (1998). With the differing damages issue removed from the equation, we

[12] The Midland parties argue that no routine procedures have been established in this matter; however, there are allegations that Midland routinely filed collection actions in the inappropriate jurisdiction, and their general process for filing by in-house counsel was detailed by Kimberly Klemenok's in her deposition.

cannot find that the trial court abused its discretion by determining that the remaining questions common to the class predominate. The singular, narrow question of whether the class members were sued in the wrong jurisdiction is a "significant aspect of the case" and it is "capable of resolution for all members in a single adjudication." *Marks v. C.P. Chem. Co.*, 31 Ohio St.3d 200, 204 (1987).

{¶43} We are also not persuaded by the lengthy string-cite the Midland parties presented in their brief to this Court in an attempt to establish that "predominance" has not been met in this matter. As Colvin responded in her brief, there are significantly different factual and legal issues in the cases cited by the Midland Parties that require far more individualized analysis of each class member. For example, in *Marks*, *supra*, the Supreme Court of Ohio upheld a trial court's discretion denying class certification where events prior to commission of the tort would have to be looked at for each individual, the nature of the wrongdoing would have to be analyzed for each individual, the identity of the responsible parties had to be established, the standard of care owed to class members could differ, and legal liability could differ. *Marks* at 206.

{¶44} Similarly, in *Schmidt v. Avco Corp.*, 15 Ohio St.3d 310, 314 (1984), the Supreme Court of Ohio found that a trial court did not abuse its discretion by denying class certification when individual issues predominated. The Court thus *upheld a trial court's discretion* in addition to finding that individual issues

predominated, namely that elements of inducement and reliance had to be proven on an individual basis. Some other cases cited by the Midland parties contain factual or legal distinctions that do not undermine, but often in fact reaffirm, a trial court's broad discretion. *See Hall v. Jack Walker Pontiac Toyota, Inc.*, 143 Ohio App.3d 678, 687 (2nd Dist.2000) (upholding trial court's denial of class certification where issues had to be determined such as whether contracts, advertising and loan agreements violated the CSOA *and* it had to be determined the behavior of appellee towards an individual appellant to determine whether that made appellee a credit services organization); *Cannon v. Fid. Warranty Servs., Inc.*, 5th Dist. Muskingum No. CT2005-0029, 2006-Ohio-4995 (upholding trial court's denial of class certification where common questions did not predominate). Others cases cited by the Midland parties just strongly illustrate how different the factual and legal circumstances are. *See Linn v. Roto Rooter, Inc.*, 8th Dist. Cuyahoga No. 82657, 2004-Ohio-2559, ¶ 23 (individual issues predominated where, *inter alia*, each potential class member would have to be analyzed to determine "the nature of the service provided, the representations made by technicians, and each plaintiff's understanding of the fee.").[13]

[13] We are aware that the Midland parties cite many other cases in addition to those mentioned in this opinion. Again, broadly, we do not find that the cases cited by the Midland parties compel us to find an abuse of discretion here.

{¶45} We also do not find that the Midland parties have offered compelling legal authority that would require us to overturn the trial court's discretion on this issue. Accordingly, we find that the trial court did not abuse its discretion by determining that the predominance requirement for certification was met here.

{¶46} Next, we turn to the trial court's finding with regard to the "superiority" requirement of class certification. In its decision, the trial court found that there was a significant benefit to the class members to have the case adjudicated collectively. The trial court also found that there were numerous claims all over the state that could lead to uneven or conflicting legal responses. Further, the trial court stated, "A broad based attempt to notify class members would provide an opportunity for the potentially aggrieved to participate." (Doc. No. 135). Thus the trial court determined that a class action would be the superior method of addressing these claims.

{¶47} Again, we can find no abuse of discretion with the trial court's analysis. We reiterate that the Supreme Court of Ohio has stated, "[T]he appropriateness of applying the abuse-of-discretion standard in reviewing class action determinations is grounded not in credibility assessment, *but in the trial court's special expertise and familiarity with case-management problems and its inherent power to manage its own docket*." (Emphasis added.) *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 70 (1988). Stated differently, "[a] trial court which

routinely handles case-management problems is in the best position to analyze the difficulties which can be anticipated in litigation of class actions." *Marks v. C.P. Chem. Co.*, 31 Ohio St.3d 200, 201 (1987). Here, the trial court seems satisfied that there is a desirability of concentrating the litigation, that the Hancock County Common Pleas Court would be an appropriate forum to produce more uniform responses to the matter, and that the class itself is manageable. *See* Civ.R. 23(B).

{¶48} Moreover, the Supreme Court of Ohio stated in *Hamilton*,

> **The purpose of Civ.R. 23(B)(3) was to bring within the fold of maintainable class actions cases in which the efficiency and economy of common adjudication outweigh the interests of individual autonomy. * * * Thus, "[t]his portion of the rule also was expected to be particularly helpful in enabling numerous persons who have small claims that might not be worth litigating in individual actions to combine their resources and bring an action to vindicate their collective rights." 7A Wright, Miller & Kane, *supra,* at 518, Section 1777.**

Hamilton at 80. After reviewing the record, the applicable legal authority, and the arguments of the parties, we cannot find that the trial court abused its discretion by finding that the "superiority" requirement of class certification was met here.

{¶49} Finally, before we conclude, we must address a separate argument raised by the Midland parties. Throughout their brief, the Midland parties contend that *Gilbert v. Midland Funding, L.L.C.*, 3d Dist. Hancock No. 5-19-11, 2019-Ohio-5295, and *Lingo v. State*, 138 Ohio St.3d 427, 2014-Ohio-1052, should prevent recovery in this matter because, in order for Colvin's class to prevail, the trial court

would have to invalidate or "void" judgments from other courts over which the trial court did not have jurisdiction. We disagree. Just as the trial court suggested, recovery in this matter (assuming any affirmative defenses such as bona-fide error are overcome) depends only upon whether the FDCPA was violated. The validity of other court's judgments would not be determined.[14] Thus we do not find that *Gilbert* or *Lingo* control here.

{¶50} In sum, we find that the trial court did not abuse its discretion by finding that the "predominance" and "superiority" requirements of class certification were established in this matter. The Midland parties' arguments to the contrary are not well-taken, and their assignment of error is overruled.

Conclusion

{¶51} For the foregoing reasons the Midland parties' assignment of error is overruled and the judgment of the Hancock County Common Pleas Court is affirmed.

Judgment Affirmed

ZIMMERMAN, P.J. and WILLAMOWSKI, J., concur

/jlr

[14] The Midland parties argue that Gilbert is a member of Colvin's proposed class, and affirming the trial court's class certification here would lead to the "peculiar" outcome of Gilbert being unable to recover in her case individually, but being able to recover as part of Colvin's class. However, Gilbert's case did not involve an FDCPA claim like the one before us, thus it is not the same. Notably, there was also disagreement at oral argument about whether Gilbert was actually a member of Colvin's proposed class.

[Cite as *Franklin Dissolution L.P. v. Athenian Fund Mgt. Inc.*, 2022-Ohio-623.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

FRANKLIN DISSOLUTION L.P., :

Petitioner-Appellee, :

No. 110641

v. :

ATHENIAN FUND MANAGEMENT, INC., :

Respondent-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: March 3, 2022

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-21-942792

Appearances:

Taft, Stettinius & Hollister, L.L.P., David H. Wallace, and Jozeff W. Gebolys, *for appellee*.

Arnold & Clifford L.L.P., James E. Arnold, and Damien C. Kitte, *for appellant*.

MICHELLE J. SHEEHAN, J.:

{¶ 1} Athenian Fund Management, Inc. ("AFMI") appeals the trial court's order granting Franklin Dissolution L.P.'s ("Franklin Dissolution") motion to compel arbitration based on a dispute concerning a management agreement.

Because the arbitration provision in the Management Agreement is valid and the dispute falls within the scope of the arbitration provision, we affirm the judgment of the trial court compelling arbitration.

I. PROCEDURAL HISTORY AND FACTS

{¶ 2} In December 2004, Athenian Venture Partners III L.P. (the "Fund") was formed as an investment fund. The Fund entered into a Management Agreement with AFMI to act as the fund manager and to be paid quarterly fees from the fund. In June 2018, the Fund began to plan its dissolution. In December 2018, the Fund informed AFMI that it would suspend payment of fees to AFMI. In January 2020, the Fund merged with Franklin Dissolution. At that time, AFMI informed Franklin Dissolution that the Fund was still required to pay the quarterly fees under the Management Agreement. Franklin Dissolution responded that it believed the Management Agreement was terminated when the Fund ceased to exist and it had no obligation to pay the management fees.

{¶ 3} In December 2020, Franklin Dissolution informed AFMI that the Fund had one remaining liability, AFMI's claim for fees. Without response from AFMI, Franklin Dissolution filed a demand for arbitration. AFMI thereafter did not consent to the arbitration, and the procedure was halted.

{¶ 4} On January 11, 2021, Franklin Dissolution filed a petition to compel arbitration in the court of common pleas. In its petition, Franklin Dissolution alleged that it was the successor to the Fund, that a dispute arose between it and

AFMI as to whether fees were due AFMI, and asked the trial court to order arbitration.

{¶ 5} On February 22, 2021, AFMI filed an answer to the petition and asserted counterclaims against the "Fund and/or" Franklin Dissolution for breach of contract. AFMI sought recovery of unpaid fees and a declaratory judgment that Franklin Dissolution is not entitled to the benefit of the Management Agreement's arbitration clause without accepting its obligation to pay the management fees due AFMI. AFMI did not join the Fund as a party to the lawsuit.

{¶ 6} The terms of the Management Agreement attached to the petition provide in paragraph 12 that "[s]ubject to the provisions of Section 13 hereof, the term of this Agreement shall be co-extensive with the term of existence of the" Fund. Paragraph 13 provides a mechanism for termination of the Management Agreement upon occurrence of certain specified events. The Management Agreement further provides that "[s]ubject to the provisions of this Section 15, this Agreement shall inure to the benefit of and be binding upon the parties hereto and their successors and permitted assigns." Additionally, the Management Agreement provides in paragraph 14 that

> [a]ny dispute between the parties arising out of or relating to this Agreement or the affairs and activities of the Partnership shall be settled by arbitration in Athens County, Ohio, in accordance with the provisions of the Ohio Arbitration Act, Chapter 2711 of the Ohio. Revised Code. This agreement to arbitrate shall be specifically enforceable, the arbitration decision shall be final and judgment may be entered upon the arbitration decision in any court having jurisdiction over the subject matter of the dispute.

{¶ 7} The trial court held a hearing and granted the petition, ordered arbitration, and stayed ruling on Franklin Dissolution's motion to dismiss counterclaims. The trial court denied AFMI leave to conduct discovery to determine whether the dispute was subject to the arbitration provision in the Management Agreement. After the hearing, Franklin Dissolution filed an affidavit to which it attached a copy of Franklin Dissolution's partnership agreement indicating it to be the successor to the Fund pursuant to a merger. In ruling upon the petition, the trial court found that

> [h]ere, the arbitration provision of the Management Agreement specifically sets out what disputes are arbitrable, the rules governing any potential arbitration, and where the arbitration would take place. Also, the Management Agreement was entered into by two entities formed by the same individual with seemingly comparable bargaining power.

{¶ 8} The trial court held that "the Management Agreement contains a valid arbitration provision and that petitioner is aggrieved by respondent's failure to comply with it." It further held that "the underlying dispute could not be maintained without reference to the Management Agreement, and thus, that the dispute falls within the scope of the arbitration provision."

{¶ 9} AFMI appeals the trial court's judgment ordering arbitration.

II. LAW AND ARGUMENT

A. Assignments of Error

{¶ 10} AFMI raises two assignments of error:

> Assignment of Error 1: The trial court erred by granting Franklin [Dissolution's] motion to compel arbitration.

> Assignment of Error 2: The trial court erred by not permitting discovery on the arbitrability of the parties' dispute.

{¶ 11} AFMI argues under these assignments of error that the trial court conducted too narrow of an inquiry in granting the petition because it maintains that Franklin Dissolution was formed for the purpose of avoiding payment of fees due under the Management Agreement. It argues that discovery was required to develop the record of its assertion and to determine if Franklin Dissolution is the successor to the Fund.

{¶ 12} Franklin Dissolution argues that the trial court properly granted the petition because resolution of the dispute and claims of the parties are dependent upon the terms and conditions contained in the Management Agreement. It argues that, therefore, the arbitration provision is enforceable. It further argues that there is no dispute as to the validity of the Management Agreement or its enforceability, that it is the successor to the Fund, and therefore the trial court did not abuse its discretion in denying AFMI the ability to conduct discovery.

B. Applicable Law and Standard of Review

{¶ 13} Ohio law allows for the enforcement of an arbitration provision in a written agreement. R.C. 2711.01(A) reads in relevant part:

> A provision in any written contract * * * to settle by arbitration a controversy that subsequently arises out of the contract, or out of the refusal to perform the whole or any part of the contract, or any agreement in writing between two or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit, or arising after the agreement to submit, from a relationship then existing between them or that they simultaneously

> create, shall be valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract.

{¶ 14} A trial court may summarily resolve a petition to enforce an arbitration provision where no jury demand has been made. R.C. 2711.03 (B). If the court is "satisfied that the making of the agreement for arbitration or the failure to comply with the agreement is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the agreement." R.C. 2711.03 (A).

{¶ 15} The Ohio Supreme Court set forth the principles underlying a court's determination of whether to order arbitration pursuant to a written agreement as 1) whether the parties agreed to submit any dispute to arbitration; 2) whether the agreement creates an obligation to arbitrate a particular grievance; 3) when deciding if the parties agreed to submit a particular grievance to arbitration, the court is not to rule on the potential merits of underlying claims; and 4) that where an arbitration provision is contained in a contract, there is a presumption of arbitrability. *Academy of Medicine of Cincinnati v. Aetna Health, Inc.*, 108 Ohio St.3d 185, 2006-Ohio-657, 842 N.E.2d 488, ¶ 1o – 14, citing *Council of Smaller Ents. v. Gates, McDonald & Co.*, 80 Ohio St.3d 661, 687 N.E.2d 1352 (1998).

{¶ 16} We review a trial court's ruling on a motion to stay and compel arbitration under a de novo standard. *Wisniewski v. Marek Builders, Inc.*, 2017-Ohio-1035, 87 N.E.3d 696, ¶ 5 (8th Dist.), citing *McCaskey v. Sanford-Brown College*, 8th Dist. Cuyahoga No. 97261, 2012-Ohio-1543. But factual findings of the trial court under this standard of review are to be given deference. *Gibbs v.*

Firefighters Community Credit Union, 2021-Ohio-2679, 177 N.E.3d 294, ¶ 13 (8th Dist.), citing *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶ 38.

{¶ 17} In contrast to the de novo review standard of review employed to determine the validity of a court's ruling on the validity of an arbitration provision, an appellate court reviews a decision to deny discovery under an abuse of discretion standard. *Roark v. Keystate Homes, L.L.C.*, 2021-Ohio-707, 169 N.E.3d 1, ¶ 31 (8th Dist.); *see Wozniak v. Tonidandel*, 121 Ohio App.3d 221, 227, 699 N.E.2d 555 (8th Dist.1997), citing *State ex rel. Daggett v. Gessaman*, 34 Ohio St. 2d 55, 295 N.E.2d 659 (1973). "[T]he term 'abuse of discretion' implies that the court's attitude was unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983). "A decision is unreasonable if there is no sound reasoning process that would support that decision." *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990).

C. The trial court properly ordered arbitration

{¶ 18} Ohio has a strong public policy favoring arbitration of disputes, and there is a presumption favoring arbitration that arises when the dispute falls within the scope of an arbitration provision. *Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, at ¶ 25 – 27. "Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Sebold v. Latina Design Build Group, L.L.C.*, 2021-Ohio-124, 166 N.E.3d 688, ¶ 10 (8th Dist.), citing *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).

{¶ 19} In this case, the petition to compel arbitration identifies a dispute between Franklin Dissolution and AFMI. AFMI asserts that Franklin Dissolution owes it fees under the Management Agreement from January 2019. Franklin Dissolution asserts that under the terms of the Management Agreement it has no obligation as successor to the Fund to pay those fees.

{¶ 20} The Management Agreement contains an arbitration provision. Although both AFMI and Franklin Dissolution dispute the meaning of the terms within the Management Agreement and their respective rights and obligations under that agreement, neither AFMI or Franklin Dissolution contest the validity of the Management Agreement or the arbitration provision. *Aetna Health, Inc.*, 198 Ohio St.3d 185, 2006-Ohio-657, 842 N.E.2d 488, at ¶ 11. Further, the arbitration agreement required arbitration for the resolution of "[a]ny dispute between the parties arising out of or relating to this Agreement or the affairs and activities of the Partnership shall be settled by arbitration * * *." *Id.* at ¶ 12. The trial court found that the resolution of the dispute cannot be resolved without reference to the terms of the Management Agreement. *Id.* at ¶ 13. As such, the trial court properly granted the motion to compel arbitration. *See Sebold*, 2021-Ohio-124, 166 N.E.3d 688, at ¶ 15 ("We are not persuaded by the Sebold's argument that their claims fall outside of their agreement to arbitrate — none of their claims could be maintained without reference to the contract and none of the claims preclude arbitration.").

{¶ 21} AFMI's arguments against enforcing the arbitration provision in the Management Agreement do not dissuade us that the trial court properly ordered arbitration in this case. AFMI's arguments that contest the intent in the formation of Franklin Dissolution to avoid the payment of fees by the Fund to avoid arbitration are related to the "the affairs and activities of the [Fund]" that are within the scope of the arbitration agreement. There is a presumption of arbitrability under Ohio law. *Id*. at ¶ 14; *Sebold* at ¶ 10. As such, any argument over the intent in dissolving the Fund by merger with Franklin Dissolution is subject to the arbitration provision in the Management Agreement.

{¶ 22} AFMI argues that because Franklin is denying responsibility for payment of fees under the Management Agreement because the agreement terminated, it is estopped from attempting to enforce the arbitration provision. However, a party does not waive enforcement of an agreement's arbitration provisions simply because that agreement has been terminated. *Colegrove v. Handler*, 34 Ohio App.3d 142, 145, 517 N.E.2d 979, 983 (10th Dist.1986).

{¶ 23} Finally, AFMI asserts the trial court should have allowed discovery because of the alleged ill intent in the formation of Franklin Dissolution and to determine whether Franklin Dissolution is the successor to the Fund. But the argument regarding intent in the formation of Franklin Dissolution does not identify any issue in the formation of the Management Agreement or the enforceability of the arbitration provision therein. As to the necessity for further discovery to determine whether Franklin Dissolution is the successor to the Fund, Franklin

Dissolution asserted in the petition to compel arbitration that it was the successor to the Fund, asserted at the hearing held to the trial court that it "stood in the same shoes" as the Fund, and thereafter filed its partnership agreement indicating it is the entity that merged with the Fund. As such, we cannot find that the trial court's decision to deny AFMI discovery before ruling upon Franklin Dissolution's motion to compel arbitration was an abuse of the trial court's discretion. *See Roark,* 2021-Ohio-707, 169 N.E.3d 1, at ¶ 31.

{¶ 24} The first and second assignments of error are overruled.

III. CONCLUSION

{¶ 25} The trial court properly granted Franklin's motion to compel arbitration because there was no evidence presented to the trial court that the arbitration provision in the Management Agreement was invalid or otherwise not subject to enforcement. Further, the trial court did not err by denying AFMI's request for discovery where AFMI did not dispute the applicability or validity of the arbitration provision.

{¶ 26} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

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

_____
MICHELLE J. SHEEHAN, JUDGE

ANITA LASTER MAYS, P.J., and
EMANUELLA D. GROVES, J., CONCUR

KEYWORDS:

Petition to compel arbitration; R.C. 2711.03(A) and (B); denial of discovery request; abuse of discretion.

Successor to investor fund filed petition to compel arbitration to resolve fund manager's claim for fees. The trial court properly limited its inquiry to determining the validity of the arbitration agreement in granting the petition to compel arbitration and properly found that it was necessary to apply terms of the contract containing the arbitration provision to resolve the parties' dispute. The trial court did not abuse its discretion in denying fund manager further discovery where there was no showing discovery would assist in determining the validity of the arbitration agreement.