[Cite as *Royal Oaks Landmark, L.L.C. v. Royal Oak Cal, L.L.C.*, 2022-Ohio-1144.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

ROYAL OAKS LANDMARK, LLC,	:	
Appellee,	:	CASE NO. CA2021-06-025
	:	O P I N I O N
- vs -		4/4/2022
	:	
ROYAL OAK CAL, LLC, et al.,	:	
Appellant,	:	
- vs -		
CALTEX MANAGEMENT LLC.,		
Third-Party Defendant.		

CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2020 CVE 00452

Statman, Harris & Eyrich, LLC, and William B. Fecher, for appellant.

Pickrel, Schaeffer & Ebeling Co., LPA, and Matthew C. Sorg and James I. Weprin, for appellees.

Cors & Bassett, LLC, and Curtis L. Cornett and Alison M. Huenefeld, urging affirmance for amicus curiae Mac Lenders I, LLC.

PIPER, P.J.

{¶1} Appellant, Royal Oak Cal, LLC ("Royal Oak"), appeals a decision from the

Clermont County Court of Common Pleas ordering the distribution of sale proceeds following a sheriff's sale. For the reasons detailed below, we affirm the trial court's decision.

{¶2} This appeal arose out of a land installment contract entered into between Royal Oaks Landmark, LLC ("Plaintiff") and Royal Oak for real property ("Property") consisting of 40 units of an apartment complex in Pierce Township, Clermont County, Ohio. The land contract was executed on March 28, 2013, for a total purchase price of $1,200,000. Royal Oak tendered $200,000 as a down payment at closing followed by monthly installment payments.

{¶3} As relevant here, MAC Lenders I, LLC ("MAC Lenders") held a mortgage on the Property, which Plaintiff was obligated to remit mortgage payments. Plaintiff initiated this foreclosure action on May 21, 2020, alleging that Royal Oak defaulted on its monthly installment payment and had breached the terms of the land contract by wrongfully assigning its interest to a third-party, Caltex Management, LLC ("Caltex"). Plaintiff named the interested parties, Royal Oak, Caltex, MAC Lenders, and the Clermont County Treasurer as party defendants. Plaintiff claimed damages in the amount of $922,201.20, plus interest.

{¶4} On June 18, 2020, MAC Lenders filed its answer and asserted its interest in the Property, demanding that its mortgage be fully satisfied before granting relief to any other party and requesting that Royal Oak be barred from asserting any right, title, or interest in the Property.

{¶5} On July 29, 2020, Royal Oak filed its answer along with a counterclaim against Plaintiff for unjust enrichment, quantum meruit, and fraudulent misrepresentation. It also named Caltex in a third-party complaint.[1] The counterclaim alleged, among other things,

1. Caltex was found to be in default. On June 1, 2021, Royal Oak dismissed their third-party complaint against Caltex.

that Plaintiff failed to deliver the premises in market-ready condition and failed to comply with statutory provisions in R.C. Chapter 5312. On August 19, 2020, Plaintiff answered Royal Oak's counterclaim denying the allegations.

{¶6} On September 4, 2020, Plaintiff moved for summary judgment. Royal Oak opposed the summary judgment motion but admitted to the nonpayment of the land contract. It did not dispute the amount of the default. It presented no argument concerning its counterclaim, nor any indication that foreclosure was inappropriate at that time due to its pending counterclaims. Royal Oak instead opposed summary judgment on the basis that Plaintiff was not entitled to a deficiency judgment. In its reply, Plaintiff countered Royal Oak's argument by denying any intention of seeking a deficiency judgment.

{¶7} On October 30, 2020, the trial court granted Plaintiff's motion for summary judgment and ordered the foreclosure of the Property. The trial court ordered that the Property be sold at a sheriff's sale. Upon confirmation of the sale, the trial court ordered distribution of proceeds in the following order of priority:

> 1. To the Clerk of this Court, the costs of this action, including the fees of the appraisers;
>
> 2. To the Treasurer of this County, taxes and assessments due and payable as of the date of transfer of the property after Sheriff's sale;
>
> 3. To [MAC Lenders], any and all actual proceeds received pursuant to the Sheriff's sale, in lieu of or over and above the credit bid, if any, up to the sum of $1,040,277.74 due and owing to [MAC Lenders], along with interest accruing at a rate of 14% per annum from October 31, 2020 and fees accruing at a rate of 1% per quarter;
>
> 4. To [Plaintiff], all amounts paid at the Sheriff's sale above and beyond the amounts due to defendant [MAC Lenders] pursuant to the Mortgages, up to the sum of $911,412.46 with interest at a rate of 6.10% per annum from March 1, 2018 plus $30,622.58 until paid in full, plus court costs, advances and other charges, as allowed by law on its Land Contract.

* * *

The trial court's entry contained Civ.R. 54(B) language stating there was "no just reason for delay."

{¶8} Royal Oak did not appeal the trial court's decision, nor did it seek to stay enforcement of the foreclosure order through the sale of the Property.[2] On December 21, 2020, Plaintiff's counsel filed a notice of sale and advised the parties that the sale was scheduled for January 5, 2021. The Property was appraised for $700,000. On January 5, 2021, the Property was sold to the highest bidder for the sum of $1,621,700.

{¶9} The Sheriff's return was filed on January 6, 2021, confirming the sale of the Property to an individual named Heather Richmond. On February 5, 2021, Richmond filed notice with the trial court that she had assigned her interest to another corporation, Royal Oaks on the Green, LLC.

{¶10} On February 19, 2021, Royal Oak filed a motion to disburse funds alleging that the priority lienholders had been paid. Therefore, Royal Oak sought a court order to "release the excess funds in the amount of $445,614.02." Despite its assertion, the record reflects that Plaintiff had not been paid the $911,412.46 it was owed pursuant to the foreclosure order.

{¶11} On March 1, 2021, the trial court entered a journal entry confirming sale, ordering deed, and distributing sale proceeds. The trial court's entry ordered the distribution of proceeds to the clerk, the treasurer, the recorder, the auditor, and MAC Lenders. The trial court distributed a portion of the proceeds to Plaintiff but ordered the balance of $445,614.02 be held by the clerk for resolution of Royal Oak's motion to disburse.

{¶12} On March 15, 2021, Plaintiff filed an objection to Royal Oak's motion to

2. During oral argument Royal Oak's counsel stated that it supported the decision to sell the Property at the time.

disburse funds. In the objection, Plaintiff noted it was a priority lienholder according to the court's foreclosure order in the amount of $911,412.46 with interest. Therefore, Plaintiff argued that Royal Oak's claim was misguided because there were no excess funds, and it was apparent the remaining funds were insufficient to fully satisfy Plaintiff's priority lien.

{¶13} On March 22, 2021, the trial court entered its second amended journal entry confirming sale, ordering deed, and distributing sale proceeds.[3] On March 26, 2021, Royal Oak's counsel again opposed Plaintiff's request to distribute funds.

{¶14} The parties appeared for a hearing on the motion to disburse funds. During the hearing, Royal Oak's counsel argued that it should be entitled to the remaining funds on equitable grounds. Royal Oak's counsel acknowledged that it had not appealed the foreclosure order but called it an "unseen, unapproved judgment." Notably, Royal Oak did not raise the argument that the foreclosure order was not a final appealable order. Royal Oak's counsel stated:

> So my position is - - without waiving it, is that equitably this Court should do what is right, and that is prevent the windfall. All right. Whether the unseen, unapproved judgment entry of late October of 2020 was appealed, we know it wasn't. And that is what it is. And I can't unring that bell, Your Honor. However, the whole nature of the General Assembly, and the statute in question, support the judgment debtor in this. So I know his distinction is, well, there's no excess funds. There absolutely is excess funds. Otherwise, they would have a double windfall.

{¶15} On June 2, 2021, the trial court entered its decision denying Royal Oak's motion to disburse funds and instead awarded the remaining sale proceeds to Plaintiff. The trial court noted that its foreclosure order setting the priorities of the lienholders order was a final appealable order. Since Plaintiff had the next priority interest, it was entitled to the

3. The second amended judgment entry removed Plaintiff's distribution contained in the prior orders, included an additional payment of unpaid real estate tax penalties, and ordered the remaining $508,185.39 be held by the clerk until further order of the court.

distribution. In so doing, the trial court found the "time for raising" additional arguments had passed. Royal Oak now appeals the trial court's decision, raising two assignments of error for review.

{¶16} Assignment of Error No. 1:

{¶17} THE TRIAL COURT ERRED IN FINDING THAT ITS OCTOBER 30, 2020 "FINAL JUDGMENT ENTRY" CONSTITUTED A FINAL APPEALABLE ORDER.

{¶18} In its first assignment of error, Royal Oak argues the trial court erred when it determined that its foreclosure order was a final appealable order.

Foreclosure

{¶19} It is well established that "[f]oreclosure actions proceed in two stages, both of which end in a final, appealable judgment: the order of foreclosure and the confirmation of sale. *Farmers State Bank v. Sponaugle*, 157 Ohio St.3d 151, 2019-Ohio-2518, ¶ 18. The order of foreclosure determines the extent of each lienholder's interest, sets out the priority of the liens, determines the other rights and responsibilities of each party, and orders the property to be sold by sheriff's sale. *CitiMortgage, Inc. v. Roznowski*, 139 Ohio St.3d 299, 2014-Ohio-1984, ¶ 39; R.C. 2323.07. On appeal, parties may challenge the court's decision to grant the decree of foreclosure. *Id*. Once the foreclosure decree is final and upon completion of the appeals process, the rights and responsibilities of the parties under the foreclosure decree may no longer be challenged. *Id*.

Confirmation of sale

{¶20} The confirmation of sale is an ancillary proceeding limited to whether the sheriff's sale conformed to law. *Sponaugle* at ¶ 19. If the trial court, after examining the proceedings, finds that the sale conformed with R.C. 2329.01 through 2329.61, inclusive, then the court enters an order confirming the sale and orders the dispersal of the proceeds. R.C. 2329.31. An appeal of the confirmation of sale is limited to challenging the

confirmation order itself and to issues related to confirmation proceedings — for example, computation of the final total amount owed by the mortgagor, accrued interest, and amounts advanced by the mortgagee for inspections, appraisals, property protection, and maintenance. *Sponaugle* at ¶ 19.

{¶21} "The issues appealed from confirmation are wholly distinct from the issues appealed from the order of foreclosure." *Roznowski* at ¶ 40. "In other words, if the parties appeal the confirmation proceedings, they do not get a second bite of the apple, but a first bite of a different fruit." *Id.* The trial court's decision to confirm a sheriff's sale of property will not be reversed absent an abuse of discretion. *Sponaugle* at ¶ 19.

Procedural History

{¶22} In the present case, the trial court granted Plaintiff's motion for summary judgment and entered an order of foreclosure on October 30, 2020. Among other things, the foreclosure order determined the applicable interests, set the priority of the liens, and ordered the Property be sold by sheriff's sale. As relevant here, MAC Lenders was listed as the third-in-priority lienholder up to its interest of $1,040,277.74 plus interest and Plaintiff was listed as the fourth-in-priority lienholder up to its interest of $911,412.46 plus interest. The trial court did not address Royal Oak's counterclaim at that time. The trial court's foreclosure order contained Civ.R. 54(B) language.

{¶23} It is undisputed that Royal Oak did not appeal from that decision. It is further undisputed that Royal Oak failed to seek a stay of the trial court's judgment. Instead, the matter proceeded to a Sheriff's sale where the Property was sold to the highest bidder for $1,621,700.

Trial Court

{¶24} After the sale, the trial court entered journal entries confirming sale, ordering deed, and distributing sale proceeds. The trial court distributed the funds according to the

foreclosure order. The trial court confirmed distributions to the County and MAC Lenders according to their respective priorities. Despite Plaintiff being the next priority, Royal Oak claimed there were excess funds and demanded distribution for itself.

{¶25} Following briefing, the trial court found that Plaintiff held a priority lien over Royal Oak up to $911,412.46 and therefore was entitled to the remaining balance. The trial court's entry concluded:

> There is no dispute that the Court's Final Judgment Entry, filed October 30, 2020, constitutes an order of foreclosure. The entry sets out the priority of the liens, it determines the rights, responsibilities and liabilities of the parties, and it orders the property to be sold by sheriff's sale. As such, it was a final, appealable order. The Final Judgment Entry is the controlling document regarding the distribution of the sale proceeds. It orders the proceeds of the sale to be distributed in the following, specific priority of order: 1) the Clerk of Court; 2) the County Treasurer, 3) the mortgage holder, Mac Lenders I, LLC ("MAC Lenders") and; 4) [Plaintiff]. The Final Judgment Entry states that Landmark is entitled to "all amounts paid at the Sheriff's sale above and beyond the amounts due to defendant Mac Lenders pursuant to the Mortgages, up to the sum of $911,412.46 * * *." Sale proceeds have been distributed satisfying the claims of the Clerk of Court, the County Treasurer and Mac Lenders. The sale proceeds remaining to be distributed, $508,185.39, is less than the $911,412.46 judgment awarded to [Plaintiff] under the express terms of the Final Judgment Entry. Accordingly, [Plaintiff] is entitled to the $508,185.39 of the sale proceeds remaining to be distributed.
>
> [Royal Oak] argues that [Plaintiff] will receive a windfall if the remaining proceeds are distributed to [Plaintiff] instead of [Royal Oak]. The time for raising such an argument has passed. Again, it is undisputed that the Court's October 30, 2020 Final Judgment Entry was an order of foreclosure and constituted a final, appealable order. [Royal Oak] did not appeal the order. Accordingly, the Court's decision is mandated by the case law cited above. The distribution of the remaining sale proceeds is controlled by order of distribution set forth in the Final Judgment Entry. That order of foreclosure was not appealed, thus the rights and responsibilities of the parties that were established by the Final Judgment Entry may no longer be challenged.

Appeal

{¶26} Royal Oak disputes whether the foreclosure order was a final appealable order. There is no dispute that a foreclosure order, in general, constitutes a final appealable order. *Sponaugle*, 2019-Ohio-2518 at ¶ 18. For the first time on appeal, Royal Oak argues that the trial court's foreclosure order, in this instance, was not a final appealable order because Royal Oak had pending counterclaims, thereby violating the holding in *Marion Production Credit Assn. v. Cochran*, 40 Ohio St.3d 265 (1988).

{¶27} In *Marion Production*, the plaintiff sought judgment on three mortgage agreements. *Id*. at 266. The defendants disputed the validity of the loan agreements and filed counterclaims asserting that the plaintiff had made false representations. *Id.* at 267. The trial court ordered foreclosure on the properties prior to adjudicating the merits of the counterclaims.[4] *Id.* at 268-269. In reversing the trial court, the supreme court held "it was error to allow the foreclosure and subsequent sale of the mortgaged premises prior to complete disposition of the pending counterclaim." *Id*. at 270. The court held:

> In an action upon a note secured by a mortgage, the defendant is entitled to interpose all counterclaims and defenses he may have against the creditor. In this regard, trial courts are imbued with authority to hold separate trials upon any claim, cross-claim, counterclaim, or third-party claim * * *. However, whenever the court orders such separate trials on separate issues, the execution of all judgments determined upon a single claim should be stayed pending a final determination of the entire action as to all parties.

Id. at paragraph one of the syllabus. (Citations removed).

{¶28} In rendering its decision, the supreme court stated that, once both claims are determined, "the amount of damages due to the party having the greater injury shall be reduced by the party having the lesser injury." *Id.* at 270. The court noted that in foreclosure

4. The defendants argued that the judgment should be treated as interlocutory, and the property should not be sold until the remaining counterclaim was resolved. *Id*. at 268.

proceedings, a final judgment determines "the rights of all the parties in the premises sought to be foreclosed upon" and "where the mortgagor's damages ultimately exceed those of the mortgagee, the mortgagee's right to recover the premises is defeated." *Id.*

{¶29} Some courts have criticized aspects of the holding in *Marion Production* and found it to have limited application. *Sky Bank v. Heckathorn*, 6th Dist. Wood No. WD-03-016, 2003-Ohio-5202, ¶ 11; *Anderson v. Scherer*, 97 Ohio App.3d 753 (10th Dist. 1994). In *Heckathorn*, the court noted that the holding in *Marion Production* could not be the absolute rule in all cases as it would eliminate a trial court's discretion to bifurcate a trial, allow an interlocutory appeal, or impose a stay pursuant to Civ.R. 62(E). *Id*. at ¶ 11. Similarly, the Tenth District held *Marion Production* was not a proper basis to reverse where a counterclaim only amounted to a small value of the total judgment and there was no prejudice by the trial court's failure to stay the execution of judgment. *Anderson* at 759; *State ex rel. Myocare Nursing Home, Inc. v. Cuyahoga Cty. Court of Common Pleas*, 145 Ohio App.3d 22 (8th Dist. 2001) ("*Anderson* rejected the *Marion Production* principle that execution must necessarily await the resolution of all other pending claims and reaffirmed the principle that execution may issue upon a judgment rendered final under a Civ.R. 54[B] determination").

Analysis

I. *Marion Production* involved a different factual scenario

{¶30} Following review, we find that *Marion Production* is factually distinguishable from the matter sub judice. In *Marion Production*, the defendants disputed the plaintiff's right to foreclose on the property, preserved its interest in the property, and directly appealed the trial court's decision. Although Royal Oak initially denied certain allegations in its answer and filed counterclaims against Plaintiff, when Plaintiff moved for summary judgment, Royal Oak admitted that it was in default of the land contract and failed to dispute

the amount owed. Royal Oak did not argue that foreclosure was premature or inappropriate. Royal Oak only argued that Plaintiff was not entitled to a deficiency judgment.

{¶31} The trial court granted summary judgment in favor of Plaintiff and entered a foreclosure order. Among other things, the foreclosure order determined the applicable interests, set the priority of the liens, and ordered that the Property be sold by sheriff's sale. The trial court did not address Royal Oak's counterclaim in granting the foreclosure order. The Property was then sold without objection. Royal Oak never appealed or requested the trial court stay the foreclosure order. It never argued that the sale could not proceed due to its pending counterclaims.

{¶32} Rather than attacking the validity of Plaintiff's claim, as was done in *Marion Production*, Royal Oak did not dispute Plaintiff's right to foreclose on the Property. Royal Oak only argued that Plaintiff should not be entitled to any deficiency judgment. Though Royal Oak raised counterclaims for unjust enrichment, quantum meruit, and fraudulent misrepresentation, it did not claim that the counterclaims could extinguish Plaintiff's right to foreclose on the Property, suggesting that the claims are ancillary and separate from the issues surrounding the foreclosure. Therefore, as the court of appeals did in *Heckathorn*, we find that Royal Oak failed to establish that it would be substantially harmed by the trial court's enforcement of the judgment, prior to the resolution of Royal Oak's counterclaims. *Heckathorn*, 2003-Ohio-5202 at ¶ 17 (finding the defendants failed to establish that they would be substantially harmed by enforcement of foreclosure order prior to the adjudication of their claims).

II. The trial court's Civ.R. 54(B) determination

{¶33} In addition, we find the trial court did not abuse its discretion by following its foreclosure order in distributing the proceeds from the sale. As noted above, in the

foreclosure order, the trial court entered Civ.R. 54(B) language stating there was "no just reason for delay." The supreme court has held that an express determination that there is no just reason for delay is reviewable. *Whitaker-Merrell v. Geupel Co*., 29 Ohio St.2d 184, (1972). The syllabus provides:

> A trial court is authorized to grant final summary judgment upon the whole case, as to fewer than all of the claims or parties in multi-party or multi-claim actions, only upon an express determination that there is no just reason for delay until judgment is granted as to all the claims and parties. In that event, the judgment is reviewable upon the determination of no reason for delay, as well as for error in the granting of judgment; otherwise, the judgment is not final and not reviewable.

Id. at syllabus.

{¶34} On similar facts, the Tenth District held "[i]n order to raise the issue that the partial judgment should not have immediate effect, defendant should have appealed that judgment to contest the Civ.R. 54(B) finding of no just reason for delay." *Anderson*, 97 Ohio App.3d at 757. On resolution of this issue, however, we recognize that there is a split of authority about the procedural implications of such an appeal.

{¶35} In *Harness v. D. Jamison & Assocs*., 1st Dist. Hamilton No. C-960735, 1997 Ohio App. LEXIS 2719 (June 25, 1997), the First District considered a foreclosure action in which the defendant counterclaimed for an accounting of debts between the parties that would have offset the mortgage debt. *Id.* at *4. After the trial court granted summary judgment in favor of the plaintiff, and certified there was "no just reason for delay" under Civ.R. 54(B), the defendant appealed. *Id.* at *3. The appellate court found that the trial court erred by granting the foreclosure order while ignoring the pending counterclaim and stated:

> Even if [the defendant] does not dispute his default on the notes and mortgages in the foreclosure action, he asserts a claim against [the plaintiff] that, if proven, may offset the debt he himself owes. Given this set of operative facts, we cannot see

> how anything other than a complete adjudication of all claims of indebtedness between the two parties would facilitate the interests of both judicial economy and justice. * * * Therefore, we hold that the issues presented in the foreclosure claim and the counterclaim are inextricably intertwined and should be fully litigated before this court assumes jurisdiction.

Id. at * 5. Because the trial court erred by finding there was "no just reason for delay," the court of appeals found there was no final appealable order and dismissed the appeal for resolution of the pending counterclaim. *Id. Accord RBS Citizens, N.A. v. Krasnov*, 8th Dist. Cuyahoga No. 98997, 2013-Ohio-1670 (trial court erred by certifying there was no just reason for delay while there was an unadjudicated counterclaim).

{¶36} However, in *Countrywide Home Loans Servicing, L.P. v. Stultz*, 161 Ohio App.3d 829, 2005-Ohio-3282, ¶ 23 (10th Dist.), the Tenth District did not dismiss a similar case as lacking a final appealable order, but rather reversed the trial court's decision entering Civ.R. 54(B) language and remanded the matter to address the defendant's counterclaim. *Id.* at ¶ 27, citing *Bank One, Columbus, N.A. v. Lucas*, 10th Dist. Franklin No. 85AP-418, 1986 Ohio App. LEXIS 7447 (June 30, 1986).

{¶37} While there is a split in authority on this issue, it does not impact resolution of the matter herein. In *RBS*, *Harness*, and *Stultz*, the defendants directly appealed the trial court's foreclosure order prior to the sale of the property.[5] Unlike those cases, Royal Oak never directly challenged the trial court's foreclosure order either by attempting to appeal the foreclosure order, or by requesting a stay of foreclosure. Royal Oak could have and should have appealed the trial court's express Civ.R. 54(B) determination that there was "no just reason for delay." Upon an appeal of that determination, this court could have

5. Royal Oak cites another case that is inapplicable to the facts herein. *Woods Cove II, L.L.C. v. Am. Guaranteed Mgt., Co*., L.L.C., 8th Dist. Cuyahoga No. 103652, 2016-Ohio-3177. In *Woods Cove*, the court of appeals found the trial court implicitly resolved a claim in its order granting summary judgment and therefore there was no pending counterclaim. *Id.* at ¶ 13.

reversed the Civ.R. 54(B) certification or dismissed the appeal for resolution of the counterclaim. Rather than attacking the validity of Plaintiff's interest, or appealing the Civ.R. 54(B) determination, Royal Oak simply allowed the matter to proceed to a sheriff's sale.

{¶38} Although Royal Oak now claims that the Civ.R. 54(B) language in the foreclosure order is inconsistent with the rule in *Marion Production*, it did not appeal that decision, which is now a final judgment. *Anderson*, 97 Ohio App.3d at 757-758 ("Although the trial court's judgment containing the Civ.R. 54[B] language is inconsistent with the *Marion Production* syllabus rule with respect to the Civ.R. 54[B] findings, defendant did not appeal that judgment, and it is now a final judgment"). Since the foreclosure decree became final, the rights and responsibilities are no longer subject to challenge. *Roznowski*, 139 Ohio St.3d 299 at ¶ 39. Therefore, our review is limited to whether the sale conformed to law. *Sponaugle*, 2019-Ohio-2518 at ¶ 19. Royal Oak is not permitted a "second bite of the apple" to challenge the priorities that were already established in the foreclosure order.

{¶39} Having reviewed the record, we find the trial court did not abuse its discretion in the confirmation proceedings. In this case, there are no challenges to the confirmation proceedings, merely an attempt to reorder the priorities established in the foreclosure order. Royal Oak failed to assert its argument until it was too late, and now asserts this new argument for the first time on appeal. The Property has been sold, the priorities have been set, and the trial court has distributed the proceeds from the sheriff's sale in accordance with its prior order. We further note that Royal Oak cannot show any prejudice because its ancillary claims were essentially bifurcated and remain pending below.[6]

III. Royal Oak's untimely argument is raised for the first time on appeal

{¶40} Furthermore, it is well established that a party may not raise new issues or

6. We acknowledge that Royal Oak may claim prejudice because Plaintiff has a higher priority interest in the foreclosure order, however, consistent with this opinion, the foreclosure order was never appealed.

legal theories for the first time on appeal. *Wells Fargo Bank, N.A. v. Washington*, 12th Dist. Butler No. CA2014-10-214, 2015-Ohio-2988, ¶ 17; *BAC Home Loans Servicing, LP v. Mullins*, 12th Dist. Preble No. CA2013-12-015, 2014-Ohio-4761, ¶ 33 ("it is axiomatic that a party cannot raise new issues or legal theories for the first time on appeal and failure to raise an issue before the trial court results in waiver of that issue for appellate purposes"). Again, Royal Oak did not appeal the trial court's Civ.R. 54(B) designation when it was appropriate and never contested the sale of the Property or requested a stay. During the hearing on its motion to disburse, Royal Oak never suggested that the trial court's foreclosure order was not a final appealable order. Instead, Royal Oak argued that it was entitled to disbursement of funds inconsistent with the trial court's foreclosure order. It was not until this appeal that Royal Oak first argued that the trial court's foreclosure order was not a final appealable order and therefore should not be followed in the confirmation stage of the proceedings. Accordingly, Royal Oak's first assignment of error is overruled.

{¶41} Assignment of Error No. 2:

{¶42} THE TRIAL COURT ERRED IN FINDING THAT THE DISTRIBUTION OF EXCESS FORECLOSURE SALE PROCEEDS IS CONTROLLED BY THE COURT'S OCTOBER 30, 2020[,] FINAL JUDGMENT ENTRY RATHER THAN THE PLAIN LANGUAGE OF R.C. 2329.44.

{¶43} In its second assignment of error, Royal Oak argues that the trial court erred by failing to award it the "excess funds" allegedly remaining following the distribution of the sale proceeds.

{¶44} R.C. 2329.44 provides the statutory procedure for the distribution of excess funds remaining after judicial sales. *State ex rel. Macey v. Byrd*, 8th Dist. Cuyahoga No. 103646, 2016-Ohio-4703, ¶ 13. Pursuant to that statute:

> On a sale made pursuant to this chapter, if the officer who

> makes the sale receives from the sale more money than is necessary to satisfy the writ of execution, with interest and costs, the officer who made the sale shall deliver any balance remaining after satisfying the writ of execution, with interest and costs, to the clerk of the court that issued the writ of execution. * * * The clerk of the court that issued the writ of execution is not required to pay the balance to the judgment debtor or the judgment debtor's legal representatives * * *.

R.C. 2329.44.

{¶45} In the present case, the trial court set the priority lienholders in its foreclosure order. Following the County interests, the trial court named MAC Lenders as the third priority interest and Plaintiff as the fourth priority interest:

> 3. To [MAC Lenders], any and all actual proceeds received pursuant to the Sheriff's sale, in lieu of or over and above the credit bid, if any, up to the sum of $1,040,277.74 due and owing to [MAC Lenders], along with interest accruing at a rate of 14% per annum from October 31, 2020 and fees accruing at a rate of 1% per quarter;
>
> 4. To [Plaintiff], all amounts paid at the Sheriff's sale above and beyond the amounts due to defendant [MAC Lenders] pursuant to the Mortgages, up to the sum of $911,412.46 with interest at a rate of 6.10% per annum from March 1, 2018 plus $30,622.58 until paid in full, plus court costs, advances and other charges, as allowed by law on its Land Contract.
>
> * * *

{¶46} The Property sold for $1,621,700. The record reflects that MAC Lenders has received its full distribution. Therefore, Plaintiff is the next priority interest and is entitled "up to the sum of $911,412.46."

{¶47} According to the second amended entry confirming sale, ordering deed, and distributing sale proceeds, there remains $508,185.39 left to be distributed. Therefore, it is clear that Plaintiff will not receive the full award it was entitled to under the terms of the foreclosure order. Contrary to Royal Oak's argument, there are no excess funds to distribute in accordance with R.C. 2329.44. The funds held by the clerk are more accurately

characterized as "remaining funds" subject to distribution to the next priority lienholder. As noted previously, Plaintiff's award will be less than it was entitled to under the terms of the foreclosure order. The characterization of these remaining funds as "excess funds" is inaccurate. Accordingly, Royal Oak's second assignment of error is without merit.

{¶48} Judgment affirmed.

S. POWELL and HENDRICKSON, JJ., concur.

[Cite as *Am. Steel City Indus. Leasing, Inc. v. Bloom Land Co., L.L.C.*, 2022-Ohio-1004.]

IN THE COURT OF APPEALS OF OHIO
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY

AMERICAN STEEL CITY INDUSTRIAL LEASING, INC., Plaintiff-Appellant, - v - BLOOM LAND COMPANY, LLC, et al., Defendants-Appellees.	**CASE NO. 2021-T-0013** Civil Appeal from the Court of Common Pleas Trial Court No. 2020 CV 00789

O P I N I O N

Decided: March 28, 2022
Judgment: Affirmed

Thomas C. Nader, Nader & Nader, 7011 East Market Street, Warren, OH 44484 (For Plaintiff-Appellant).

Kevin P. Murphy and *Patrick C. Manning*, Harrington, Hoppe & Mitchell, Ltd., 108 Main Avenue, S.W., Suite 500, Warren, OH 44481 (For Defendants-Appellees).

JOHN J. EKLUND, J.

{¶1} Appellant, American Steel City Leasing, Inc., ("American Steel") appeals the decision granting summary judgment to Appellees, Bloom Land Company, LLC, ("Bloom Land") and Youngstown Bending and Rolling, Inc. ("Youngstown Bending"). We affirm.

{¶2} In 2016, American Steel, owned by William Marsteller, held fee simple title to real property on Hendricks Road in Youngstown, Ohio. A tenant of the property, Youngstown Bending, has operated a manufacturing facility on the property since 2006. Youngstown Bending was owned in equal shares by Mr. Marsteller and Ted Bloom, who

is the sole owner of Bloom Land. In 2016, American Steel and Bloom Land entered into an agreement for Bloom Land to purchase the Hendricks Road property upon Mr. Marsteller's death. In 2017, Mr. Marsteller passed away, leaving his wife, Linda Marsteller, the sole owner of American Steel and fifty percent shareholder of Youngstown Bending. In 2018, Bloom Land closed on the purchase of the Hendricks Road property by submitting to American Steel the purchase price, and American Steel provided a warranty deed to Bloom Land in return.

{¶3} Thereafter, a dispute arose as to whether the industrial machinery owned by American Steel and used by Youngstown Bending at the Hendricks Road property was included in the purchase agreement. In 2020, American Steel filed a complaint, attaching a copy of the purchase agreement, and asking the trial court to declare it the owner of all machinery located at the Hendricks Road property and used in the business operations of Youngstown Bending. Bloom Land and Youngstown Bending moved to dismiss the complaint, arguing that the purchase agreement clearly provided for the sale of the industrial machinery along with the real property. Therefore, Appellees argued that any resort to parol evidence to determine the parties' intent would be improper. Further, Appellees maintained that the complaint contained no allegations that Youngstown Bending asserted an ownership interest in the land or machinery. American Steel opposed the motion, attaching a supporting affidavit of Mrs. Marsteller. American Steel maintained that: dismissal is generally inappropriate in a declaratory judgment action; the purchase agreement was ambiguous as to whether it included sale of the machinery; parol evidence was necessary to clarify the ambiguity; after closing of the sale, Mrs. Marsteller and Mr. Bloom arranged for appraisals of the machinery at issue and

negotiated for the sale of the machinery to Youngstown Bending, raising an inference that the machinery was not included in the sale; and the continued negotiations and appraisals raised a reasonable inference that a modification of the agreement or a waiver had occurred.

{¶4} The trial court converted the motion to dismiss to a motion for summary judgment pursuant to Civ.R. 12(B)(6) and permitted the parties additional time to provide supporting documents. Bloom Land provided an affidavit of Mr. Bloom averring that he had ordered appraisal of the machinery due to a pending divorce action wherein Bloom Land was named as a third-party defendant. American Steel responded that Mr. Bloom's affidavit raised a question of fact, because Mrs. Marsteller had averred in her affidavit that Mr. Bloom's accountant had emailed her a copy of the appraisal one month after closing on the real estate, which would have been unnecessary if the appraisal had been conducted solely for purposes of Mr. Bloom's divorce.

{¶5} Thereafter, the trial court found that there existed no genuine question of material fact that the purchase agreement included the industrial machinery at issue, and appellees were entitled to judgment as a matter of law. Accordingly, the trial court granted summary judgment to appellees, determining that Bloom Land owned the machinery at issue. The court did not specifically address issues pertaining to modification or waiver.

{¶6} In its first and second assigned errors, American Steel contends:

{¶7} "[1.] The Trial Court erred in concluding that [the] Purchase Agreement was not ambiguous and therefor[e] barred extrinsic evidence under the Parol Evidence Rule.

{¶8} "[2.] The Trial Court erred in interpreting that the industrial machinery was included in the term equipment."

{¶9} In its first and second assigned errors, American Steel argues that the court erred in granting Bloom Land summary judgment because the agreement's use of the term "equipment" is ambiguous, and a genuine issue of material fact remained as to the parties' intent. American Steel argues that the trial court should have considered extrinsic evidence and applied the interpretative rule of *ejusdem generis* in determining whether a triable issue of intent remained.

{¶10} "We review decisions awarding summary judgment de novo, i.e., independently and without deference to the trial court's decision." *Hedrick v. Szep*, 11th Dist. Geauga No. 2020-G-0272, 2021-Ohio-1851, ¶ 13, citing *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996).

> Civ.R. 56(C) specifically provides that before summary judgment may be granted, it must be determined that: (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the 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, 364 N.E.2d 267, 274 (1977); *Allen v. 5125 Peno, LLC*, 11th Dist., 2017-Ohio-8941, 101 N.E.3d 484, ¶ 6, citing *Holliman v. Allstate Ins. Co.*, 86 Ohio St.3d 414, 415, 715 N.E.2d 532 (1999). "The initial burden is on the moving party to set forth specific facts demonstrating that no issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Allen* at ¶ 6, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). "If the movant meets this burden, the burden shifts to the nonmoving party to establish that a genuine issue of material fact exists for trial." *Allen* at ¶ 6*, citing Dresher* at 293*.*

{¶11} Here, the trial court determined that summary judgment was appropriate based upon the unambiguous contract language. "'If a contract is clear and unambiguous, then its interpretation is a matter of law and there is no issue of fact to be determined. However, if a term cannot be determined from the four corners of a contract, factual determination of intent or reasonableness may be necessary to supply the missing term.'" *Fairport Real Estate LLC v. Nautical Ridge Condominium Owners' Assn., Inc.*, 2018-Ohio-791, 108 N.E.3d 101, ¶ 17 (11th Dist.), quoting *Inland Refuse Transfer Co. v. Browning-Ferris Indus. of Ohio, Inc.*, 15 Ohio St.3d 321, 322, 474 N.E.2d 271 (1984), citing *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146 (1978), *superseded by statute on other grounds*, and *Hallet & Davis Piano Co. v. Starr Piano Co.*, 85 Ohio St. 196, 97 N.E. 377 (1911).

{¶12} "In all cases involving contract interpretation, we start with the primary interpretive rule that courts should give effect to the intentions of the parties as expressed in the language of their written agreement." *Sutton Bank v. Progressive Polymers, L.L.C.,* 161 Ohio St.3d 387, 2020-Ohio-5101, 163 N.E.3d 546, ¶ 15, citing *Sunoco, Inc. (R&M) v. Toledo Edison Co.*, 129 Ohio St.3d 397, 2011-Ohio-2720, 953 N.E.2d 285, ¶ 37. "Other primary interpretive rules assist the court in doing this by giving guidance on how to interpret the meaning of certain words." *Sutton Bank* at ¶ 15. "For example, one rule is that '[c]ommon words appearing in a written instrument 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.'" *Id.*, quoting *Alexander* at paragraph two of the syllabus.

{¶13} In *Sutton Bank*, the Supreme Court noted that this court had applied "traditional rules of contract interpretation" to some extent to a cognovit note. *Id.* at ¶ 17. However, the Supreme Court concluded that this court's analysis applying the defined term "you" to a provision of the note "stopped short" of the appropriate analysis by adopting this reading "*without considering, as it should have considered, whether the parties intended this reading.*" (Emphasis added.) *Id*. The Supreme Court explained that rules of contract interpretation "must yield to the intent of the parties, and when the parties clearly did not intend [a] * * * definition to apply, a court cannot force that construction upon them." *Sutton* at ¶ 18, citing *In re Adelphia Communications Corp.,* 368 B.R. 348, 354 (Bankr.S.D.N.Y.2007) (defined terms must still be interpreted in the context of the entire agreement); *Beanstalk Group, Inc. v. AM Gen. Corp.*, 283 F.3d 856, 860 (7th Cir.2002) ("a contract will not be interpreted literally if doing so would produce absurd results, in the sense of results that the parties, presumed to be rational persons pursuing rational ends, are very unlikely to have agreed to seek"). Accordingly, we review contractual language mindful that defined terms and dictionary definitions must yield to the parties' intent as expressed within the agreement.

{¶14} Here, Bloom Land maintains that the contract clearly provided that the machinery is included in the purchase agreement. In support, Bloom Land points to the first section of the agreement, defining the sale property as including:

> (i) The parcel of real property situated in the City of Youngstown, OH, as described in Exhibit "A" * * * together with all appurtenances, hereditaments, rights, privileges and easements belonging to or in any way appertaining thereto (the "Land");
>
> (ii) The existing buildings located on the 14.638 acre lot, and the building located on Parcel Number 48-0446-0-009.01-0,

> and all other improvements, equipment, fixtures, and landscaping contained within the Land (the "Improvements")[.]

{¶15} Bloom Land contends that what American Steel has argued is "machinery" constitutes "equipment" within the contract's definition of "[i]mprovements." The trial court agreed, concluding that the "standard understanding of the word 'equipment'" does not exempt machinery.

{¶16} However, American Steel argues that the term "equipment" could reasonably be read as excepting "machinery," relying on agreements that use both terms in other cases. *See Zinser v. Auto-Owners Ins. Co.*, 12th Dist. Butler No. CA2016-08-144, 2017-Ohio-5668, ¶ 5 (regarding insurance policy covering "machinery" and "equipment" that were "permanently installed" in commercial building); *In re M B Industries, L.L.C.*, 783 Fed.Appx. 333, 337 (5th Cir.2019) (issue of whether 42 cranes belonged to lessee under lease terms allocating to lessee untagged "equipment, fixtures, machinery [or] personal property"); *Henry & Wright Corp. v. Automatic Press Corp.*, 142 F.3d 434, *1 (6th Cir.1998) (purchase agreement defined seller's "assets" as "all of Seller's machinery and equipment, if any * * *"). However, these cases do not present the issue of whether machinery was excluded from the definition of "equipment," and, contrary to American Steel's argument, one of its cited cases indicates that these terms may overlap. *See Zinser* at ¶ 19 (Air conditioning units "constitute machinery *and* equipment pursuant to the terms' plain and ordinary meanings.") (Emphasis added.); *In re M B Industries* at 338 (42 cranes included as "machinery" under lease terms without discussion of whether the cranes also constituted "equipment"); *Henry & Wright Corp*. at *1-2 (seller's assets included all machinery and equipment and not limited to exhibit listing some machinery and equipment).

{¶17} Accordingly, the cited cases do not support American Steel's proposed definition of equipment as excluding machinery and are of little assistance in determining the parties' intent with respect to this contract.

{¶18} Further, although the trial court did not expound upon its source for concluding that the "standard understanding" of "equipment" includes "machinery," we agree that, in isolation, "equipment" is a very broad term. *See* Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/equipment (accessed July 8, 2021) (defining "equipment" to include "the implements used in an operation or activity" and "all the fixed assets other than land and buildings of a business enterprise."). However, we must review the entirety of the agreement to determine if the parties intended a use of "equipment" that includes machinery, not view the term in isolation. *See MidFirst Bank v. Stump*, 10th Dist. No. 16AP-189, 2017-Ohio-4312, 83 N.E.3d 974, ¶ 22, quoting *Dodd v. Bartholomew*, 44 Ohio St. 171, 175, 5 N.E. 866 (1886) ("It is a well settled principle, applicable to the construction of deeds and other instruments, that all their parts are to be construed together, and the meaning ascertained from a consideration of each and every part" of the document.).

{¶19} The agreement, when read a whole, does not demonstrate an intent by the parties to temper the ordinary meaning of the term equipment in such a way as to exclude the machinery at issue. The purchase agreement included the sale of the land, improvements (including "equipment"), rights of away, intangible property and engineering products related to the land and improvements, and "Seller's interest in and to any Existing Leases by and between Seller and its current tenants on the Land and Improvements."

{¶20} The agreement contains numerous references to the "Existing Lease(s)." In response to Bloom Land's motion, American Steel provided a copy of the lease between itself and Youngstown Bending. The lease provides that American Steel leased to Youngstown Bending specified portions of the warehouse located on the Hendricks Road property together with "all machinery, equipment, tools, tooling, and supplies, together with those improvements that may hereafter be erected and installed in the Building or Leased Premises * * *." Accordingly, as opposed to the purchase agreement, the lease agreement specified that it included machinery.

{¶21} We note that American Steel argued in the trial court that the distinction in the language between the lease and the purchase agreement indicated that the parties did not intend to include machinery in the purchase agreement. Insofar as it may be appropriate to review the lease to ascertain the extent of rights transferred through the assignment of the "Existing Leases" referenced in the agreement, we note that, contrary to American Steel's position, the lease reinforces a reading of the purchase agreement that *includes* machinery in the sale. The purchase agreement provides an assignment of the lease to Bloom Land, thus giving Bloom Land the right to receive rents for the lease of the machinery. The reasonable inference drawn from Bloom Land's right to receive rents for the machinery is that the parties intended to convey ownership of the machinery to Bloom Land, an inference consistent with the common usage of "equipment."

{¶22} Upon review of the competing summary judgment materials, no triable issue of the parties' intent with respect to sale of the machinery remains, as the agreement, when read as a whole, is subject to only one reasonable interpretation – it includes the machinery at issue. Accordingly, the purchase agreement is not ambiguous in this

regard, and we need not consider the parties' affidavits or apply *ejusdem generis*, to determine the meaning.

{¶23} Therefore, American Steel's first and second assigned errors lacks merit.

{¶24} In its third assigned error, American Steel maintains that:

{¶25} "[3.] There was a genuine issue of fact regarding the post-closing modification or waiver of the sale of machinery under the Purchase Agreement, therefore the Trial Court erred in failing to address this issue."

{¶26} In ruling on summary judgment, the trial court reviewed the language of the contract and declared Bloom Land the owner of the machinery at issue, as discussed above. The trial court's judgment at no point addresses the parties' arguments or affidavits insofar as they relate to modification or waiver.

{¶27} However, the complaint did not contain any allegations with respect modification or waiver, and American Steel did not seek to amend its complaint. Instead, American Steel presented its theories of modification and waiver in response to the motion to dismiss and in its supplemental materials filed after the trial court converted the motion to dismiss to a motion for summary judgment.

{¶28} "We are mindful that even if a complaint neither contains allegations on a legal theory nor suggests or intends to advance that theory, the complaint may still be sufficient if it contain[s] allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial." *Morris v. Dobbins Nursing Home*, 12th Dist. Clermont No. CA2010-12-102, 2011-Ohio-3014, ¶ 28, quoting *White v. Mt. Carmel Med. Ctr.*, 150 Ohio App.3d 316, 780 N.E.2d 1054, 2002-Ohio-6446, ¶ 52. Nonetheless, here, there is a complete absence of any reference to modification or waiver

in the complaint. "It is axiomatic that a complaint cannot be amended by briefs in opposition to a motion to dismiss." *Hernandez v. Riggle*, 7th Dist. Mahoning No. 15 MA 0223, 2016-Ohio-8032, 74 N.E.3d 822, ¶ 5, quoting *General Elec. Co. v. S & S Sales Co.,* N.D.Ohio No. 1:11CV00837, 2012 WL 2921566, *4 (July 17, 2012). Further, "Ohio Courts have repeatedly held that a plaintiff is generally limited to the allegations in [its] pleading and cannot enlarge [its] claims in a memorandum in opposition to summary judgment." (Citations omitted.) *Bryan v. Valley Care Health Sys. of Ohio*, 11th Dist. Trumbull No. 2015-T-0130, 2016-Ohio-7156, ¶ 36. *See also Gates v. Ohio Sav. Assn.*, 11th Dist. Geauga No. 2009-G-2881, 2009-Ohio-6230, ¶ 47 (where complaint and amended complaint failed to assert legal theory that was raised in response to memorandum in opposition to summary judgment, the theory was not before the trial court).

{¶29} We cannot say the trial court erred in failing to address the alleged modification or waiver when the complaint contains no allegations regarding modification or waiver. Accordingly, American Steel's third assigned error lacks merit.

{¶30} The judgment of the trial court is affirmed.

THOMAS R. WRIGHT, P.J.,

MATT LYNCH, J.,

concur.

[Cite as *Tabbaa v. Nouraldin*, 2022-Ohio-1172.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

MOHAMMAD TABBAA, :

Plaintiff-Appellant, :

No. 110737

v. :

DR. HAZEM NOURALDIN, ET AL., :

Defendants-Appellees. :

JOURNAL ENTRY AND OPINION

JUDGMENT: REVERSED AND REMANDED
RELEASED AND JOURNALIZED: April 7, 2022

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-19-922499

Appearances:

Michael Drain, *for appellant*.

RaslanPla & Company, LLC, Nadia R. Zaiem, and Jorge Luis Pla, *for appellees*.

EILEEN T. GALLAGHER, J.:

{¶ 1} This cause came to be heard on the accelerated calendar pursuant to App.R. 11.1 and Loc.App.R. 11.1. Plaintiff-appellant, Mohammad Tabbaa ("Tabbaa"), appeals an order granting summary judgment in favor of defendant-appellee, Dr. Hazem Nouraldin ("Nouraldin"). He claims the following two errors:

1. The trial court committed prejudicial error in granting defendant's motion for summary judgment on the ground that plaintiff's claim for breach of contract was irrelevant.

2. The trial court committed prejudicial error in granting defendant's motion for summary judgment where the statute of limitations for breach of written contract had not expired.

{¶ 2} After reviewing the record and applicable law, we reverse the trial court's judgment and remand the case to the trial court for further proceedings.

I. Facts and Procedural History

{¶ 3} On September 30, 2019, Tabbaa filed a complaint against Nouraldin and his wife, Sainya Atassi (collectively "the Nouraldins"). The complaint alleges that Tabbaa and the Nouraldins co-owned multiple commercial properties and businesses. At some point in time, Tabbaa was sued in connection with a restaurant he owned with a third party. Tabbaa transferred his membership interests in the businesses he co-owned with the Nouraldins to the Nouraldins in order to conceal his assets from creditors. (Complaint ¶ 3, 4, 32.) According to the complaint, the parties agreed Tabbaa would transfer his interests to the Nouraldins, but he would continue to exercise his voting rights and receive his share of the profits from the businesses. He also alleged that the Nouraldins agreed to return his shares and membership interests to him upon request.

{¶ 4} After the restaurant litigation was resolved, Tabbaa requested the return of his business interests. Tabbaa alleges that the Nouraldins not only failed to return his interests as promised, they also failed to pay his share of the profits and proceeds from the sale of some of the commercial properties. The complaint asserts

claims for breach of contract, promissory estoppel, conversion, fraud, unjust enrichment, and declaratory judgment. The complaint repeatedly refers to an "oral contract," but also refers to a written contract, though no written contract was attached to the complaint. (Complaint ¶ 31-32, 46.)

{¶ 5} The complaint does not allege any dates on which the alleged oral agreement was made. During discovery, Tabbaa averred in responses to interrogatories that the parties entered into an agreement some time in 2007. (Responses to interrogatory Nos. 4, 7, 8, 9, 10, and 11.)[1] Tabbaa also averred that he transferred his interests in the businesses pursuant to the parties' agreement in January 2008, and that he made repeated demands for the Nouraldins to return his membership interests from 2010 through 2016, but the Nouraldins refused to honor the parties' agreement. (Response to interrogatory No. 12.)

{¶ 6} The Nouraldins filed a motion for summary judgment, arguing that Tabbaa's claims were barred by the statute of limitations applicable to each of his claims. The trial court agreed and granted the Nouraldinses' motion for summary judgment. In its judgment entry, the court acknowledged that Tabbaa twice refiled the complaint in this case. The complaint was first filed on November 8, 2016, and was voluntarily dismissed by Tabbaa on January 9, 2017. Tabbaa refiled the complaint on January 8, 2018, but that complaint was dismissed for want of

[1] Tabbaa's responses to interrogatories are attached to defendants' motion for summary judgment as Exhibit A.

prosecution on November 2, 2018.[2] Tabbaa filed the complaint for the third time on September 30, 2019.

{¶ 7} The trial court concluded that Tabbaa did not plead a claim for breach of a written contract and that, therefore, the six-year statute of limitations applicable to oral contracts applied to his breach-of-contract claim. Although Tabbaa's first complaint was filed within the applicable statute of limitations and that the Ohio Savings Statute, R.C. 2305.19(A), allowed Tabbaa to refile the case within one year of dismissal, the trial court found that the six-year statute of limitations had expired before Tabbaa filed the third complaint on September 30, 2019. The trial court also found that the statutes of limitations applicable to Tabbaa's other claims were also expired. Tabbaa now appeals the trial court's judgment.

II. Law and Analysis

A. Standard of Review

{¶ 8} Appellate review of summary judgments is de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). The party moving for summary judgment bears the burden of demonstrating the absence of a genuine issue of material fact as to the essential elements of the case with evidence of the

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[2] The "double dismissal rule" bars the subsequent refiling of a complaint that has previously been voluntarily dismissed and refiled. However, the double dismissal rule only applies to notices of voluntary dismissal under Civ.R. 41(A). A dismissal for want of prosecution is a different type of dismissal under Civ.R. 41(B) and does implicate the double dismissal rule. *Hamrick v. Ramalia*, 8th Dist. Cuyahoga No. 97385, 2012-Ohio-1953, ¶ 12, citing *Olynyk v. Scoles*, 114 Ohio St.3d 56, 2007-Ohio-2878, 868 N.E.2d 254, ¶ 25-26. *See also Thompson v. Ohio State Univ. Hosps.*, 10th Dist. Franklin No. 06AP-1117, 2007-Ohio-4668.

type listed in Civ.R. 56(C). *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). Once the moving party demonstrates entitlement to summary judgment, the burden shifts to the nonmoving party to produce evidence related to any issue on which the party bears the burden of production at trial. Civ.R. 56(E). Summary judgment is appropriate when, after construing the evidence in a light most favorable to the party against whom the motion is made, reasonable minds can only reach a conclusion that is adverse to the nonmoving party. *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201 (1998).

B. Written Contract

{¶ 9} In the first assignment of error, Tabbaa argues the trial court erred in finding that the parties did not have a written contract and that the statute of limitations applicable to written contracts, which is longer than the statute of limitations for oral contracts, was inapplicable. He contends the parties had a written contract that the trial court erroneously ignored.

{¶ 10} In granting the Nouraldinses' motion for summary judgment, the trial court concluded, in relevant part:

> Plaintiff did not plead a breach of a written contract in the Complaint. Plaintiff allege[s] oral contracts in paragraphs 31 and 32 of the Complaint. Plaintiff nowhere alleged a written contract. No written contract was attached to the Complaint in compliance with Civil Rule 10(D). The statute of limitations for a written contract is therefore irrelevant as no such claim was plead [sic] in the Complaint.

However, Civ.R. 10(D) provides:

> When any claim or defense is founded on an account or other written instrument, a copy of the account or written instrument must be

> attached to the pleading. *If the account or written instrument is not attached, the reason for the omission must be stated in the pleading*.

(Emphasis added.) The complaint alleges, in part, that the Nouraldins made fraudulent misrepresentations to Tabbaa "[p]rior to the parties entering into the oral agreements and throughout the term of the written contract." (Complaint ¶ 46.) The complaint further states, in relevant part:

> Shortly after everything was signed, Defendants demanded the file from the attorney and has kept all copies of all documents regarding this transaction and has refused to provide same to Plaintiff.

(Complaint ¶ 10.) Thus, Tabbaa alleged that the parties had a written contract and explained that he did not attach a copy of the parties' written contract to the complaint, as contemplated by Civ.R. 10(D), because it was in the defendant's possession.

{¶ 11} Furthermore, Ohio is a notice-pleading state, which means that a plaintiff is generally not required to plead facts with particularity. *Cincinnati v. Beretta USA Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, 768 N.E.2d 1136, ¶ 29. Civ.R. 8(A), which governs the general rules of pleadings and claims for relief, provides that a complaint is only required to contain "(1) a short and plain statement of the claim showing that the party is entitled to relief, and (2) a demand for judgment for the relief to which the party claims to be entitled." Civ.R. 8(A). Thus, under notice pleading requirements, a plaintiff need only allege sufficient facts to put the opposing party on notice of the nature of the claims against it. *Filips v. Case W. Res. Univ.*, 8th Dist. Cuyahoga No. 79741, 2002-Ohio-4428, ¶ 23.

{¶ 12} Although the complaint refers to "an oral contract," the complaint also references a written contract and alleges sufficient operative facts to put the Nouraldins on notice that Tabbaa was seeking damages caused by the Nouraldinses' failure to return the interests in businesses and properties that Tabbaa temporarily transferred to them. Thus, Tabbaa alleged a breach-of-contract claim in the complaint and explained why the written contract was not attached to the complaint as required by Civ.R. 10(D). Moreover, Tabbaa attached a verified copy of the written contract to his brief in opposition to summary judgment and thus provided evidence of a written contract. Therefore, the trial court erred in concluding that Tabbaa never alleged a breach-of-written-contract claim and that the statute of limitations applicable to written contracts was irrelevant.

{¶ 13} The first assignment of error is sustained.

C. Statutes of Limitations

{¶ 14} In the second assignment of error, Tabbaa argues the trial court erred in finding that his breach-of-contract claim was barred by the statute of limitations applicable to oral contracts. He contends that because the parties had a written contract, the trial court should have applied the statute of limitations applicable to written contracts.

{¶ 15} As discussed in the previous assignment of error, the trial court erred in finding that the statute of limitations for written contracts was inapplicable since Tabbaa alleged and proved that the parties had a written contract. Tabbaa concedes, however, that his interests in Doctor Realty, L.L.C. were not included in the written

agreement and that it was the subject of an oral contract. (Plaintiff's response to motion for summary judgment p. 3.) Thus, the statute of limitations applicable to oral contracts applies to the parties' oral contract concerning Tabbaa's interests in Doctor Realty, L.L.C.

{¶ 16} Having determined that the parties had both a written and oral contract, we must now determine whether Tabbaa's claims for breach of written and oral contracts are barred by the respective statutes of limitations applicable to oral and written contracts. "Ordinarily, a cause of action accrues and the statute of limitations begins to run at the time the wrongful act was committed." *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, 849 N.E.2d 268, ¶ 21, quoting *Collins v. Sotka*, 81 Ohio St.3d 506, 507, 692 N.E.2d 581 (1998). "Under the discovery rule, the statute of limitations begins to run when the plaintiff discovers or, through the exercise of reasonable diligence, should have discovered a possible cause of action." *Id.*

{¶ 17} A breach-of-contract claim accrues when the alleged breach causes actual damages to the complaining party. *Kincaid v. Erie Ins. Co.*, 128 Ohio St.3d 322, 2010-Ohio-6036, 944 N.E.2d 207, ¶ 13 (Breach of contract to provide insurance benefits does not accrue until insurer refuses to pay claim.).

{¶ 18} R.C. 2305.06 provides the statute of limitations for "contracts in writing" and states that except for certain inapplicable provisions, "an action upon a specialty or an agreement, contract, or promise in writing shall be brought within six years after the cause of action accrued." R.C. 2305.06 was amended, effective

June 16, 2021. An editor's note to the 2021 amendment to R.C. 2305.06 provides that the limitations period for claims that accrued prior to the effective date of the 2021 enactment shall be the limitations period in existence prior to 2021, or six years from the 2021 effective date, whichever occurs first.

{¶ 19} Another editor's note, pertaining to amendments made in 2012, states that the limitations period for causes of action that accrued prior to the effective date of the 2012 amendment "shall be eight years from the effective date of this act or the expiration of the period of limitations in effect prior to the effective date of this act, whichever occurs first." The statute of limitations applicable to written contracts prior to the 2012 amendment was 15 years. *See* Amendment Notes to R.C. 2305.06.

{¶ 20} Tabbaa's breach-of-contract action accrued as early as 2010, when he demanded return of his shares or membership interests and the Nouraldins refused to return them. (Complaint ¶ 11-21, 34; response to interrogatory No. 12.) In his brief in opposition to the motion for summary judgment, Tabbaa asserts that his breach-of-contract action would have accrued at the earliest on October 13, 2011, when one of the properties he co-owned with the Nouraldins was sold and he did not receive any of the proceeds. (Plaintiff's response to motion for summary judgment p. 5.) Whether Tabbaa's breach-of-contract action accrued sometime in 2010, or on October 13, 2011, the claim accrued before the 2021 and 2012 amendments to R.C. 2305.06 took effect. A six-year statute of limitations beginning on June 16, 2021, the effective date of the most recent amendment to R.C. 2305.06, would expire in 2027. Assuming the breach-of-contract claim arising from the

parties' written contract accrued in 2010, the 15-year statute of limitations in effect prior to the 2012 amendment would not expire until 2025, which will occur before 2027. Therefore, the 15-year statute of limitations in effect prior to the 2012 and 2021 amendments applies to the parties' written contract.

{¶ 21} Tabbaa filed the third complaint on September 30, 2019. Although the specific month and day the claim accrued are unknown, we can determine that the complaint was timely filed based on the year. We, therefore, find that Tabbaa's complaint for breach of contract based on a written contract was timely filed and that the trial court erred in concluding that his breach-of-contract claim was barred by the statute of limitations.

{¶ 22} As previously stated, Tabbaa's breach-of-contract claim relative to his interests in Doctor Realty, L.L.C. is based on an oral contract. R.C. 2305.07 provides the statute of limitations for "contracts not in writing." As relevant here, R.C. 2305.07(A) states that "[e]xcept as provided in sections 126.301 and 1302.98 of the Revised Code, an action upon a contract not in writing, express or implied, shall be brought within four years after the cause of action accrued."

{¶ 23} R.C. 2305.07 was amended, effective June 16, 2021. The editor's notes state, in relevant part:

> Acts 2021, SB 13, § 5 provides: "(A) For causes of action that are governed by division (A) of section 2305.07 of the Revised Code that accrued prior to the effective date of this act, the period of limitations shall be four years from the effective date of this act or the expiration of the period of limitations in effect prior to the effective date of this act, whichever occurs first."

{¶ 24} The statute of limitations for oral contracts in effect prior to the effective date of S.B. 13, was six years. *See* amendment notes to R.C. 2305.07; *Pomeroy v. Schwartz*, 8th Dist. Cuyahoga No. 99638, 2013-Ohio-4920, ¶ 26. Tabbaa stated in response to interrogatories that he requested the return of his interests in multiple business entities "numerous" times between 2010 and 2016. Therefore, his cause of action on the oral contract accrued before the effective date of the 2021 amendment to R.C. 2305.07, and the six-year statute of limitations in effect prior to the effective date of 2021 amendment applies to this claim.

{¶ 25} As previously stated, Tabbaa demanded the return of his interests in multiple entities "numerous" times "between 2010 and 2016." (Response to interrogatory No. 12.) It is not clear from the complaint, Tabbaa's answers to interrogatories, or the affidavit attached to his brief in opposition to the summary judgment motion when he specifically requested the return of his interests in Doctor Realty, L.L.C. We have no way of knowing whether he requested the return of his interests in all entities at once or whether he only requested a few at a time over a period of years and, if so, when he requested the return of his interests in Doctor Realty, L.L.C.

{¶ 26} Tabbaa argues that his breach-of-contract claim relative to Doctor Realty, L.L.C. has not yet accrued because the property owned by that entity has not been sold, and the Nouraldins have not yet deprived him of the proceeds. (Plaintiff's response to motion for summary judgment p. 5; affidavit attached to plaintiff's response to motion for summary judgment ¶ 9.) We simply do not have sufficient

information in the record to make a determination as to whether this cause of action has accrued and, if so, when it accrued. Therefore, the trial court erred in granting summary judgment on that claim without sufficient evidence to make such a determination.

{¶ 27} The second assignment of error is sustained.

{¶ 28} Judgment reversed and case remanded to the trial court for further proceedings. Tabbaa did not challenge the trial court's finding that his claims for promissory estoppel, conversion, fraud, unjust enrichment, and declaratory judgment were barred by the applicable statutes of limitations relative to those claims. Therefore, the trial court's order granting summary judgment on those claims remains unchanged.

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

The court finds there were reasonable grounds for this appeal.

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

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

EILEEN T. GALLAGHER, JUDGE

ANITA LASTER MAYS, P.J., and
LISA B. FORBES, J., CONCUR