[Cite as *Sal's Heating & Cooling, Inc. v Bers Acquisition Co., L.L.C.*, 2022-Ohio-1756.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

SAL'S HEATING AND COOLING INC., :

Plaintiff-Appellant, :

No. 110685

v. :

BERS ACQUISITION CO., LLC, ET AL., :

Defendants-Appellees. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: May 26, 2022

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-20-941545

Appearances:

Dan Morell & Associates, L.L.C., Dan A. Morrell, Jr., and Lisa M. Lahrmer, *for appellants*.

Benesch, Friedlander, Coplan & Aronoff, LLP, Thomas O. Crist, and Richard Hepp, *for appellees*.

EMANUELLA D. GROVES, J.:

{¶ 1} Plaintiff-appellant, Sal's Heating and Cooling, Inc. ("Sal's"), appeals the trial court's dismissal of Counts 7 and 8 of its complaint for injunctive relief and damages against three corporate defendants and their principals, as well as against 13 of Sal's former employees. For the reasons set forth below, we affirm.

Procedural and Factual History

{¶ 2} Sal's provides heating and air conditioning repair and installation, as well as other contracting services to residential and commercial customers in Northeast Ohio. To protect its valuable and confidential information relating to business operations including, but not limited to, client lists, employee lists, vendor information, pricing, advertising guidelines, and trade secrets, Sal's requires that its employees sign a "Non-Competition Agreement" and/or an "Employee Confidentiality/Security Agreement."

{¶ 3} The Non-Competition Agreement contained three covenants, which provided in part that: (1) for a period of two years after termination of employment, the former employee will not directly or indirectly engage in any business that competes with Sal's; (2) for a period of two years after employee's termination, the former employee shall not directly or indirectly solicit business from, or attempt to sell, license or provide the same or similar products or services as were presently provided to any Sal's client or customer; and (3) for a period of two years after termination, the former employee will not directly or indirectly solicit, induce, or attempt to induce any Sal's employee to terminate his or her employment with Sal's.

{¶ 4} The Employee Confidentiality/Security Agreement contained seven covenants. Paramount among the covenants was the employee's acknowledgment that he or she will develop and be exposed to information that was or will be confidential and proprietary to Sal's. Further, that the employee agreed to use such information only in the performance of his or her duties with Sal's, to maintain such

information in confidence, and to disclose the information only with the consent or upon the direction of Sal's.

{¶ 5} In Spring 2020, several Sal's employees went to work for either BERS Acquisition Co., LLC ("BERS"), or HUGE Acquisition Co., LLC ("HUGE"). Sal's employees Nyle LaForce, Robert Sibley, Dean Pieronek, Brandon Tague, Da'Rell Albert, Ediva Johnson, Jack Salem, Bruce LaForce, and Donald Supeck went to work for BERS. While Terry Reitz, James Damm, Matthew Waldren, and William May went to work for HUGE (The individuals named above, who went to work for either BERS or HUGE, are collectively, "former employees"). The former employees went to work for BERS and HUGE in the same capacities as their previous employment with Sal's.

{¶ 6} BERS and HUGE are both engaged in providing the same services as Sal's, operate in the same market, and thus compete with Sal's. BERS and HUGE are owned by JAWS-SDG Holdings, LLC ("JAWS"), a privately held limited liability company that is owned by Jesse A. Warren ("Warren"). Warren, through JAWS, purchased BERS from Bryan E. Rutkosky ("Rutkosky"), and HUGE from Mark W. Huge ("Huge").

{¶ 7} On May 18, 2020, Sal's sent a cease-and-desist letter to BERS, Warren, Ruthosky, and Nyle LaForce ("LaForce") in reference to BERS' hiring of LaForce in breach of his non-competition and confidentiality agreements. On June 2, 2020, Sal's sent a cease-and-desist letter to HUGE, Warren, Huge, and Terry Reitz

("Reitz") in reference to HUGE's hiring of Reitz in breach of his non-competition and confidentiality agreements.

{¶ 8} On December 16, 2020, Sal's filed suit against BERS, HUGE, JAWS, their principals, and against its former employees, who had left to work for its competitors. The complaint, which was twice amended, brought claims for breach of non-competition agreement, breach of non-solicitation agreement, breach of contractual duty not to disclose confidential and proprietary information, violation of Ohio's Uniform Trade Secret Act ("OUTSA"), tortious interference, and civil conspiracy.

{¶ 9} In the complaint, Sal's specifically alleged that BERS, HUGE, JAWS, and Warren have jointly conspired to knowingly solicit, hire, and/or retain Sal's customers, vendors, and employees as an improper means to utilize the valuable confidential information that Sal's employees acquired during the scope and course of their employment with Sal's. In addition, that despite being clearly informed that Sal's former employees were subject to Non-Competitive Agreements and/or Employee Confidentiality/Security Agreement or both, these defendants have continued to conspire to solicit, hire and/or retain Sal's trained and valuable employees to both utilize the skills of Sal's employees and its proprietary and confidential information obtained in the course and scope of their employment with Sal's. Further, Sal's alleged that the former employees' intimate knowledge of its business affairs and operations has given BERS and HUGE an unfair business

advantage and has caused and will continue to cause irreparable damage unless the covenants and agreements not to compete are enforced.

{¶ 10} On March 1, 2021, the defendants filed a motion to dismiss Counts 2, 3, 4, 7, and 8 of the second amended complaint and to provide a more definite statement.

{¶ 11} On June 24, 2021, the trial court denied defendant's motion to dismiss Counts 2, 3, and 4. The trial court granted defendant's motion to dismiss Counts 7 and 8, and for a more definite statement.

{¶ 12} Sal's now appeals and assigns the following errors for review:

Assignment of Error No.1

> The trial court erred as a matter of law in dismissing count seven of appellant's complaint in finding that appellant failed to plead an underlying tort that would be actionable as an independent cause of action to make out a civil conspiracy claim against appellees Rutkosky and Mark Huge.

Assignment of Error No. 2

> The trial court erred in dismissing count eight of appellant's complaint in finding that count eight is preempted by the Ohio Uniform Trade Secret Act.

Law and Analysis

{¶ 13} In the first assignment of error, Sal's argues the trial court erred in dismissing Count 7, civil conspiracy, on the basis that it failed to plead an underlying tort.

{¶ 14} Preliminarily, the trial court dismissed the respective counts pursuant to Civ.R. 12(B)(6). "A Civ.R. 12(B)(6) motion to dismiss for failure to state a claim

on which relief can be granted "'is procedural and tests the sufficiency of the complaint.'"" *Harper v. Weltman, Weinberg & Reis Co., L.P.A.*, 8th Dist. Cuyahoga No. 107439, 2019-Ohio-3093, ¶ 11, quoting *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 605 N.E.2d 378 (1992), citing *Assn. for Defense of Washington Local School Dist. v. Kiger*, 42 Ohio St.3d 116, 117, 537 N.E.2d 1292 (1989).

{¶ 15} "A trial court's review of a Civ.R. 12(B)(6) motion to dismiss is limited to the four corners of the complaint along with any documents properly attached to, or incorporated within, the complaint." *Lakeside Produce Distrib. v. Wirtz*, 8th Dist. Cuyahoga No. 109460, 2021-Ohio-505, ¶ 11, citing *Glazer v. Chase Home Fin. L.L.C.*, 8th Dist. Cuyahoga Nos. 99875 and 99736, 2013-Ohio-5589, ¶ 38. "Within those confines, a court accepts as true all material allegations of the complaint and makes all reasonable inferences in favor of the nonmoving party." *Srokowski v. Shay*, 8th Dist. Cuyahoga No. 100739, 2014-Ohio-3145, ¶ 10, citing *Fahnbulleh v. Strahan*, 73 Ohio St.3d 666, 667, 653 N.E.2d 1186 (1995).

{¶ 16} "It is a long-standing principle that a plaintiff is not required to prove his or her case within the complaint at the pleading stage." *Dean v. Cuyahoga Cty. Fiscal Office*, 8th Dist. Cuyahoga No. 107824, 2019-Ohio-5115, ¶ 16, citing *York v. Ohio State Hwy. Patrol*, 60 Ohio St.3d 143, 144-145, 573 N.E.2d 1063 (1991). "'Consequently, as long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss.'" *Id.*, quoting *York* at 145.

{¶ 17} An appellate court reviews de novo a trial court's decision granting a motion to dismiss under Civ.R. 12(B)(6). *Figgie v. Figgie*, 8th Dist. Cuyahoga No. 109834, 2021-Ohio-1812, ¶ 7, citing *Naiman Family Partners, L.P. v. Saylor*, 2020-Ohio-4987, 161 N.E.3d 83, ¶ 11 (8th Dist.), citing *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5, "In applying the de novo standard of review, this court independently reviews the record without affording deference to the trial court's judgment." *Id.*, citing *Penniman v. Univ. Hosps. Health Sys.*, 2019-Ohio-1673, 130 N.E.3d 333, ¶ 7 (8th Dist.), citing *Bandy v. Cuyahoga Cty.*, 8th Dist. Cuyahoga No. 106635, 2018-Ohio-3679, ¶ 10, citing *Herakovic v. Catholic Diocese of Cleveland*, 8th Dist. Cuyahoga No. 85467, 2005-Ohio-5985, ¶ 13.

Civil Conspiracy

{¶ 18} "To establish a civil conspiracy claim, the plaintiff must prove: '(1) a malicious combination of two or more persons, (2) causing injury to another person or property, and (3) the existence of an unlawful act independent from the conspiracy itself.'" *Goree v. Northland Auto Ent.*, 8th Dist. Cuyahoga No. 108881, 2020-Ohio-3457, ¶ 78, citing *Bentkowski v. Trafis*, 2015-Ohio-5139, 56 N.E.3d 230, ¶ 50 (8th Dist.), quoting *Kelley v. Buckley*, 193 Ohio App.3d 11, 2011-Ohio-1362, 950 N.E.2d 997, ¶ 70 (8th Dist.), citing *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 700 N.E.2d 859 (1998).

{¶ 19} In this matter, regarding its claim for civil conspiracy, Sal's alleged in pertinent part as follows:

86. [A]lthough Warren is the controlling member of both BERS and HUGE, both Rutkosky and/or Mark Huge appear to have publicly retained some interest or involvement in each of these entities despite privately stating they have not.

87. At the time of the BERS and HUGE purchases, Rutkosky had assigned his HVAC and Plumbing licenses to BERS and Mark Huge and [David E.] Brenneis[1] had assigned their HVAC licenses to HUGE, and these assignments permit BERS and HUGE to comply with the O.R.C. 4740.13 requirement that each company must be assigned a valid license of a registered contractor.

88. O.R.C. 4740.13 provides that any license that ceases to be actively engaged with and/or employed by the contracting company must notify the appropriate specialty section of the Construction Industry Licensing Board within ninety calendar days from the time a license assignment becomes invalid.

* * *

90. Despite the foregoing, Rutkosky, Mark Huge, and Brenneis permitted and/or continue to permit their HVAC and/or plumbing licenses to be assigned to and/or utilized by BERS and/or HUGE by renewing their annual license assignments under the apparent former entities known as BERS and /or HUGE, after each former entity's sale to BERS and HUGE.

91. Rutkosky, Mark Huge, and Brenneis permitted assignment and/or continuing renewed assignments of their licenses have allowed BERS and HUGE and/or Warren to hold themselves out as an otherwise legal and validly operating HVAC contracting company that are fully and lawfully able to both undertake HVAC projects and to appear as an otherwise desirable employer(s) to Sal's employees who know of the former BERS and HUGE names by reputation.

* * *

93. Rutkosky, Mark, and/or Brenneis improperly assigned their licenses to BERS and/or HUGE and these actions constitute an independent tortious act, as the duty to notify the Construction Industry Licensing Board of an entity's legal ownership status change

[1] By agreement, Brenneis, the former general manager of HUGE, was dismissed from the case.

> lies with the licensee to so inform the Board that they no longer own nor manage the assigned contracting companies as identified in filings with the Ohio Secretary of State.

{¶ 20} However, as previously stated, after viewing the above allegations as true and in a light most favorable to Sal's, the trial court found that Count 7 could not survive because it failed to plead an underlying tort that would be actionable as an independent cause of action.

{¶ 21} Notwithstanding the trial court's conclusion, Sal's contends that Rutkosky and Huge violated R.C. 4740.13, by allowing BERS, HUGE, and Warren to utilize their HVAC licenses. Yet, we too fail to see any indicia that an independent cause of action exists on account of Rutkosky and Huge allegedly assigning their HVAC licenses to BERS and HUGE.

{¶ 22} To begin, R.C. 4740.13 provides in part that

> (A) No person shall act as or claim to be a type of contractor that this chapter licenses unless that person holds or has been assigned a license issued pursuant to this chapter for the type of contractor that person is acting as or claiming to be.

{¶ 23} Here, as we can clearly observe, R.C. 4740.13 is a statutory provision that requires contractors engaged in certain skilled trades to be assigned or issue a license. Sal's does not dispute that a statutory violation, as it alleges here, is not a tort. Sal's recognizes the requirement that it must allege facts to separately support an unlawful act or tort. Sal's maintains it has sufficiently supported the claim and relies on our decision in *Mangelluzzi v. Morley*, 2015-Ohio-3143, 40 N.E.3d 588 (8th Dist.). However, we find Sal's reliance on *Mangelluzzi* misplaced.

{¶ 24} In *Mangelluzzi*, we found that the Mangelluzzis had sufficiently satisfied Civ.R. 8 in pleading a civil conspiracy claim, because they alleged that the Morleys maliciously conspired and acted with the intent of depriving them of their right to privacy, intending to cause them emotional distress, and intending damage to their reputations in the community. *Id.* at ¶ 55. Thus, based on the specific instances of misconduct identified in the complaint, we could reasonably infer that the Morleys conspired together in committing the alleged torts. *Id.*

{¶ 25} Critically, present in *Mangelluzzi,* but missing here, is the independent act. As we stated then, "[a]dditionally, having already found that the other torts survive the pleadings stage, an independent act exists to support the claim [of civil conspiracy]." *Id.* That Sal's has alleged that Rukosky and Huge have assigned their licenses to BERS and HUGE, does not automatically transform the alleged act into an independent cause of action. Thus, without an independent act, Sal's reliance on *Mangelluzzi* is misplaced.

{¶ 26} As alluded to earlier, an action for civil conspiracy cannot be maintained unless an underlying unlawful act is committed. *Olive Oil, L.L.C. v. Cleveland Elec. Illum. Co.*, 8th Dist. Cuyahoga No. 109553, 2021-Ohio-2309, ¶ 20, citing *Williams v. United States Bank Shaker Square*, 8th Dist. Cuyahoga No. 89760, 2008-Ohio-1414, ¶ 16, citing *Gosden v. Louis*, 116 Ohio App.3d 195, 219, 687 N.E.2d 481 (9th Dist.1996). Here, Sal's failure to plead an unlawful act, that is separate and apart from the conspiracy itself, proves fatal to this claim.

{¶ 27} Further, pursuant to R.C. 4740.13(B), Sal's has no standing to bring an independent cause of action against Rutkosky and Huge for the violations alleged. That subsection provides as follows:

> (B) Upon the request of the appropriate specialty section of the Ohio construction industry licensing board, the attorney general may bring a civil action for appropriate relief, including but not limited to a temporary restraining order or permanent injunction in the court of common pleas of the county where the unlicensed person resides or is acting as or claiming to be a licensed contractor.

{¶ 28} Here, a plain reading of the statute reveals that it is within the province of the Ohio Construction Industry Licensing Board (the "Board"), not Sal's, to initiate actions to enforce compliance with the statute. Under the framework delineated in R.C. 4740.16, "an investigator appointed by the director of commerce, on behalf of the appropriate specialty section of the Ohio construction industry licensing board may investigate any person who allegedly has violated section 4740.13 of the Revised Code." R.C. 4740.16(A).

{¶ 29} If

> after an investigation pursuant to section 4740.05 of the Revised Code, the appropriate specialty section determines that reasonable evidence exists that a person has violated section 4740.13 of the Revised Code, the appropriate specialty section shall send a written notice to that person in the same manner as prescribed in section 119.07 of the Revised Code for licensees.

Id.

{¶ 30} Next,

> [t]he appropriate specialty section shall hold a hearing regarding the alleged violation in the same manner prescribed for an adjudication hearing under section 119.09 of the Revised Code. If the appropriate specialty section, after the hearing, determines a violation has

> occurred, the appropriate specialty section, upon an affirmative vote of a majority of its members, may impose a fine on the person, not exceeding one thousand dollars per violation per day and may file a complaint against the person with the appropriate local prosecutor for criminal prosecution. The appropriate specialty section's determination is an order that the person may appeal in accordance with section 119.12 of the Revised Code.

R.C. 4740.16(B).

{¶ 31} Thus, in addition to the inability of the alleged violation to serve as an independent cause of action to support a claim of civil conspiracy, Sal's has no standing, under R.C. 4740.13, to bring an independent cause of action against Rutkosky and Huge for the alleged violation of that statute.

{¶ 32} Although the power to investigate and to address violations of R.C. 4740.13 is vested in the Board, Sal's now claims that R.C. 2307.60 creates a statutory cause of action resulting from any criminal act. Sal's suggests that a statutory tort action, pursuant to R.C. 2307.60(A)(1), is sufficient to serve as the underlying tort to support its civil conspiracy claim.

{¶ 33} Briefly, under R.C. 2307.60(A)(1), "anyone injured in person or property by a criminal act has, and may recover full damages in, a civil action unless specifically excepted by law * * *."

{¶ 34} However, Sal's did not raise this argument in the trial court. It is well established that "a party cannot raise new arguments and legal issues for the first time on appeal, and that failure to raise an issue before the trial court waives that issue for appellate purposes." *Hudson & Keyse LLC v. Sherrills*, 8th Dist. Cuyahoga No. 110366, 2022-Ohio-126, ¶ 14, citing *Miller v. Cardinal Care Mgt.,* 8th Dist.

Cuyahoga No. 107730, 2019-Ohio-2826, ¶ 23, citing *Cleveland Town Ctr., L.L.C. v. Fin. Exchange Co. of Ohio, Inc.,* 2017-Ohio-384, 83 N.E.3d 383, ¶ 28 (8th Dist.); *Kalish v. Trans World Airlines, Inc.,* 50 Ohio St.2d 73, 79, 362 N.E.2d 994 (1977) (appellate courts "will not consider a question not presented, considered, or decided by a lower court"). Thus, we will not consider this argument for the first time on appeal.

{¶ 35} Undeterred, Sal's further argues that Rutkosky and Hughes, by assigning their licenses, misrepresented the licensing status of BERS and HUGE to the public as well as to the state Board. Sal's contends this supports a claim for fraudulent misrepresentation sufficient to support the claim of civil conspiracy.

{¶ 36} It is important to note that Sal's claim for fraudulent misrepresentation constitutes a fraud claim that must be pled with particularity. *Glazer v. Chase Home Fin. L.L.C.*, 8th Dist. Cuyahoga Nos. 99875 and 99736, 2013-Ohio-5589, at ¶ 83. Civ.R. 9(B) provides, "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

{¶ 37} To establish a claim of fraudulent representation, a plaintiff must establish the following:

> "(a) a representation or, where there is a duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another into relying upon it,

> (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance."

Spit Shine A Detailer, L.L.C. v. Rick Case Hyundai, 2017-Ohio-8888, 100 N.E.3d 1231, ¶ 17, citing *Groob v. KeyBank*, 108 Ohio St.3d 348, 357, 2006-Ohio-1189, 843 N.E.2d 1170, ¶ 47, quoting *Gaines v. Preterm-Cleveland, Inc.,* 33 Ohio St.3d 54, 55, 514 N.E.2d 709 (1987).

{¶ 38} Here, we can easily observe that Sal's cannot establish a claim for fraudulent misrepresentation. Notably absent is a transaction between Sal's and either of these two individuals. As a result, we find this present claim not well-taken.

{¶ 39} Finally, Sal's argues that the failure of Rutkosky and Huge to insist that BERS, HUGE, and Warren to honor Sal's right to protect its confidential information, trade secrets, and non-competitive agreements is an underlying tort that should suffice to state a claim of civil conspiracy. We find no merit in this assertion.

{¶ 40} In the recent past, we addressed a similar notion in *Godwin v. Facebook, Inc.,* 8th Dist. Cuyahoga No. 109203, 2020-Ohio-4834, and stated:

> According to the drafters of the Restatement of the Law 2d, Torts 122, Section 315 (1965), as adopted in *Gelbman v. Second Nat'l Bank*, 9 Ohio St.3d 77, 79, 458 N.E.2d 1262 (1984), however, there is generally no duty to control the conduct of a third person to prevent harm to another even though "the actor realizes that he has the ability to control the conduct of a third person and could do so with only the most trivial of efforts and without any inconvenience to himself." Restatement of the Law 2d, Torts 122, Section 315, Comment b (1965); *Estates of Morgan v. Fairfield Family Counseling Ctr.*, 77 Ohio St.3d 284, 300, 673 N.E.2d 1311 (1997), fn. 5.

Id. at ¶ 20.

{¶ 41} Sal's reliance on the ability of Rutkosky and Hughes to control the conduct of BERS, HUGHES, and Warren does not give rise to a duty to control them as contemplated under Ohio law. As such, we summarily reject this assertion.

{¶ 42} Following our de novo review, we conclude Sal's has failed to allege an "unlawful act" independent from the conspiracy itself. Because Sal's failed to establish the requisite elements to sustain a cause of action for civil conspiracy, his claim fails as a matter of law. As such, the trial court did not err when it dismissed Count 7 of the complaint.

{¶ 43} Accordingly, we overrule Sal's first assignment of error.

{¶ 44} In the second assignment of error, Sal's argues the trial court erred when it found that Count 8 was preempted by the OUTSA.

Misappropriation of Trade Secrets

{¶ 45} Relevantly, effective July 20, 1994, the General Assembly enacted OUTSA, R.C. 1333.61 through 1333.69, which provides for civil remedies, i.e., injunctive relief and damages, for the misappropriation of trade secrets. *Berardi's Fresh Roast, Inc. v. PMD Ent., Inc.*, 8th Dist. Cuyahoga No. 93920, 2010-Ohio-5124, citing *State ex rel. Besser v. Ohio State Univ.,* 87 Ohio St.3d 535, 538-539, 721 N.E.2d 1044 (2000), citing *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.,* 80 Ohio St.3d 513, 523, 687 N.E.2d 661 (1997).

{¶ 46} Additionally, section R.C. 1333.67(A) states that OUTSA displaces "conflicting tort, restitutionary, and other laws of this state providing civil remedies for misappropriation of a trade secret." *Tomaydo-Tomahhdo L.L.C. v. Vozary*,

2017-Ohio-4292, 82 N.E.3d 1180, ¶ 47 (8th Dist.). *See Rogers Indus. Prods. v. HF Rubber Mach., Inc.*, 188 Ohio App.3d 570, 2010-Ohio-3388, 936 N.E.2d 122 (9th Dist.); *Allied Erecting & Dismantling Co., v. Genesis Equip. & Mfg.*, 649 F.Supp.2d 702, 720 (N.D.Ohio 2009).

{¶ 47} In Count 8, Sal's alleged that BERS, HUGE, JAWS, Warren, Rutkoksy, Huge, Nyle LaForce, Reitz, Damm, and Sibley conspired to misappropriate its trade secrets and induce former employees to breach their contractual obligation to Sal's. In dismissing Count 8, the trial court found that the civil conspiracy claim is specifically linked to the alleged theft of trade secrets, which is asserted in Counts 4 and 5. Thus, it was preempted by OUTSA.

{¶ 48} Sal's argues against preemption citing *Glasstech, Inc. v. TGL Tempering Sys., Inc.,* 50 F.Supp.2d 722, 730 (N.D.Ohio 1999), for the proposition that under OUTSA only claims that are based entirely on factual allegations of misappropriation of trade secrets are preempted.

{¶ 49} However, we find the Southern District's discussion in *Campfield v. Safelite Grp., Inc.*, S.D.Ohio No. 2:15-cv-2733, 2021 U.S. Dist. LEXIS 62070 (Mar. 31, 2021), of a broader approach, applicable to this matter. We visit the discussion here:

> The OUTSA incorporates the Uniform Trade Secrets Act's displacement of "conflicting tort, restitutionary, and other laws of this state providing civil remedies for misappropriation of a trade secret." *Stolle v. Mach. Co., LLC v. Ram Precision Indus.*, 605 F.App'x 473, 484 (6th Cir.2015), quoting R.C. 1333.67(A). If a civil remedy is not based on misappropriation of a trade secret, it is not preempted. *Id.*, quoting R.C. 1333.67(B)(2).

> The Sixth Circuit has adopted a broader interpretation of OUTSA preemption, finding that it "should be understood to preempt not only causes of action for misappropriation of trade secrets but also causes of action that are based in some way on misappropriation of trade secrets." *Id.*
>
> The test to determine whether a state law claim is displaced by OUTSA is to determine whether "the claims are no more than a restatement of the same operative facts that formed the basis of the plaintiff's statutory claim for trade secret misappropriation." *Id.* at 485, quoting *Thermodyn Corp. v. 3M Corp.,* 593 F.Supp.2d 972, 989 (N.D.Ohio 2008).
>
> "Where the state-law claim has a factual basis independent from the facts establishing the OUTSA claim, the portion of the claim supported by an independent factual basis survives preemption." *Id.*, quoting *Miami Valley Mobile Health Servs., Inc. v. ExamOne Worldwide, Inc.,* 852 F.Supp.2d 925, 940 (S.D.Ohio 2012).

{¶ 50} Embracing this broader approach, we have reviewed Counts 4, 5, and 8 of Sal's second amended complaint. Our review reveals that Sal's redeploys throughout the same operative facts that form the basis for its statutory claim for trade secret misappropriation.

{¶ 51} As illustration, in Count 4, it is alleged that

> Sal's Former Employee Defendants have and/or continue to use improper means to misappropriate and exploit Sal's confidential and proprietary trade secret information to benefit themselves and/or their employers, Defendants, BERS and/or HUGE, for whom they have worked since leaving Sal's employment.

{¶ 52} In Count 5, it is alleged that

> BERS, HUGE, JWAS, and/or Warren has and will continue to use the actual proprietary and secret information of Sal's to interfere and/or attempt to interfere with actual established residential commercial customers, and/or to contact and solicit former or prospective Sal's customers whose identity was obtained from Sal's Former Employee Defendants and/or Sal's proprietary information copied or retained by Sal's Former Employee Defendants.

{¶ 53} In Count 8, it is alleged that

> BERS, HUGE, JAWS, Warren, Rutkoksy, Mark Huge, Brenneis, Nyle LaForce, Reitz, Damm, and Sibley have maliciously conspired or acted in concert to participate in malicious combination with the intent of misappropriating Plaintiff Sal's trade secrets and/or inducing or attempting to induce the former Sal's employee Defendants and other their contractual agreements of non-competition, non-disclosure, and/or non-solicitation with Plaintiff Sal's * * *.

{¶ 54} As reflected in the above excerpt, the central theme of the three counts is the misappropriation of trade secrets. In substance, the allegations contained in the respective counts are mirror images of each other. As such, the trial court did not err when it concluded that Count 8 was preempted by OUTSA.

{¶ 55} Accordingly, we overrule Sal's second assignment of error.

{¶ 56} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

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

EMANUELLA D. GROVES, JUDGE

EILEEN A. GALLAGHER, P.J., and
MARY J. BOYLE, J., CONCUR

[Cite as *AC Asset, L.L.C. v. Mitchell*, 2022-Ohio-1763.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

AC ASSET, L.L.C.,	:	
Plaintiff-Appellee,	:	No. 110818
v.	:	
CHANEL MITCHELL, ET AL.,	:	
Defendants-Appellants.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: May 26, 2022

Civil Appeal from the Cleveland Municipal Court
Housing Division
Case No. 2020 CVG 005551

Appearances:

Powers Friedman Linn, P.L.L, and Rachel C. Cohen, *for appellee*.

L. Bryan Carr, *for appellant* Chanel Mitchell.

KATHLEEN ANN KEOUGH, J.:

{¶ 1} Defendant-appellant, Chanel Mitchell ("appellant"), appeals from the housing court's judgment affirming the magistrate's decision and awarding damages in favor of plaintiff-appellee, AC Asset L.L.C. ("AC Asset"). For the reasons that follow, we affirm.

{¶ 2} On June 24, 2020, AC Asset filed a complaint for forcible entry and detainer and money damages against appellant and her cousin, Taeylor Mitchell ("Taeylor") (collectively "the tenants"). The complaint alleged that appellant and Taeylor were tenants with a written lease agreement for the premises located at 1383 West 114th Street in Cleveland (hereinafter "leased premises"). It further alleged that the tenants failed to leave the premises following the requisite three-day notice and owed back and future rent pursuant to the terms of the lease agreement. The complaint sought damages in the amount of $1,524 for unpaid rent and requested additional contractual damages. AC Asset attached to the complaint the lease agreement and all other requisite documents to maintain the action.

{¶ 3} Following a July 30, 2020 virtual hearing, the housing court granted AC Asset's motion to dismiss Count 1 (forcible entry and detainer) against the tenants because the premises was vacant.

{¶ 4} On August 21, 2020, appellant, pro se, filed an answer denying that she (1) lived or resided at the leased premises, and (2) signed the lease attached to the complaint. She stated that she was a victim of identity theft and referenced a police report filed with the Lakewood Police Department. Appellant included with her answer a copy of two lease agreements purportedly proving that she resided at another location during alleged lease term.

{¶ 5} AC Asset subsequently moved for summary judgment against appellant, contending that because she did not respond to AC Asset's first set of

interrogatories, production of documents, and admissions, she effectively admitted to all matters, and thus, it was entitled to judgment as a matter of law.

{¶ 6} Appellant opposed AC Asset's motion, contending that Taeylor fraudulently used her identity to obtain the lease. She maintained that AC Asset failed to prove that she electronically signed the lease agreement. In support, she provided (1) partial copies of two lease agreements purportedly proving that she resided at other locations than the leased premises; (2) a 2018 email she sent to Taeylor referencing an employment contract; (3) a direct pay report from Wells Fargo showing payments she made to Taeylor from April to November 2019; (4) a July 2020 email from a Lakewood detective containing information on "Identity Theft Reference and Assistance," and referencing a police report number; (5) an email between her and an attorney from AC Asset; and (6) a printout of the docket from the underlying case. Subsequently, appellant filed a new answer to the complaint that also asserted a counterclaim.

{¶ 7} The housing court denied AC Asset's motion for summary judgment, finding that AC Asset served appellant with the discovery requests at an address where she did not reside. It also struck appellant's new answer and counterclaim, finding that she did not seek leave of court prior to filing.

{¶ 8} In preparation for trial, AC Asset filed a trial brief with a list of witnesses and exhibits, including (1) the lease agreement containing the electronic signatures of both appellant and Taeylor; (2) an audit report printed from Adobe Sign showing a timeline of the preparation, submission, and execution of the lease

agreement; (3) an accounting statement regarding the premises; (4) receipts from repairs made to the premises following vacancy; (5) photographs of the premises following vacancy; (5) rental applications purportedly submitted by appellant and Taeylor; and (6) an employment contract between appellant and Taeylor. Appellant did not file a reciprocal brief or exhibits. The matter proceeded to trial before a magistrate who heard the following testimony.

{¶ 9} Cindy Opincar testified that she is the leasing agent for AC Asset. She stated that on or about April 15, 2020, she called appellant at the phone number listed on appellant's rental application and had a conversation with her regarding making rent payments. According to Opincar, appellant did not advise her that her identity had been stolen or that she was not responsible for the debt. On cross-examination, Opincar admitted that she had never seen appellant.

{¶ 10} Daryl Kertesz testified that he is the property manager for AC Asset and familiar with its business operations. According to Kertesz, appellant and Taeylor each electronically submitted the rental application and uploaded a copy of their driver's license and paystubs, along with an application fee. Regarding appellant's application, it was noted that the applicant was "cosigning for applicant." (Tr. 60; exhibit No. I.) A copy of their rental applications was admitted as exhibit No. I.

{¶ 11} Kertesz also explained AC Asset's business practices and procedures involving electronically executing lease agreements. He testified about Exhibit B, which was an audit report from Adobe Sign. According to Kertesz, the audit report

is a "trail system" that tracks the signing process of the lease. He explained that AC Asset generates the lease and sends it electronically to the tenant's email address provided on the rental application. He stated that after the lease is executed, it is automatically emailed back to AC Asset. Kertesz said that after the document is fully executed by all parties, a copy is electronically sent to the tenant.

{¶ 12} Kertesz testified that both appellant and Taeylor electronically executed the lease in the same manner as all leases that AC Asset issues. He further discussed and explained the information contained in the audit report. Kertesz said that according to Exhibit B, the lease was emailed simultaneously to appellant and Taeylor at the respective email addresses provided on their rental application. The report shows that Taeylor viewed the lease, and ten minutes later, appellant viewed the lease. According to the report, appellant e-signed the lease, and over two hours later, Taeylor e-signed the lease. The document was then emailed and viewed by Opincar, who also e-signed it. The fully executed lease was then emailed to all parties.

{¶ 13} Kertesz testified that pursuant to the audit report, appellant viewed the email containing the lease agreement and signed the lease from the same IP address. He stated that pursuant to the audit report, Taeylor viewed the email containing the lease agreement and e-signed the lease from different IP addresses, and different from the IP address associated with appellant's execution of the lease. Kertesz testified that it was his understanding that different computers use different IP addresses. (Tr 32.) Appellant did not object to Kertesz's testimony or

assert that an expert witness was required to testify about the significance of IP addresses.

{¶ 14} Kertesz further testified that he was present when Opincar called appellant in April 2020. According to Kertesz, he heard appellant tell Opincar that Taeylor "needed to learn her lesson." (Tr. 34). He stated that appellant did not allege during this conversation that Taeylor had stolen her identity.

{¶ 15} Appellant testified that she employed Taelyor as a nanny from 2018 until March 2020. She stated that during that time, Taeylor had unfettered access to her personal information, including her driver's license, social security number, banking information, and work computer. She stated that she researched the IP address identified on the Adobe Sign audit report and discovered that the address belonged to Oracle, the company she worked for that was based out of California. Appellant testified that when she worked for Oracle, she lived in Texas. She explained to the court that Taeylor could have used her work computer simultaneously with another computer to access and sign the lease on her own behalf and forge her name. She denied that she electronically executed the lease and that she ever spoke with Opincar.

{¶ 16} In support of her claim that Taeylor forged her signature, appellant stated that she filed a police report with Lakewood police department. She admitted, however, that she did not provide AC Asset with a copy of the police report, nor did she submit it to the court as an exhibit. She admitted that other

than the report, she did not have any other proof that Taeylor used her identity to execute the lease.

{¶ 17} During the trial, the magistrate extended great courtesy and consideration to appellant by allowing her to refer to, use, and rely on the exhibits she filed with her answer and summary judgment opposition. Over objection, the trial court admitted those exhibits into evidence.

{¶ 18} At the close of trial, the magistrate stated that she would take the matter under advisement but because Taeylor failed to answer the complaint, AC Asset was entitled to a default judgment against her.

{¶ 19} On June 3, 2021, the magistrate issued a thorough written decision finding that AC Asset proved by a preponderance of the evidence that the lease for the premises was signed by appellant and that appellant did not meet her burden of demonstrating that she was a victim of identity theft or that anyone other than herself applied for the apartment and signed the lease. The magistrate further determined that AC Asset was entitled to damages in the amount of $2,540 for unpaid rent and $382.85 for damages beyond normal wear and tear to the leased premises. After deducting the security deposit amount, the magistrate concluded that appellant and Taeylor were liable for damages in the amount of $2,287.85.

{¶ 20} The housing court approved and confirmed the magistrate's decision the same day, and entered judgment against appellant and Taeylor in the amount of $2,287.85.

{¶ 21} Appellant retained counsel and filed timely objections, contending that the magistrate erred in its determination that she failed to prove that Taeylor assumed her identity and forged her signature on the lease. Specifically, she raised the following three objections: (1) her signature was used on the lease without permission; (2) she had no knowledge of the rental application; and (3) she never resided at the property. In support, appellant provided for the first time a copy of the July 1, 2020 police report she made with the Lakewood Police Department, and copies of text messages purportedly exchanged between her and Taeylor regarding Taeylor renting an apartment on West 114th Street. Appellant also attached to her written objections copies of her W-2 tax forms, utility bills, her child's school enrollment application, and proof of payment of rent at locations other than West 114th to prove that she did not live at the leased premises.

{¶ 22} Before the housing court ruled on appellant's objections, appellant, pro se, filed additional "evidence" in support of her objections and directed the court to "several inaccurate details" that AC Asset presented at trial. Appellant submitted photographs of text messages between her and Taeylor, information regarding her employment at Oracle, a copy of a utility bill, and her lease agreement from October 2017 until October 2019. According to appellant, the additional documentation proved that Taeylor assumed her identity and forged her name on the lease agreement.

{¶ 23} On August 18, 2021, the housing court issued a thorough written decision overruling appellant's objections and affirming the court's prior decision

confirming the magistrate's decision. The housing court, citing Civ.R. 53(D)(4)(d), determined that it would not consider appellant's exhibits attached to her objections because she failed to demonstrate that those exhibits were unavailable to her at the time of the trial. The court overruled appellant's objections, finding that the testimony and evidence presented at trial demonstrated that both appellant's and Taeylor's signatures were electronic and that appellant's copy of the lease was accessed and signed from an IP address belonging to her employer. The court further found that appellant's untimely evidence of text messages between her and Taeylor did not establish that she had no knowledge of the rental application. The court further noted that although appellant finally presented the police report, she failed to explain why she did not present it prior to trial during discovery or at trial. Finally, the court determined that whether appellant actually resided at the leased premises was not dispositive to the issue of whether she was liable under the terms of the lease because pursuant to the rental application, she was intended to be a co-signer of the lease.

{¶ 24} Appellant now appeals, raising two assignments of error.

I. Standard of Review

{¶ 25} Civ.R. 53 governs proceedings before a magistrate and the trial court's duties in accepting or rejecting a magistrate's rulings. A party has 14 days from the issuance of a magistrate's decision to file objections with the trial judge; the objections are to be specific and state with particularity the grounds of objection. Civ.R. 53(D)(3)(b)(ii). The party who objects to the magistrate's factual findings has

the duty to provide a transcript of the evidence relevant to the findings to the trial court, or an affidavit of that evidence. Civ.R. 53(D)(3)(b)(iii). Pursuant to Civ.R. 53(D)(3)(b)(iv), except for a claim of plain error, a party that fails to object to the magistrate's decision may not assign as error on appeal the trial court's adoption of any of the magistrate's factual findings or legal conclusions.

{¶ 26} A trial court's decision to adopt a magistrate's decision is reviewed for an abuse of discretion. *Kapadia v. Kapadia*, 8th Dist. Cuyahoga No. 94456, 2011-Ohio-2255, ¶ 7. A discretionary act that reaches an end or purpose clearly against reason and evidence is an abuse of discretion. *In re Guardianship of S.H.*, 9th Dist. Medina No. 13CA0066-M, 2013-Ohio-4380, ¶ 9.

II. Defective Lease

{¶ 27} In her first assignment of error, appellant contends that the trial court erred in adopting the magistrate's decision that found her liable as a signatory on a defective lease.

{¶ 28} Appellant contends that the lease was defective because the electronic signatures on the lease were not witnessed or notarized as required by the Ohio Statute of Conveyances, promulgated under R.C. 5301.01(A). Appellant did not raise this issue during trial or in her objections to the magistrate's decision. Accordingly, we find that the argument is waived. *See* Civ.R. 53(D)(3)(b)(iv).

{¶ 29} Next, appellant contends that the trial court's finding that she signed the lease is not supported by the evidence. In support, she directs this court to her own testimony where she claimed that Taeylor obtained and used her personal

information to surreptitiously execute the lease, and where she denied that she (1) completed and submitted the rental application; (2) signed the lease; (3) spoke with any agents from AC Asset; (4) visited or lived at the leased premises; and (5) used the email address from which the application was received, submitted, and signed.

{¶ 30} "'In a civil case, in which the burden of persuasion is only by a preponderance of the evidence, evidence must still exist on each element (sufficiency) and the evidence on each element must satisfy the burden of persuasion (weight).'" *Holliday v. Calanni Ents.*, 2021-Ohio-2266, 175 N.E.3d 663, ¶ 21 (8th Dist.), quoting *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 19; *Fanous v. Ochs*, 8th Dist. Cuyahoga No. 98649, 2013-Ohio-1034, ¶ 22 (burden of proof in a civil action for past due rent under a lease is preponderance of the evidence). "'Preponderance of the evidence simply means "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it."'" *Id.*, quoting *In re Starks*, 2d Dist. Darke No. 1646, 2005-Ohio-1912, ¶ 15, quoting *Black's Law Dictionary* (6th Ed.1998) 1182.

{¶ 31} In a manifest-weight review, the reviewing court "'weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [finder of fact] clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed and a new trial ordered.'" *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). Moreover, this court must make every reasonable

presumption in favor of the trial court's judgment and findings of fact and, if the evidence is susceptible of more than one construction, we must give it that interpretation which is consistent with the trial court's judgment. *Eastley* at ¶ 21, citing *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn. 3.

{¶ 32} "A lease is a contract between a landlord and the tenant." *Christe v. GMS Mgt. Co.*, 124 Ohio App.3d 84, 88, 705 N.E.2d 691 (9th Dist.1997). A signature on a contract creates a rebuttable presumption that it was validly executed. *R.C. Olmstead, Inc. v. GBS Corp.*, 7th Dist. Mahoning No. 08 MA 83, 2009-Ohio-6808, ¶ 45, citing *Cardinal Constr. Co. v. Americare Corp.*, 3d Dist. Marion No. 9-84-46, 1986 Ohio App. LEXIS 6579 (Apr. 28, 1986). The use of an electronic signature does not change this rebuttable presumption. *See Bell v. Hollywood Entertainment Corp.*, 8th Dist. Cuyahoga No. 87210, 2006-Ohio-3974, ¶ 16, fn.3 (a contract may not be denied legal effect or enforceability because an electronic signature was used). "A rebuttable presumption is a presumption which is not conclusive and which may be contradicted by evidence." *Forbes v. Midwest Air Charter, Inc.*, 86 Ohio St.3d 83, 85, 711 N.E.2d 997 (1999).

{¶ 33} In order to rebut this presumption, "the party denying the signature must introduce evidence to support [her] denial which if believed would be sufficient to permit the trier of fact to make a finding in [her] favor." *Bates & Springer, Inc. v. Stallworth*, 56 Ohio App.2d 223, 233, 382 N.E.2d 1179 (8th Dist.1978), (construing R.C. 1303.36(A) and the validity of a signature on a promissory note).

When a defendant presents such evidence to rebut the presumption, the burden then remains with the plaintiff to establish that the signature was genuine. *R.C. Olmstead* at ¶ 45. Accordingly, even though the burden in this case rests with AC Asset, appellant has some responsibility to refute the evidence. *SMS Fin. 30 v. Federick D. Harris, M.D., Inc.*, 2018-Ohio-2064, 112 N.E.3d 395, ¶ 46 (8th Dist.), citing *Knox Cty. Local Emergency Planning Commt. v. Santmyer Oil Co.*, 5th Dist. Knox No. 01CA0035, 2002-Ohio-3590, ¶ 17 (in a civil case, where the preponderance of the evidence is the burden of proof, there remains some responsibility on the defendant to refute the evidence).

{¶ 34} The trial court found that AC Asset withstood its burden of proving by a preponderance of the evidence that appellant executed the lease agreement. In support, AC Asset provided documentary evidence that appellant electronically submitted a rental application, along with a copy of her driver's license and a pay stub. Additionally, AC Asset provided evidence of an electronically signed lease agreement and an audit report documenting the execution of the lease agreement by both appellant and Taeylor.

{¶ 35} Although appellant testified that she did not execute the lease, she provided no corroborative, credible evidence that Taeylor assumed her identity and executed the lease agreement on her behalf. During trial, appellant admitted that other than a police report, which she failed to provide during trial, she had no other proof to substantiate her claim. Moreover, the documents that she did provide did not establish that she either actually lived elsewhere or that she paid rent to another

landlord. In fact, the magistrate specifically found that the documentation appellant relied upon to corroborate her defense of identity theft presented "very little probative value to the issue at hand." Accordingly, the housing court did not abuse its discretion in adopting the magistrate's decision that found that appellant failed to rebut with sufficient evidence the presumption that the lease was validly executed, or failed to demonstrate that she was the victim of identity theft.

{¶ 36} This court does not act as factfinders; we neither weigh the evidence nor judge the credibility of witnesses. Our role is to determine whether there is relevant, competent and credible evidence upon which the factfinder could base its judgment. *State v. Bank*, 5th Dist. Licking No. 2004CA00086, 2005-Ohio-3562, ¶ 26, citing *Cross Truck v. Jeffries*, 5th Dist. Stark No. CA-5758, 1982 Ohio App. LEXIS 15233 (Feb. 10, 1982). The fact that appellant offered some evidence to rebut the presumption, even if it is not specifically disputed, does not automatically compel the conclusion that Taeylor forged appellant's signature or that appellant did not sign the lease. Whether the rebuttal evidence rises to the level sufficient to rebut the presumption is still an issue left to the trier of fact. *Bank* at *id*. In this case, the housing court found that appellant's testimony alone was insufficient. We find the trial court's judgment to be supported by competent, credible evidence. Accordingly, we cannot say that the trial court abused its discretion in adopting the magistrate's decision. The assignment of error is overruled.

III. IP Address

{¶ 37} During trial, Kertesz testified regarding AC Asset's business practice and process of electronically creating, submitting, and signing a lease. He stated that appellant and Taeylor executed the lease in the same manner as all leases that AC Asset generates. During his testimony, he stated that the IP addresses on AC Asset's Adobe Sign audit report were different from "Chanel Mitchell" and Taeylor, but that "Chanel Mitchell" viewed and e-signed the lease agreement from the same IP address. Without objection, Kertesz stated that it was his understanding that different computers use different IP addresses. On cross-examination, appellant testified that she researched the IP address listed on the report and that the IP address used by "Chanel Mitchell" to view and e-sign the lease agreement belonged to Oracle — her place of employment.

{¶ 38} In its independent review of the magistrate's decision and filed objections, the trial court noted that appellant and Taeylor each signed the lease from separate IP addresses and that the IP address associated with appellant's access and execution of the lease was sent from "a Texas IP address, the state where [appellant's] employer was based."

{¶ 39} Appellant contends in her second assignment of error that the housing court erred by relying on an IP address to support its conclusion that she signed the lease, without the presentation of expert testimony. Appellant is misreading the housing court's decision. It did not conclude that the IP address evidence proved that she signed the lease. The housing court upheld the

magistrate's decision that found that appellant failed to provide sufficient evidence to counter AC Asset's evidence that appellant was liable under the terms of the lease.

{¶ 40} Nevertheless, expert testimony was not required in this instance. Expert testimony is necessary whenever a factual issue is beyond the ordinary, common and general knowledge and experience of a layperson. *Ramage v. Cent. Ohio Emergency Servs., Inc.*, 64 Ohio St.3d 97, 103, 592 N.E.2d 828 (1992) and *Darnell v. Eastman*, 23 Ohio St.2d 13, 261 N.E.2d 114 (1970), syllabus.

{¶ 41} Appellant provided information during trial regarding Oracle's ownership of the IP address — information that the trial court relied upon. Arguably, any error regarding the lack of expert testimony could be deemed invited error. Nevertheless, expert testimony was not required because the testimony regarding IP addresses was not beyond ordinary, common knowledge. The testimony was used merely to show that "Chanel Mitchell" utilized the same IP address to open and sign the lease. Additionally, appellant testified that she researched the IP address and discovered that it belonged to Oracle, her employer. Granted, the housing court may have been incorrect in its assertion that appellant's employer was based in Texas, but the misstatement is harmless because appellant testified that she worked for Oracle while living in Texas. It is irrelevant where appellant's employer is headquartered; the relevant aspect of the testimony is that the IP address belonged to appellant's employer — testimony that appellant herself provided.

{¶ 42} Accordingly, we find that expert testimony was not required when the evidence was used merely to compare the IP address when the lease was accessed and signed and to show that the IP address belonged to appellant's employer. Any inference drawn from that testimony and evidence was left to the trier of fact. Accordingly, the assignment of error is overruled.

{¶ 43} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

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

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

KATHLEEN ANN KEOUGH, JUDGE

SEAN C. GALLAGHER, A.J., and
FRANK DANIEL CELEBREZZE, III, J., CONCUR

[Cite as *Hawes v. Downing Health Technologies, L.L.C.*, 2022-Ohio-1677.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

SHANE HAWES,	:	
Plaintiff-Appellee,	:	No. 110920
v.	:	
DOWNING HEALTH TECHNOLOGIES L.L.C., ET AL.,	:	
Defendants-Appellees,	:	
[Appeal by Michael Shaut,	:	
Defendant-Appellant.]	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED IN PART; REVERSED IN PART; VACATED IN PART; AND REMANDED
RELEASED AND JOURNALIZED: May 19, 2022

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-16-857599

Appearances:

Morganstern MacAdams & DeVito Co., L.P.A., and Christopher M. DeVito, *for appellee* Shane Hawes.

Cohen Rosenthal & Kramer LLP, Ellen M. Kramer, and Joshua R. Cohen, *for appellant*.

FRANK DANIEL CELEBREZZE, III, J.:

{¶ 1} Appellant Michael Shaut ("Shaut") appeals the decision of the Cuyahoga County Court of Common Pleas entering judgment against him and awarding compensatory damages, punitive damages, and attorney fees to appellee Shane Hawes ("Hawes") following a bench trial. After a thorough review of the facts and applicable law, we affirm in part, reverse in part, vacate in part, and remand to the trial court.

I. Factual and Procedural History

{¶ 2} This case arose from Hawes's investment in and former employment with a company known as Downing Health Technologies, LLC f.k.a. Downing Digital Healthcare Group, LLC n.k.a. 3SI ("Downing Health").

{¶ 3} Defendant Downing Partners, LLC ("Downing Partners") owns a majority interest and operates Downing Health and a pooled investment fund of affiliated companies through defendant Downing Investments, LLC ("Downing Investments"). Downing Investments' general manager is defendant David Wagner ("Wagner"). Downing Investments, through its ownership and the control of Wagner, owns and operates other business entities known as Downing Partners, Downing Health n.k.a. 3SI, and the "portfolio companies" of defendant Surgical Safety Solutions, LLC ("SSS") and defendant IVC Healthcom, LLC ("IVC").

{¶ 4} SSS is a portfolio company that has been merged into 3SI and/or is controlled and operated by 3SI or the other parent corporations known as Downing Investments and its general partner Downing Partners through Wagner. IVC is a

portfolio company that has been merged into 3SI and/or is controlled by the other parent corporate entities Downing Partners and Downing Investments through Wagner.[1]

{¶ 5} Shaut was president of Downing Investments and had invested $500,000 into the business. Shaut also had ownership, directly or indirectly, and management responsibility with respect to the other related Downing entities, including Downing Health. Defendant Marc Lawrence ("Lawrence") was the president and chief operating officer of Downing Health and had ownership, directly or indirectly, and management responsibility at the other related Downing entities. Wagner is the majority owner, chairman, and general manager of Downing Investments.

{¶ 6} In 2014, Hawes was seeking a new employment opportunity and was contacted by a recruiter, Peter Boyle ("Boyle"), who put him in touch with Lawrence, who at the time was running a division of Downing Partners. Hawes spoke several times with both Boyle and Lawrence and eventually had a face-to-face meeting with Lawrence.

{¶ 7} Lawrence presented him with a summary of the organization known as Downing Health. The document consisted of a slide deck that provided information about the organization for Hawes as both an employee and an investor.

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[1] The six corporate defendants named in this matter, known as Downing Health, Downing Partners, Downing Investments, 3SI, SSS, and IVC, may be referred to as "corporate defendants."

{¶ 8} After reviewing the slide deck, Hawes spoke with Boyle and some friends who worked in venture capital to get their thoughts on the opportunity. Hawes conveyed to Boyle that he was having second thoughts about being an employee and investor in the company. His concerns were the compensation, which was lower than he felt comfortable with, and the fact that he was required to make a $250,000 investment in the company. Hawes was aware that the company was a "start-up," which made him nervous because start-ups often fail and carry greater risks than an established company.

{¶ 9} The venture capitalists with whom Hawes had spoken did not help him to feel any more comfortable with investing the money because they told him they had not heard of such an arrangement. One of these venture capitalists was Hawes's friend, Joe Renson ("Renson"), who was the chief executive officer of a venture capital firm. Hawes sent Renson some of the documents he had received regarding Downing Health and asked him to review it. Renson advised Hawes against making the investment and working for Downing Health.

{¶ 10} Boyle suggested that he speak with someone else at the company, namely Shaut. Hawes was familiar with Shaut's name from reviewing the Downing Health organizational chart.

{¶ 11} Shaut and Hawes met at a Starbucks for approximately 45 minutes. The two did not discuss the business operations of the company or any employment matters, such as salary or bonuses. Instead, the discussion was focused on the strategy and legitimacy of the company and the opportunity to "really make some

serious money." Hawes found Shaut to be very honest and upbeat about where the organization was going.

{¶ 12} Prior to Hawes's hiring, Downing Health had failed to make payroll at least once. Shaut did not reveal this information to Hawes at their meeting.

{¶ 13} Ultimately, Hawes decided to move forward with Downing Health, and in October 2014, he signed a two-year employment offer letter with Downing Digital Healthcare Group, LLC, which later became known as Downing Health Technologies, LLC, to serve as vice president of business development. Downing Health has since merged and is now known as 3SI, which is controlled or owned by Downing Investments and its general partner, Downing Partners. In addition, 3SI is now a combination of other Downing portfolio entities known as SSS and IVR.

{¶ 14} Regarding his responsibilities, Hawes's employment agreement provided as follows:

> Your responsibilities may vary from time-to-time, but will be consistent with the following outline of your general responsibilities: Achieve assigned sales budgets for all portfolio businesses. Develop and implement a business plan for the region to include sales support from the portfolio businesses, channel development and key account strategies including IDN/GPO contracting. Establish business activities with channel partners to include[:] sales support, monthly forecasting, and quarterly business reviews. Manage a 30, 60, 90 day rolling forecast.

{¶ 15} Section 3 of the employment agreement addressed Hawes's compensation and stated:

> Your base compensation will be two hundred twenty-five thousand dollars ($225,000.) per annum. Additionally, you will participate in the commission plan. Variable compensation is fifty thousand dollars

($50,000) per annum at your assigned budget. Stretch compensation up to an additional twenty-five thousand dollars ($25,000) per annum exceeding budget.

{¶ 16} Hawes was further entitled to certain benefits under the contract, which stated that "[t]he cost of [his] health benefits (PPO Health plan and Dental plan) will be covered 100% by [Downing Health] during the first year of employment."

{¶ 17} Hawes also signed an investment document titled "Series C Preferred Units & Warrant Purchase Agreement" agreeing to invest $250,000 in Downing Health for 23,474 units of the company valued at $10.65 per unit. Hawes's wife signed this agreement as well because she and Hawes jointly purchased the interest in the company.

{¶ 18} Hawes testified that, prior to making the investment, he had read the "Downing Health Private Offering Memorandum," which reinforced this message of inherent risk, as it explicitly indicated that Downing Health might not be able to raise all the money needed to implement its business plan — which Hawes recognized would jeopardize his investment and his employment with the company.

{¶ 19} Within a "couple of days" of beginning his job at Downing Health, Hawes discovered that Downing Health was "fundamentally different than what had been represented" and was in fact a "sham." Hawes's first four paychecks were late, with some being as late as five months. There were several other gaps in pay during 2015, and Hawes's last paycheck covered the period of July 1 through July 15, 2015,

although Hawes was employed at the company until August 2015. Hawes was never provided with a W-2 tax form for his 2014 compensation.

{¶ 20} Hawes later learned that Lawrence and other employees were owed back pay from 2014 and 2015. An email was sent to all employees regarding a payroll recovery plan and explained when employees would receive the back pay for 2014 and 2015. This plan was never implemented.

{¶ 21} There were also problems with the medical insurance and premiums not being paid by the company. Hawes and his family lost their health benefits multiple times. Hawes paid his own January 2015 deductible and requested reimbursement but received none. Hawes additionally paid $8,008 in COBRA benefits for August and September 2015.

{¶ 22} In April 2015, Hawes told Lawrence that he would not recommend investors for Downing Health because it was not a valid company. Hawes thought he might be terminated, but instead, Lawrence demoted him.

{¶ 23} At the same time that Hawes's position was demoted, Downing Digital Healthcare Group, LLC underwent a name change to Downing Health Technologies, LLC. Hawes entered into a new employment agreement in May 2015 reflecting the company name change and his "title change with a little bit of a territory change," with "everything [else]" staying "the same." Hawes dealt exclusively with Lawrence in negotiating the contract, and Shaut was not involved. At the time he signed the second employment agreement, Hawes was interviewing with other employers

trying to find a new job. Hawes signed the agreement to stay with the company because he could still get paid when the company brought on new investors.

{¶ 24} On August 25, 2015, Hawes sent an email to various employees of the corporate defendants, including Shaut, memorializing the issues that had been occurring since November 2014 regarding employees being paid incorrectly. Downing employees generally only got paid when a new employee was hired, and the new employee made a $250,000 investment in the company.

{¶ 25} At the end of the email, Hawes asked for his $250,000 investment back and to be paid in full for the work he had performed up until that point; he further asked for his W-2 tax form for tax year 2014, which he had never received. He set a deadline for payment and receipt of the W-2 tax form of August 28, 2015.

{¶ 26} Hawes did not receive his requested money and tax form and instead received an email the following day advising him that the decision had been made on August 21, 2015 to terminate his employment. Hawes began a new job thereafter that paid an annual salary of $175,000.

{¶ 27} Hawes filed a complaint against Shaut, Lawrence, Wagner, and the corporate defendants. The amended complaint alleged claims for breach of employment contract, violation of the Prompt Pay Act, fraudulent inducement (employment contract), breach of investment contract, fraudulent inducement (investment contract), conspiracy, violation of Blue Sky laws, conversion, and breach of fiduciary duty.

{¶ 28} During the pendency of the litigation, all of the corporate defendants went out of business. In addition, Wagner and Lawrence filed for personal bankruptcy and the claims against them were stayed. Shaut was the only defendant that remained at the time of trial.

{¶ 29} Shaut moved for summary judgment on the claims against him. Hawes opposed the motion and cross-moved for summary judgment on all of his claims. The trial court granted Hawes summary judgment against the corporate defendants, who had not responded to his motion. The court further granted summary judgment to Shaut on Hawes's claims for breach of employment contract, breach of investment contract, and conversion.

{¶ 30} The matter proceeded to a bench trial on the remaining claims where both Hawes and Shaut testified. No other witnesses were offered for either side. In lieu of closing arguments, the trial court ordered the parties to submit proposed findings of fact and conclusions of law. The trial court then held a virtual hearing to allow the parties to further argue their proposed findings of fact and conclusions of law.

{¶ 31} The trial court subsequently issued its own findings of fact and conclusions of law. The trial court found in favor of Hawes on each of his claims against Shaut and awarded damages as follows:

> Plaintiff submitted compelling proof that he had sustained significant economic damages. The following enumerates the different categories of damages: loss of the initial $250,000 investment; back salary not paid in the amount of $45,362; back COBRA payments while an employee in the amount of $8,008; personal payment of healthcare

> premiums for three months in the amount of $12,012; unpaid personal time off never reimbursed in the amount of $5,114; federal taxes paid by Hawes (but owed by the corporation) in the amount of $4,656; and the remainder of the 2-year contract for salary from September 2015 through October 31, 2016, in the amount of $262,500. (Tr. 181-183). Thus, Hawes' total compensatory damages as enumerated above total $587,652.00. (Tr. 183). This amount does not include any interest, costs, exemplary damages or attorneys' fees.
>
> * * *
>
> In accordance with the damage calculations discussed in paragraph 49 of the Findings of Fact above, the Court awards damages in the amount of $587,652.00 to Hawes against Shaut, jointly and severally with all the Downing Corporate Defendants. The Court further adopts Hawes' calculation of past pre-judgment interest at the current statutory rate of 4% on $587,652.00, which is $23,506.08 per year and $64.40 per day. From October 31, 2016, through April 30, 2020, the past-due interest amount is $82,271.28, for a total amount of $669,923.28. The Court further awards punitive damages in the amount of $1,000,000.00 on the fraud and breach of fiduciary duty claims, which provide for exemplary damages. The Court hereby enters judgment accordingly against Shaut and all the Downing Corporate Defendants, jointly and severally, in the total amount of $1,669,923.28, plus future postjudgment interest on that amounts [sic] at the statutory rate of 4% or $73.42 per diem until paid in full.

{¶ 32} The trial court further found that Hawes was entitled to reasonable attorney fees. The parties filed briefs and the court held a hearing on the attorney fees issue. Following the hearing, the court awarded attorney fees as follows:

> The court found, after having reviewed the affidavit of plaintiff's trial counsel Christopher Devito, the affidavit of the expert attorney Paul Grieco, the relevant case law, and the factors spelled out in Prof.Cond.R. 1.5(a), that based upon the considerations of a customary hourly rate in the local legal community for comparable legal services, the experience and ability of plaintiff[']s counsel Christopher Devito, the time expended (i.e, over 270 hours of itemized attorney time) and results obtained, the complexity of the case, and the contingent fee agreement, an upwards adjustment of the lodestar on attorney Christopher Devito's hourly rate of $750.00 per hour is reasonable and

necessary. Accordingly, the court grants Hawes' application for attorneys' fees in the contingency fee amount of 45% of the $1,699,923.28 damages determined by the court, for a total of $764,965.44 in attorneys' fees, plus litigation expenses of $2,700.36.

{¶ 33} Shaut then filed the instant appeal,[2] raising nine assignments of error for our review:

1. The trial court abused its discretion in awarding $764,965.44 in attorney's fees to the Appellee.

2. The trial court abused its discretion in awarding $1,000,000 in punitive damages to the Appellee.

3. The trial court erred in holding that the Appellant breached a de facto fiduciary duty allegedly owed to the Appellee.

4. The trial court erred in failing to hold that the Appellee waived his claim against the Appellant for fraudulently inducing his consent to the contested employment agreement.

5. The trial court erred by failing to offset the Appellee's recovery under his employment agreement by the amount he earned from other employers during the unfulfilled term of the contract.

6. The trial court erred in permitting the Appellee to recover on unilateral claims based on an investment that he and his wife owned jointly.

7. The trial court erred in failing to hold that the intra-corporate conspiracy doctrine barred the Appellee's claim against the Appellant for conspiracy.

8. The trial court erred by failing to make any finding on the disputed issue of fraudulent intent.

9. The trial court erred in simultaneously awarding the Appellee recovery under both R.C. 1707.41 and R.C. 1707.43.

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[2] Shaut's appeal challenges the trial court's decision on all of Hawes's claims except for violation of the Prompt Pay Act, R.C. 4113.15.

II. Law and Analysis

A. Irregularities in the Court's Findings of Fact

{¶ 34} Preliminarily, Shaut argues that there were certain irregularities in the trial court's treatment of the evidence that worked to his detriment. Specifically, Shaut cites incorrect references to page numbers in the trial transcript and exhibits from trial. Shaut further asserts that the trial court relied upon the deposition testimony of Wagner and Lawrence, which were not offered at trial.

{¶ 35} App.R. 12 outlines the parameters of the appellate court's exercise of its reviewing powers and provides that a court of appeals is not required to consider errors that were not separately assigned and argued, as required by App.R. 16(A). *Hungler v. Cincinnati*, 25 Ohio St.3d 338, 341, 496 N.E.2d 912 (1986). "'[E]rrors not specifically pointed out in the record and separately argued by brief may be disregarded.'" *State v. Mock*, 8th Dist. Cuyahoga No. 108837, 2020-Ohio-3667, ¶ 33, quoting *State v. Hill*, 8th Dist. Cuyahoga No. 70930, 1997 Ohio App. LEXIS 3006, 12 (July 10, 1997), citing *C. Miller Chevrolet v. Willoughby Hills*, 38 Ohio St.2d 298, 313 N.E.2d 400 (1974).

{¶ 36} Shaut did not separately assign his argument regarding the court's findings as error. It is evident from the court's journal entry that the trial court did rely on the depositions of Wagner and Lawrence, which were not offered as exhibits during the trial. In stating that it was appropriate to consider such items, the trial court appeared to conflate the concepts of "evidence in the record" and "evidence at trial." "In rendering judgment after a bench trial, a trial court considers the evidence

adduced from the witness stand, the exhibits admitted during trial, and stipulations." *Kidane v. Gezahegn*, 10th Dist. Franklin No. 14AP-892, 2015-Ohio-2662, ¶ 20, citing *Midstate Educators Credit Union, Inc. v. Werner*, 175 Ohio App.3d 288, 2008-Ohio-641, 886 N.E.2d 893, ¶ 35 (10th Dist.). Other evidence that is in the record but not admitted at trial may not be considered. *Hoaglin Holdings v. Goliath Mtge., Inc.*, 8th Dist. Cuyahoga No. 83657, 2004-Ohio-3473, ¶ 15.

{¶ 37} Hawes takes the same position as the trial court, erroneously asserting that the court could consider all of the evidence *in the record*. While Shaut now argues that the trial court was not permitted to rely upon depositions that had not been admitted as evidence, during the trial, his counsel (who is also his counsel of record in this appeal) posited that the depositions were part of the record and erroneously agreed that they could be considered as part of the evidence in the trial:

> [Hawes's Counsel]: Objection.
>
> [Hawes]: I'm sorry?
>
> [Hawes's Counsel]: For the record, we've submitted the depositions and gave notice of them. So they're in the record. Mr. Wagner, Mr. Lawrence. So they're in the record.
>
> The Court: Right.
>
> [Shaut's Counsel]: Yeah. But they don't testify about this.
>
> The Court: But their depositions are part of the record, so they are actually evidence to be considered.
>
> [Shaut's Counsel]: *I agree, your Honor*, but they don't address this subject.

(Emphasis added.)

{¶ 38} The depositions of Wagner and Lawrence were not admitted, or even offered, at trial and should not have been considered by the trial court in rendering its decision. Consequently, in evaluating any of Shaut's assignments of error that ask us to examine the evidence presented with regard to a claim, we must consider only whether the actual admitted evidence was sufficient to meet Hawes's burden of proof without relying upon the depositions cited by the trial court. If the trial court considered evidence not admitted at trial, we must determine whether the trial court could have made the same decision without the evidence not admitted at trial. *See Secy. of Veterans Affairs v. Leonhardt*, 2015-Ohio-931, 29 N.E.3d 1, ¶ 33 (3d Dist.); *Maldonado v. Maldonado*, 5th Dist. Stark No. 2003CA00329, 2004-Ohio-3648, ¶ 30.

{¶ 39} With the above in mind, we now turn to Shaut's assignments of error. For ease of discussion, we will address some of the assignments of error out of order.

B. Fiduciary Duty owed to Hawes

{¶ 40} In his third assignment of error, Shaut argues that the trial court erred in holding that he breached a de facto fiduciary duty allegedly owed to Hawes. Specifically, Shaut contends that the trial court erroneously determined that Shaut owed Hawes a de facto fiduciary duty, requiring him to make specified disclosures about Downing Health when the two met prior to Hawes joining the company.

{¶ 41} While not specifically stated by Shaut, he is essentially arguing that the trial court's determination that he breached his fiduciary duty to Hawes was against the manifest weight of the evidence. When reviewing the manifest weight of the

evidence, the reviewing court "'weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, [the trier of fact] clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed and a new trial ordered.'" *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). The standard set forth in *Thompkins* has been held to apply in civil cases. *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 17.

{¶ 42} With regard to its finding that a de facto fiduciary duty existed, the trial court stated as follows:

> In this case, the prospective employer and the prospective investment into Downing Health created a de facto fiduciary relationship with Hawes because both parties understood that a special trust or confidence has been reposed in the other. Specifically, Hawes was solicited by Shaut, a Board Member and Senior Management Director for fundraising, to become an employee and invest $250,000 into Downing Health because of its policy for senior level management to have "skin in the game." Hawes was meeting with Shaut because he was represented as the individual at Downing Health (above its president Lawrence) that knew the most about the company and could explain the investment and viability of employment and $250,000 investment (P. Ex. 8). Based upon this mutual understanding, a fiduciary relationship was created and Shaut was obligated to be truthful.

{¶ 43} A fiduciary relationship is one in which "special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust." *Stone v. Davis*, 66 Ohio St.2d 74, 419 N.E.2d 1094 (1981); *Haluka v. Baker*, 66 Ohio App. 308, 34 N.E.2d 68 (9th Dist.1941); *Tool Steel Prods. Sales Corp. v. XTEK, Inc.*, 2d Dist.

Hamilton No. C-910533, 1993 Ohio App. LEXIS 333 (Jan. 29, 1993). A de facto fiduciary relationship may arise from an informal confidential relationship. *Prudential Ins. Co. v. Eslick*, 586 F.Supp. 763 (S.D.Ohio 1984); *Walters v. First Natl. Bank of Newark*, 69 Ohio St.2d 677, 433 N.E.2d 608 (1982).

{¶ 44} "'A confidential relationship exists whenever trust and confidence is placed in the integrity and fidelity of another.'" *Golub v. Golub*, 8th Dist. Cuyahoga No. 97603, 2012-Ohio-2509, ¶ 33, quoting *Ament v. Reassure Am. Life Ins. Co.*, 180 Ohio App.3d 440, 2009-Ohio-36, 905 N.E.2d 1246, ¶ 39 (8th Dist.). "'"The determination concerning what constitutes a confidential (fiduciary) relationship is a question of fact dependent upon the circumstances in each case * * *."'" *Ryerson v. White*, 8th Dist. Cuyahoga No. 100547, 2014-Ohio-3233, ¶ 19, quoting *Ciszewski v. Kolaczewski*, 9th Dist. Summit No. 26508, 2013-Ohio-1765, ¶ 10, quoting *Indermill v. United Sav.*, 5 Ohio App.3d 243, 245, 451 N.E.2d 538 (9th Dist.1982).

{¶ 45} The Supreme Court of Ohio has explained that a fiduciary duty may arise from an informal relationship only if both parties understand that a special trust or confidence has been reposed. *Stancik v. Deutsche Natl. Bank*, 8th Dist. Cuyahoga No. 102019, 2015-Ohio-2517, ¶ 49-50, citing *Stone* at 78.

{¶ 46} In the instant matter, Shaut and Hawes were negotiating an arms-length commercial transaction. There was no evidence presented to indicate that the parties stood in a position of special confidence to each other or that Shaut exerted a position of superiority of influence over Hawes. *See Landskroner v. Landskroner*, 154 Ohio App.3d 471, 2003-Ohio-5077, 797 N.E.2d 1002, ¶ 32 (8th

Dist.); *Blon v. Bank One*, 35 Ohio St.3d 98, 519 N.E.2d 363 (1988); *Warren v. Percy Wilson Mtge. & Fin. Corp.*, 15 Ohio App.3d 48, 472 N.E.2d 364 (1st Dist.1984) (no fiduciary status arising from advice given in routine business relationship between debtor and creditor).

{¶ 47} Moreover, courts have required complete dependence by the inferior party in order to recognize the de facto status. *Cook v. Kudlacz*, 2012-Ohio-2999, 974 N.E.2d 706, ¶ 79 (7th Dist.), citing *Casey v. Reidy,* 180 Ohio App.3d 615, 2009-Ohio-415, 906 N.E.2d 1139, ¶ 33-36 (7th Dist.). There was no evidence presented that Shaut had any knowledge that Hawes was relying upon him as a fiduciary in deciding to invest in the company. More importantly, Hawes did not present evidence demonstrating that he depended completely on Shaut. Hawes testified that he was uncertain about the investment and joining the company, and Boyle suggested that he speak with Shaut.

{¶ 48} At the time of Hawes and Shaut's conversation, Hawes had worked in the healthcare industry for a number of years and had held executive positions within the industry. He testified that he had had meaningful business experience, knew how to read financial documents, and knew what questions to ask about prospective investments. While Shaut was at the meeting to answer Hawes's questions, his ultimate purpose was to sell Hawes on the company. Finally, Hawes testified that he also consulted his wife and some venture capital friends, including Renson, who advised him *not* to invest in the company.

{¶ 49} Upon weighing the evidence and making all reasonable inferences, we find that the trial court's determination that Shaut owed a fiduciary duty to Hawes was against the manifest weight of the evidence. Accordingly, Hawes's breach-of-fiduciary-duty claim must fail, and the judgment of the trial court on this claim is reversed. Shaut's third assignment of error is sustained.

C. Waiver-of-Fraudulent-Inducement (Employment-Contract) Claim

{¶ 50} In his fourth assignment of error, Shaut argues that the trial court erred in failing to hold that Hawes waived his claim against Shaut for fraudulently inducing his consent to the contested employment agreement. Shaut contends that Hawes waived his right to recover on his claim for fraudulent inducement with regard to the employment contract because Hawes remained employed after learning of the fraud.

{¶ 51} In its analysis of Shaut's argument that Hawes waived his claim regarding fraudulent inducement of the employment contract, the court held:

> The Court finds and concludes to the contrary. In one of the cases cited by Shaut, *Ziegler v. Findlay Industries*, 380 F.Supp.2d 909 (N.D.Ohio 2005), the court indeed explained the Ohio rule that "the performance of an executory contract after knowledge of facts making it voidable on the ground of fraud in its procurement, is a waiver of any right of action for damages for the fraud." *Id.* at 911 (internal citations omitted). But the court quickly added: "*unless to stop performance would be impracticable*." *Id.* (emphasis added).
>
> Hawes' testimony, including his demeanor on the witness stand, painted a scenario of what can fairly be described as desperation, in which Hawes, having already shelled out a quarter of a million dollars for the privilege of securing a job, continued to work with the hope of having at least some income and continued health insurance benefits to support and care for his family. In this context, the trial testimony leads this Court to conclude that the "continued performance result[ed]

> from the parties' [or at the very least Hawes's] efforts to remedy the alleged fraud." *Globe Metallurgical v. Hewlett-Packard Co.*, 953 F.Supp. 876, 882-883 (S.D.Ohio 1994). In light of this, the Court, like the Southern District of Ohio in *Globe Metallurgical*, finds that there are "valid policy reasons" for not applying the general rule to the facts of this case. *Id.* at 883.

{¶ 52} Shaut argues that the impracticability found by the trial court does not rise to the same level of impracticability found by other courts, which often was the result of danger or impossibility of performance. He contends that impracticability is based upon an objective standard and does not turn on the particular person's capacity to act. Shaut notes that Hawes learned of the fraud within several days of starting at the company yet continued to work there for ten months. Shaut maintains that Hawes's personal feelings of desperation did not constitute impracticability.

{¶ 53} Shaut additionally argues that Hawes waived his fraudulent-inducement claim by knowingly entering into the second employment contract. The trial court disregarded this argument because Shaut did not provide any Ohio authority in support.

{¶ 54} In Ohio, one who performs a contract after learning of fraud in its inducement ratifies the contract and may not subsequently disaffirm it. *Baltimore & Ohio R.R. Co. v. Jolly Bros. & Co.*, 71 Ohio St. 92, 128, 72 N.E. 888 (1904). Moreover, "the performance of an executory contract after knowledge of facts making it voidable on the ground of fraud in its procurement, is a waiver of any right

of action for damages for the fraud," unless to stop performance would be impracticable. *Id.*

{¶ 55} In *Jolly Bros.*, the Baltimore & Ohio Railroad hired Jolly Brothers as excavators to remove a large amount of earth. Jolly Brothers claimed Baltimore & Ohio fraudulently described the material to be removed as easily excavated, dry sand. A few weeks after transporting its workers and equipment to the site and commencing work, Jolly Brothers learned the majority of the material to be removed was mud and quicksand, which were much costlier to excavate. Jolly Brothers threatened to quit, but after a Baltimore & Ohio Railroad employee promised to increase their compensation, they continued to work. The railroad subsequently failed to honor that promise, and the excavators sued for fraudulent inducement. The Supreme Court of Ohio explained:

> Here the facts were known within a week or two after the commencement of the work, and the plaintiffs could not go on with the work, accept payment at the prices stipulated in the contract, and then, when it proved a losing venture, quit and sue for damages on the ground that their loss was caused not by themselves in electing to go on with the work but by the false representations of the defendant.

Id.

{¶ 56} Like the workers in *Jolly Brothers*, Hawes testified that he learned of the fraud soon after beginning to work for Downing Health — in fact, within merely "a couple of days." Yet he continued to work and even signed a second employment agreement containing the same terms when he was demoted to a different position. Hawes argues, and the trial court agreed, that it was "impracticable" for him to quit

working there because he was trying to remedy the claimed fraud. The trial court determined that he continued working out of "desperation."

{¶ 57} We cannot find that Hawes's "desperation" and desire to remedy the fraud constituted impracticability as that term has been used in this context. Like the workers in *Jolly Brothers*, Hawes could not accept the financial conditions under which he was working, even signing a subsequent employment agreement, and when it proved to be a losing venture, quit and sue for damages on the ground that his loss was caused by the fraud on the part of Shaut and the corporate defendants and not by Hawes's continued employment at Downing Health.

{¶ 58} We therefore find that Hawes waived his claim for fraudulent inducement with regard to the employment contract by continuing to perform the contract and even signing a subsequent contract with the same terms all the while being fully aware of the claimed fraud by Shaut and the company. Shaut's fourth assignment of error is sustained, and the judgment of the trial court finding in favor of Hawes on his fraudulent inducement of the employment-contract claim is reversed. Hawes is not entitled to damages related to his claim for fraudulent inducement of the employment contract.

D. Failure to Offset Other Income

{¶ 59} Shaut's fifth assignment of error argues that the trial court erred by failing to offset Hawes's recovery under his employment agreement by the amount he earned from other employers during the unfulfilled term of the contract.

{¶ 60} The trial court awarded Hawes $262,500 for the unexpired term of the contract at the time he left Downing Health. During this time, Hawes testified that he had worked for other companies, earning an annual salary of $175,000. Shaut argues that the court erred in failing to reduce the damages awarded on the unexpired contract by the other amounts earned from subsequent employers during the same time period and allowed Hawes to obtain double recovery.

{¶ 61} Because we determined that Hawes waived his fraudulent inducement of the employment-agreement claim, Hawes cannot recover for this claim, and we need not address whether the trial court was required to offset his damages by the amount of compensation Hawes earned from other employment during the unexpired term of the employment agreement. Shaut's fifth assignment of error is overruled.

E. Intracorporate-Conspiracy Doctrine

{¶ 62} Shaut's seventh assignment of error argues that the trial court erred in failing to hold that the intracorporate-conspiracy doctrine barred Hawes's claim against Shaut for conspiracy. Shaut asserts this doctrine holds that a corporation cannot conspire with its own agents or employees.

{¶ 63} Civil conspiracy is a tort where "'a malicious combination of two or more persons to injure another in person or property, in a way not competent for one alone, resulting in actual damages.'" *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 475, 700 N.E.2d 859 (1998), quoting *Kenty v. Transamerica Premium Ins. Co.*, 72 Ohio St.3d 415, 419, 650 N.E.2d 863 (1995). However, when all the alleged

coconspirators are members of the same corporate entity, there are not two separate "people" to form a conspiracy. *See Bays v. Canty*, 330 Fed.Appx. 594 (6th Cir.2009); *Ohio Vestibular & Balance Ctrs., Inc. v. Wheeler*, 2013-Ohio-4417, 999 N.E.2d 241, ¶ 28-30 (6th Dist.), citing *Kerr v. Hurd*, 694 F.Supp.2d 817, 834 (S.D.Ohio 2010), explaining that a corporation cannot conspire with its own agents or employees; *see also Hometown Health Plan v. Aultman Health Found.*, Tuscarawas C.P. No. 2006 CV 06 0350, 2009 Ohio Misc. LEXIS 550, 36 (Apr. 15, 2009) (Because a corporation and its wholly owned subsidiary have a unity of purpose or a common design, a corporation cannot generally be deemed to have conspired with its wholly owned subsidiary, or its officers and agents.).

{¶ 64} The trial court determined that Shaut was part of a malicious combination with two other individuals and the corporate defendants but did not address the applicability of the intracorporate-conspiracy doctrine. Shaut contends that the corporate defendants were interrelated companies, and that he, Lawrence, and Wagner each worked under the Downing name and therefore belonged to the same corporate family.

{¶ 65} Hawes asserts that there was no testimony or evidence that all of the corporate defendants were interrelated businesses or in the same corporate family of companies. He contends that simply because some of the entities have "Downing" in their name does not mean that they are the same legal entity.

{¶ 66} We agree that there was insufficient evidence presented at trial outlining the relationships between the corporate defendants. Consequently, we

find that Shaut failed to demonstrate that all of the corporate defendants, Wagner, Lawrence, and Shaut were part of the same corporate family. Thus, the trial court did not err in declining to find that the intracorporate-conspiracy doctrine barred Hawes's claim for civil conspiracy. Shaut's seventh assignment of error is overruled.

F. Failure to Make Findings Regarding Fraudulent Intent

{¶ 67} In his eighth assignment of error, Shaut argues that the trial court erred by failing to make any findings on the disputed issue of fraudulent intent. We note that Shaut is not arguing that the decision finding in favor of Hawes on the fraudulent-inducement claims was against the manifest weight of the evidence, but simply asserts that the court failed to make a finding regarding the same.

{¶ 68} Paragraph 8 of the "Conclusions of Law" section of the trial court's journal entry states as follows: "These material representations were made by Shaut with his knowledge of their falsity and intent to mislead Hawes into becoming an employee and investing $250,000 into Downing Health." While this statement is under the "Conclusions of Law" section, it is very clearly a finding of fact that the statements were made by Shaut with the intent to mislead Hawes. Thus, the court did make a finding relating to Shaut's fraudulent intent, and Shaut's eighth assignment of error is overruled.

G. Recovery Under Both R.C. 1707.41 and 1707.43

{¶ 69} Shaut's ninth assignment of error argues that the trial court erred in simultaneously awarding Hawes recovery under both R.C. 1707.41 and 1707.43.

Shaut contends that Hawes was required to elect under which statute he would pursue his claims.

{¶ 70} Shaut is correct that a plaintiff must make an election with regard to claims brought under R.C. 1707.41 and 1707.43. However, the election pertains solely to the remedy sought — damages under R.C. 1707.41 or recission under R.C. 1707.43. *See, e.g., Federated Mgt. Co. v. Coopers & Lybrand*, 10th Dist. Franklin No. 03AP-204, 2004-Ohio-4785, ¶ 11. As noted by Hawes, he abandoned any action for recission and elected to solely pursue damages. The trial court, however, analyzed Hawes's claims under both statutory sections and determined that Hawes was entitled to judgment on both. This was not correct because a plaintiff is required to elect which remedy he or she is pursuing and may only recover under one section. Here, Hawes elected to pursue damages and waived any remedy of recission and consequently could not recover under R.C. 1707.43. *See Ohio Bur. of Workers' Comp. v. MDL Active Duration Fund, LTD.*, 476 F.Supp.2d 809, 820 (S.D.Ohio 2007), citing *Byrley v. Nationwide Life Ins. Co.*, 94 Ohio App.3d 1, 20, 640 N.E.2d 187 (6th Dist.1994).

{¶ 71} Accordingly, the trial court erred by granting judgment and awarding damages under both statutory sections. By seeking damages rather than recission, Hawes elected to proceed under R.C. 1707.41 and abandoned his claim under R.C. 1707.43. Shaut's ninth assignment of error is sustained, and the court's judgment in favor of Hawes on his claim under R.C. 1707.43 is vacated. The court's judgment in favor of Hawes on his claim under R.C. 1707.41 remains.

H. Allowing Hawes to Recover on Unilateral Claims Jointly Owned by Hawes and His Wife

{¶ 72} In his sixth assignment of error, Shaut argues that the trial court erred in permitting Hawes to recover on unilateral claims based on an investment that he and his wife owned jointly. Shaut asserts that Hawes should not have been permitted to sue and recover individually when Hawes and his wife owned the investment jointly.

{¶ 73} In its journal entry, the trial court determined that Shaut had waived this argument and specifically had waived the defense of failure to join a party under Civ.R. 19 or 19.1. While the court stated that Shaut did raise the affirmative defense of failure to name all necessary parties, the defense was simply a cursory statement and did not identify the specific parties that needed to be joined. The court further noted that Shaut did not argue the defense in his motion for summary judgment and held that its assertion in his trial brief was untimely.

{¶ 74} The court further noted that Civ.R. 12(H) permits a party to raise the defense of failure to join an "indispensable" party even at the trial on the merits. The court held, however, that Shaut only raised the "necessary" party defense at trial but never argued that Hawes's wife was "indispensable."

> "A court may determine that a party is necessary for the just and complete adjudication of an action and a necessary party may be forced to join the action as an indispensable party under Civ.R. 19(B). If a trial court determines that a party is indispensable to the action, that the party is subject to service of process, and that the nonjoinder issue has not been waived, then the court has no discretion under Civ.R. 19(A) and (B) and the party must be joined or the case dismissed." *State, ex rel. Gill v. Winters* (1990), 68 Ohio App.3d 497, 589 N.E.2d 68.

Ownbey v. Professional Realty Inc., 8th Dist. Cuyahoga No. 82468, 2003-Ohio-4949, ¶ 12.

{¶ 75} Shaut did not move to add Hawes's wife as a party, nor did he move to dismiss the claims to which he asserts she should have been a party. At trial, Hawes was questioned as to whether his wife had signed the security, but no further argument was made to the court regarding this issue.

{¶ 76} We therefore find that the trial court properly determined that Shaut waived the issue of joinder. Shaut's sixth assignment of error is overruled.

I. Award of Punitive Damages

{¶ 77} In his second assignment of error, Shaut argues that the trial court abused its discretion in awarding $1,000,000 in punitive damages to Hawes.

{¶ 78} Under Ohio law, an award of punitive damages is available only upon a finding of actual malice. *Wills v. Kolis*, 8th Dist. Cuyahoga No. 93900, 2010-Ohio-4351, ¶ 47-48, citing *Berge v. Columbus Community Cable Access*, 136 Ohio App.3d 281, 316, 736 N.E.2d 517 (10th Dist.1999). The "actual malice" necessary for purposes of an award of punitive damages has been defined as "'(1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm.'" *Berge*, quoting *Preston v. Murty*, 32 Ohio St.3d 334, 512 N.E.2d 1174 (1987), syllabus.

{¶ 79} A plaintiff bears the burden of establishing entitlement to punitive damages by clear and convincing evidence. *Kelley v. Sullivan*, 8th Dist. Cuyahoga

No. 106189, 2018-Ohio-1410, ¶ 13, citing *Whetstone v. Binner*, 146 Ohio St.3d 395, 2016-Ohio-1006, 57 N.E.3d 1111, ¶ 20. The decision whether to award punitive damages is within the trial court's discretion and, absent an abuse of discretion, the court's ruling will be upheld. *Kemp v. Kemp*, 161 Ohio App.3d 671, 2005-Ohio-3120, 831 N.E.2d 1038, ¶ 73 (5th Dist.).

{¶ 80} In its journal entry, the court stated that it further "award[ed] punitive damages in the amount of $1,000,000.00 on the fraud and breach of fiduciary duty claims, which provide for exemplary damages." However, the court made no finding of actual malice or whether Hawes had presented clear and convincing evidence to support a punitive damage award.

{¶ 81} Hawes contends that the following factual finding by the court supports the award of punitive damages:

> Shaut admitted during cross-examination that a fair characterization of Downing is that it was a Ponzi scheme. (Tr. 339). However, he claimed he did not become aware of that until his deposition in this matter on July 26, 2016. (Tr. 340). Further, Shaut admitted that by the second day of trial, January 14, 2020, he "was in agreement" with Hawes' attorney that "Wagner is a fraud" and personally lied to Shaut regarding Downing. (Tr. 368).

{¶ 82} Hawes further points to instances where the trial court stated that Shaut was not credible. Finally, Hawes argues that the trial court properly found that Hawes had established all of the required elements for his breach-of-fiduciary-duty claims and civil-conspiracy claims, which included a finding of malice by Shaut.

{¶ 83} We do not believe the above findings cited by Hawes are sufficient to support an award of punitive damages. First, we have already reversed the court's

judgment on Hawes's breach-of-fiduciary-duty claim. Nevertheless, actual malice is not an element of either a breach-of-fiduciary-duty claim or a civil-conspiracy claim. While an element of civil conspiracy is "a malicious combination," the malice referenced is not *actual* malice. Rather,

> "[t]he 'malice' in 'malicious combination' is legal or implied malice, 'which the law infers from or imputes to certain acts,' and is defined as 'that state of mind under which a person does a wrongful act purposely, without a reasonable or lawful excuse, to the injury of another.' *See Pickle v. Swinehart* (1960), 170 Ohio St. 441, 443, 166 N.E.2d 22 (defining 'malice' for purposes of 'malicious prosecution'). This 'malice,' then, would be inferred from or imputed to a common design by two or more persons to cause harm to another by means of an underlying tort, and need not be proven separately or expressly."

Click v. Unknown Exr. or Admr. (Estate of Click), 4th Dist. Lawrence No. 05CA38, 2007-Ohio-3029, ¶ 21, quoting *Gosden v. Louis*, 116 Ohio App.3d 195, 219-220, 687 N.E.2d 481 (9th Dist.1996); *see also Youngstown Osteopathic Hosp. Assn. v. Pathways Ctr. For Geriatric Psychiatry, Inc.*, 280 B.R. 400, 416 (Bankr.N.D.Ohio 2002) (noting that implied malice in the context of civil conspiracy does not rise to the level of actual malice).

{¶ 84} Accordingly, we find that Hawes did not present clear and convincing evidence that Shaut acted with actual malice, and the trial court abused its discretion in awarding punitive damages in this matter. Shaut's second assignment of error is sustained, and the award of punitive damages of $1,000,000 is vacated.

J. Award of Attorney Fees

{¶ 85} In his first assignment of error, Shaut argues that the trial court abused its discretion in awarding $764,965.44 in attorney fees to Hawes. Shaut

argues that the amount of attorney fees was not reasonable and that Hawes did not sufficiently prove the lodestar used by the court.

{¶ 86} "The Supreme Court of Ohio, as well as this court, has held that attorney fees are recoverable as part of compensatory damages only when punitive damages have been awarded." *Danial v. Lancaster*, 8th Dist. Cuyahoga No. 92462, 2009-Ohio-3599, ¶ 18, citing *Davis v. Tunison*, 168 Ohio St. 471, 477, 155 N.E.2d 904 (1959); *Wilson v. Harvey*, 164 Ohio App.3d 278, 290, 2005-Ohio-5722, 842 N.E.2d 83 (8th Dist.).

{¶ 87} In *Digital & Analog Design Corp. v. N. Supply Co.*, 63 Ohio St.3d 657, 590 N.E.2d 737 (1992), the court further provided that "the requirement that a party pay attorney fees * * * is a punitive (and thus equitable) remedy that flows from a jury finding of [actual] malice and the award of punitive damages. * * * Without a finding of [actual] malice and the award of punitive damages, plaintiff cannot justify the award of attorney fees, unless there is a basis for sanctions under Civ.R. 11." *Id.* at 662.

{¶ 88} Because we determined that the award of punitive damages was improper, there can be no award of attorney fees. We need not address Shaut's arguments regarding the reasonableness of fees or the method of computation. Shaut's first assignment of error is sustained, and the award of attorney fees is vacated.

III. Conclusion

{¶ 89} The trial court did not err in (1) declining to offset Hawes's recovery by the amount he earned from other employers; (2) allowing Hawes to recover on the investment that was jointly owned by himself and his wife; and (3) declining to apply the intracorporate-conspiracy doctrine. In addition, the trial court did make a finding on the issue of fraudulent intent and thus did not err on this issue. Shaut's fifth, sixth, seventh, and eighth assignments of error are overruled.

{¶ 90} The trial court did err in finding that Shaut owed a de facto fiduciary duty to Hawes, and the court's judgment in favor of Hawes on the breach-of-fiduciary-duty claim was against the manifest weight of the evidence. The court further erred in (1) finding that Hawes had not waived his claim for fraudulent inducement with regard to the employment contract by continuing to work for Downing Health and signing a subsequent agreement under the same terms; (2) awarding Hawes relief under R.C. 1707.43 when he elected to proceed under R.C. 1707.41; and (3) awarding punitive damages and attorney fees.

{¶ 91} Shaut's first, second, third, fourth, and ninth assignments of error are sustained, and the damages awarded to Hawes for his claims for breach of fiduciary duty, fraudulent inducement of the employment agreement, and his claim under R.C. 1707.43, plus the punitive damages, and the award of attorney fees are hereby vacated.

{¶ 92} It is not clear from the trial court's journal entry what damages were awarded for each claim. Accordingly, this matter is remanded to the trial court to

clarify the proper damages for the judgments that remain in favor of Hawes in accordance with this decision, to wit: his claim under the Prompt Pay Act, his claim under R.C. 1707.41, his claim for fraudulent inducement of the investment contract, and his claim for civil conspiracy.

{¶ 93} We emphasize that this matter is not being remanded for a new trial on any of the claims or further findings by the trial court. The remand is solely for a new ruling clarifying the damages awarded on the remaining four claims, as set forth above.

{¶ 94} Judgment affirmed in part, reversed in part, vacated in part, and remanded.

Costs of the appeal are to be shared evenly between the parties pursuant to App.R. 24.

The court finds there were reasonable grounds for this appeal.

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

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

FRANK DANIEL CELEBREZZE, III, JUDGE

SEAN C. GALLAGHER, A.J., and
MICHELLE J. SHEEHAN, J., CONCUR

[Cite as *Szewczyk v. Century Fed. Credit Union*, 2022-Ohio-1683.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

GARY SZEWCZYK, :

Plaintiff-Appellant, :

No. 110822

v. :

CENTURY FEDERAL CREDIT UNION, :

Defendant-Appellee. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: May 19, 2022

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-20-937175

Appearances:

Branstetter, Stranch & Jennings, PLLC, Alyson Steele Beridon, and J. Gerard Stranch, IV, pro hac vice; Cohen & Malad, LLP and Lynn A. Toops, pro hac vice, *for appellant*.

Bricker & Eckler, LLP and Daniel C. Gibson; Litchfield Cavo, LLP, James R. Branit, pro hac vice, and James D. Sloan, pro hac vice, *for appellee*.

CORNELIUS J. O'SULLIVAN, JR., J.:

{¶ 1} Plaintiff-appellant Gary Szewczyk ("appellant") appeals from the trial court's August 13, 2021 judgment granting the motion to dismiss of defendant-appellee Century Federal Credit Union ("appellee" or "Century"). After a thorough review of the facts and law, we affirm.

Factual Allegations and Procedural History

{¶ 2} In September 2020, appellant filed this putative class action against Century on behalf of himself and all others similarly situated. Appellant asserted a claim for breach-of-contract, including breach of the covenant of good faith and fair dealing, and a claim for unjust enrichment.

{¶ 3} Appellant alleged in his complaint that he has a checking account with appellee and opted in to appellee's standard overdraft practices. According to appellant, appellee charged account holders overdraft fees on accounts that were never actually overdrawn. Appellant alleged that on November 27, 2015, he was "assessed a $25 Overdraft Fee on a $65 withdrawal when his account, as demonstrated by the statement provided by Century, was not even negative after that withdrawal." Complaint, ¶ 14. Thus, according to appellant, "the ATM transaction did not overdraw [his] account, yet Century improperly assessed [him] an Overdraft Fee for that transaction, in breach of Century's contract documents." *Id.* Appellant attached Century's "Membership and Account Agreement" to his complaint. The agreement incorporates several documents, including Century's

"Funds Availability Policy Disclosure," "Fee Schedule," "Courtesy Pay Disclosures," and "Electronic Fund Transfer Agreement and Disclosure."

{¶ 4} Century's Membership and Account Agreement provides that it "covers your rights and responsibilities concerning your accounts and the rights and responsibilities of the Credit Union providing this Agreement (Credit Union)." The agreement further provides that

> [b]y signing an Account Card * * * you * * * agree to the terms and conditions in this Agreement, and any Account Card, Funds Availability Policy Disclosure, Truth-in-Savings Disclosure, Electronic Fund Transfers Agreement and Disclosure, Privacy Disclosure, or Account Receipt accompanying this Agreement, the Credit Union's bylaws and policies, and any amendments to these documents from time to time that collectively govern your membership and accounts.

{¶ 5} The agreement contains a "Transaction Limitations" provision, which, in part, provides for "Withdrawal Restrictions." Under "Withdrawal Restrictions" the agreement provides that

> [w]e will pay checks or drafts, permit withdrawals, and make transfers from available funds in your account. *The availability of funds in your account may be delayed as described in our Funds Availability Policy Disclosure.* We may also pay checks or drafts, permit withdrawals, and make transfers from your account from insufficient available funds if you have established an overdraft protection plan or, if you do not have such a plan with us, in accordance with our overdraft payment policy.

(Emphasis added.)

{¶ 6} A provision in the agreement titled "Overdrafts" provides in relevant part as follows:

> If, on any day, the available funds in your share or deposit account are not sufficient to pay the full amount of a check, draft, transaction, or other item posted to your account plus any applicable

fee ("overdraft"), we may pay or return the overdraft. The Credit Union's determination of an insufficient available account balance may be made at any time between presentation and the Credit Union's midnight deadline with only one (1) review of the account required. We do not have to notify you if your account does not have sufficient available funds to pay an overdraft. Your account may be subject to a charge for each overdraft regardless of whether we pay or return the overdraft. For ATM and onetime debit card transactions, you must consent to the Credit Union's overdraft protection plan in order for the transaction amount to be covered under the plan.

{¶ 7} The "Overdrafts" provision further has a section regarding "Order of Payments," which reads,

> Checks, drafts, transactions, and other items may not be processed in the order that you make them or in the order that we receive them. We may, at our discretion, pay a check, draft, or item, and execute other transactions on your account in any order we choose. The order in which we process checks, drafts, or items, and execute other transactions on your account may affect the total amount of overdraft fees that may be charged to your account. Please contact us if you have any questions about how we pay checks or drafts and process transfers and withdrawals.

{¶ 8} The "Courtesy Pay Disclosure" provides that

> Courtesy Pay is an enhancement to your account that allows for a check, Point of Sale (POS), automatic debits (ACH), ATM withdrawals, and Bill Payer withdrawals drawn against a share draft account that does not have sufficient funds available at the time of the presentment.

{¶ 9} The Fee Schedule informs members that the fee for an ATM overdraft is $25.

{¶ 10} The Funds Availability Policy Disclosure provides that:

> [o]ur policy is to make funds from your cash and check deposits available to you, in total or in part according to the Right to Hold policies outlined below on the next business day after we receive your deposit. Electronic direct deposits will be available on the day we receive the deposit. *Once they are available, you can withdraw the*

> *funds in cash and we will use the funds to pay checks that you have written.*

(Emphasis added.)

{¶ 11} Further, the "Funds Availability Policy Disclosure" delineates when funds will not be immediately available:

> *In some cases, we will not make all of the funds that you deposit by check available to you on the next business day that we receive your deposit.* Funds may not be available until the second business day after the day of your deposit. However, the first $225.00 of your deposit will be available on the first business day after the day of your deposit. If we are not going to make all of the funds from your deposit available on the next business day, we will notify you at the time you make your deposit. We will also tell you when the funds will be available.

(Emphasis added.)

{¶ 12} In regard to ATM usage, the Electronic Fund Transfer Agreement and Disclosure states that "[b]ecause of the servicing schedule and processing time required in ATM operations, *there may be a delay between the time a deposit (either cash or check) is made and when it will be available for withdrawal*." (Emphasis added.)

{¶ 13} Century filed a Civ.R. 12(B)(6) motion to dismiss appellant's complaint, which appellant opposed. The trial court granted the motion. Appellant now appeals, raising the following sole assignment of error for our review:

> The trial court ("Trial Court") erred when it granted Century Federal Credit Union's ("Century") Motion to Dismiss. There is no language in the parties' contract that unambiguously authorizes Century to assess overdraft fees when the monthly account statements provided by Century show that the account was never overdrawn. Mr. Szewczyk thus stated a claim for breach-of-contract, including breach of the implied covenant of good faith and fair dealing. The Trial Court's finding that the contract unambiguously authorized the challenged fees

improperly rested on a series of factual assumptions that were outside the pleadings and unsupported by the evidence. Mr. Szewczyk also stated a claim for unjust enrichment based on Century's inequitable collection and retention of overdraft fees in the alternative to his contract claims.

Law and Analysis

Standard of Review

{¶ 14} In his sole assignment of error, appellant contends that the trial court erred in dismissing the complaint for failure to state a claim on which relief could be granted pursuant to Civ.R. 12(B)(6).

{¶ 15} A Civ.R. 12(B)(6) motion to dismiss for failure to state a claim on which relief can be granted "is procedural and tests the sufficiency of the complaint." *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 605 N.E.2d 378 (1992), citing *Assn. for Defense of Washington Local School Dist. v. Kiger*, 42 Ohio St.3d 116, 117, 537 N.E.2d 1292 (1989).

{¶ 16} A trial court's review of a Civ.R. 12(B)(6) motion to dismiss is limited to the four corners of the complaint along with any documents properly attached to, or incorporated within, the complaint. *Glazer v. Chase Home Fin. L.L.C.*, 8th Dist. Cuyahoga Nos. 99875 and 99736, 2013-Ohio-5589, ¶ 38. An appellate court reviews, de novo, a trial court's decision granting a motion to dismiss under Civ.R. 12(B)(6). *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5.

{¶ 17} In our review of a Civ.R. 12(B)(6) motion to dismiss, we must accept the material allegations of the complaint as true and make all reasonable inferences

in favor of the plaintiff. *Jenkins v. Cleveland*, 8th Dist. Cuyahoga No. 104768, 2017-Ohio-1054, ¶ 8, citing *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278, 2005-Ohio-4985, 834 N.E.2d 791, ¶ 6. For a party to ultimately prevail on the motion, it must appear from the face of the complaint that the plaintiff can prove no set of facts that would justify a trial court granting relief. *Jenkins* at *id.*, citing *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 245, 327 N.E.2d 753 (1975).

No Breach-of-Contract

{¶ 18} Appellant contends in his complaint that there is no language in Century's contract that unambiguously allows the credit union to assess overdraft fees when the monthly account statements show that the account was never overdrawn and, therefore, appellee breached the contract by charging an overdraft fee.

{¶ 19} To state a claim for breach-of-contract, the plaintiff must allege (1) the existence of a binding contract, (2) the nonbreaching party performed his or her contractual obligations, (3) the other party failed to fulfill its contractual obligations without legal excuse, and (4) the nonbreaching party suffered damages as a result of the breach. *Cynergies Consulting, Inc. v. Wheeler*, 8th Dist. Cuyahoga No. 90225, 2008-Ohio-3362, ¶ 15, citing *All Star Land Title Agency, Inc. v. Surewin Invest., Inc.*, 8th Dist. Cuyahoga No. 87569, 2006-Ohio-5729. At issue in this case is whether Century failed to fulfill its contractual obligations.

{¶ 20} When the terms in a contract are unambiguous, courts will not create a new contract by finding an intent not expressed in the clear language employed by

the parties. *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 246, 374 N.E.2d 146 (1978). A court may not put words into a contract that the parties themselves failed to include. *Porterfield v. Bruner Land Co.*, 2017-Ohio-9045, 103 N.E.3d 152, ¶ 16 (7th Dist.). Terms in a contract are ambiguous if their meanings cannot be determined from reading the entire contract, or if they are reasonably susceptible to multiple interpretations. *First Natl. Bank of Pennsylvania v. Nader*, 2017-Ohio-1482, 89 N.E.3d 274, ¶ 25 (9th Dist.).

{¶ 21} According to appellant, the contract is ambiguous because it does not define "available funds" or "available account balance." In his estimation, these terms mean "actual balance."

{¶ 22} Appellee contended in its motion to dismiss that the documentation unambiguously provided that Century will charge overdraft fees for overdrafts of the "available balance," which Century argued means "the money in an account minus holds placed on funds for uncollected deposits and pending debit transactions." Century's Motion to Dismiss, p. 12. According to appellee, the definition of available balance is "a well-established industry" one. *Id.* Appellant contended that appellee's definition is "outside the pleadings and inappropriate on a motion to dismiss." Appellant's Brief in Opposition, p. 10. We disagree with appellant. The four corners of the documents are unambiguous that "available funds" or "available funds balance" do not equate to the actual funds that may be in a member's account.

{¶ 23} It is true that the Membership and Account Agreement does not specifically define "available funds" or "available funds balance." However, "[a]

writing, or writings executed as part of the same transaction, will be read as a whole, and the intent of each part will be gathered from a consideration of the whole." *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.*, 78 Ohio St.3d 353, 361, 678 N.E.2d 519 (1997). "Where one instrument incorporates another by reference, both must be read together. * * * Courts should attempt to harmonize provisions and words so that every word is given effect." *Christe v. GMS Mgt. Co.*, 124 Ohio App.3d 84, 88, 705 N.E.2d 691 (9th Dist.1997).

{¶ 24} Construing the documents as a whole in this case, it is clear and unambiguous that "available funds" and "available account balance" are not synonymous with "actual balance," as appellant contends. Rather, a member's available funds balance can be less than his or her actual balance. For example, in regard to ATM card usage, the Electronic Fund Transfer Agreement and Disclosure states that "[b]ecause of the servicing schedule and processing time required in ATM operations, there may be a delay between the time a deposit (either cash or check) is made and when it will be available for withdrawal." Thus, if a member makes an ATM deposit of $100 into his or her account, his or her actual balance may reflect that $100, but that $100 may not be included in the member's available balance.

{¶ 25} The Funds Availability Policy Disclosure also unambiguously provides that there is distinction between available account balance and actual account balance. It explains that funds are available pursuant to Century's "Reservation of Right to Hold" policy. For example, the provision states in part that "[i]n some cases, we will not make all of the funds that you deposit by check available to you on

the next business day that we receive your deposit." The disclosure also provides for "Holds on other Funds," and that "longer delays may apply," whereby Century "may delay your ability to withdraw funds deposited by check into your account an additional number of days" for various specified reasons.

{¶ 26} Thus, upon review of the documents as a whole, they unambiguously provide that a member will not have access to his or her funds immediately; that is, that the available balance can be less than the actual balance in a member's account. Because the contract is unambiguous, the overdraft fee that Century charged appellant was not in breach of its terms. The trial court therefore properly dismissed appellant's breach-of-contract claim.

No Breach of Covenant of Good Faith and Fair Dealing

{¶ 27} The covenant of good faith and fair dealing is part of a contract claim and does not stand alone as a separate claim from breach-of-contract. *Lakota Local School Dist. Bd. of Edn.*, 108 Ohio App.3d 637, 646, 671 N.E.2d 578 (6th Dist.1996). Because we have found that there was no breach of the parties' contract, appellant's breach of the implied covenant of good faith and fair dealing must necessarily also fail, and dismissal was properly granted on the claim.

Unjust Enrichment

{¶ 28} "[A] party pursuing relief for breach-of-contract cannot at the same time seek equitable relief for unjust enrichment." *Ownerland Realty, Inc. v. Zhang*, 12th Dist. Warren Nos. CA2013-09-077 and CA2013-10-097, 2014-Ohio-2585, ¶ 24. Appellant does challenge the validity or enforceability of the parties' agreement. He

has not pled any facts in his complaint that would make an unjust enrichment claim viable. Therefore, his unjust enrichment claim fails as a matter of law.

Conclusion

{¶ 29} The trial court properly granted Century's Civ.R. 12(B)(6) motion to dismiss for failure to state a claim on which relief can be granted. Appellant failed to state a claim for breach-of-contract, breach of the implied covenant of good faith and fair dealing, or unjust enrichment. His sole assignment of error is therefore overruled.

{¶ 30} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to 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.

_____

CORNELIUS J. O'SULLIVAN, JR., JUDGE

EILEEN A. GALLAGHER, P.J., and
MARY EILEEN KILBANE, J., CONCUR