[Cite as *Cuyahoga Cty. Treasurer v. Heirs of Weisner*, 2022-Ohio-2668.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

TREASURER OF CUYAHOGA COUNTY, OHIO, :

Plaintiff-Appellee, :

No. 110868

v. :

UNKNOWN HEIRS OF NANCY WEISNER, ET AL., :

Defendants-Appellees, :

[Appeal by PNC Bank, National Association, :

Defendant-Appellant.] :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: August 4, 2022

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-18-898896

Appearances:

Thomas J. Sacerich, *for appellee* Gina Kosiewicz, Commissioner of the Estate of Nancy J. Weisner.

Sandhu Law Group, L.L.C., David T. Brady, Suzanne M. Godenswager, and Austin B. Barnes III, Jeffrey A. Panehal, *for appellant*.

FRANK DANIEL CELEBREZZE, III, P.J.:

{¶ 1} Appellant PNC Bank, National Association, successor by merger to National City Bank ("PNC"), appeals the decision of the Cuyahoga County Court of Common Pleas, which distributed the excess proceeds of a tax foreclosure sale to appellee Gina Kosiewicz ("Kosiewicz"), commissioner of the Estate of Nancy J. Weisner ("Weisner"). After a thorough review of the record and applicable law, we affirm.

I. Factual and Procedural History

{¶ 2} Treasurer of Cuyahoga County, Ohio ("Treasurer"), initiated this action against the unknown heirs of Weisner; Kosiewicz; the unknown spouse of Kosiewicz; and PNC seeking foreclosure of the property known as 9719 Plymouth Avenue in Garfield Heights, Ohio, to recover delinquent taxes in the amount of $2,117.06 plus all taxes, assessments, penalties, and interest. Weisner, the former owner of the property, died intestate on November 5, 2014.

{¶ 3} Service was effected on all named defendants, which included Kosiewicz and PNC.[1] No defendant answered or otherwise objected to the foreclosure. Subsequently, the magistrate issued a decree of foreclosure in favor of the Treasurer, and the trial court adopted it shortly thereafter.

{¶ 4} The property sold at a sheriff's sale for $25,000, and the trial court subsequently confirmed the sale. During the confirmation of sale, the proceeds were

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[1] The decree of foreclosure specifically found that all necessary parties were properly served with the summons and complaint.

allocated as follows: Treasurer ($18,040.82); Cuyahoga County ($475); the Cuyahoga County Clerk of Courts ($679.75); and the Cuyahoga County Sheriff ($469.61). Pertinently, the confirmation of sale contained the following language:

> It is further ORDERED, ADJUDGED AND DECREED that the equity of redemption is extinguished and that any parties defendant owning or claiming any right, title, or interest in, or lien upon said parcel, together with such who may have right of dower, shall be and they are hereby forever barred from asserting any right, title or interest in, or lien upon the said parcel.

{¶ 5} Following distribution of the proceeds, the trial court ordered the clerk of courts to hold the remaining balance, totaling $6,854.79, for "cost and or future order of the court."

{¶ 6} Almost two years later, Kosiewicz moved to intervene in the case and asked the court to distribute the excess proceeds, asserting that the remaining proceeds of the sale should be distributed to the heirs of Weisner, the former owner of the subject property. The trial court granted the motion to intervene and gave any opposing party time to respond to Kosiewicz's claim to the excess proceeds.

{¶ 7} PNC filed a brief in opposition to Kosiewicz's motion to distribute the excess proceeds, along with its own motion to distribute the excess proceeds. PNC claimed that it was entitled to the full balance of the excess proceeds because Weisner owed $24,074.71 on an equity reserve agreement that was secured by a mortgage on the foreclosed property. PNC acknowledged that the mortgage lien on the property was extinguished but argued that it was still entitled to claim the excess proceeds. The trial court disagreed, finding:

> Defendant PNC has moved for distribution of funds and has opposed Defendant Kosiewicz's Motion for Distribution. PNC held a mortgage on the property. PNC was joined on Plaintiff's marshaling of liens claim. Pursuant to this claim, PNC was required to assert its interest in the property or be barred from asserting an interest in the property in the future. *Zuckerman, Daiker & Lear Co. L.P.A. v. Signer,* (2009), 186 Ohio App.3d 686, 691. PNC did not, however, file an answer in this case to assert its mortgage and its mortgage was not transferred to the proceeds of sale. Accordingly, its mortgage was extinguished with the confirmation of sheriff's sale. *Deutsche Bank National Trust Co. v. Richardson,* (March 11, 2011), Darke App. No. 2010-CA-3 & 2010-CA-13, 2011-Ohio-1123. PNC has no interest in the property or the proceeds of sale. C.f. *Id.* PNC has not moved for or provided justification for relief from the confirmation order.
>
> PNC may be entitled to attach the funds if it obtains a judgment on its note. *See* R.C. Sec. 2715.01(E) and R.C. Sec. 2716.11 Et. Seq*; See also West Chateau Condo Unit Owners Ass'n v. Zanders* (March 25, 2004), Cuyahoga App. No. 83298; 2004-Ohio-1450.
>
> The parties motions for distribution are held in abeyance until 8-20-2021 to permit PNC an opportunity to pursue attachment. Thereafter, the court will address the motions for distribution.

{¶ 8} The docket indicates that PNC did not take any action after this journal entry. The trial court ultimately ordered the full distribution of the excess proceeds to Kosiewicz, finding that PNC failed to timely and properly assert its interest in the property prior to the sale, and then failed to seek attachment of the funds in the time provided by the court in its journal entry. The same day, the clerk issued the full $6,854.79 balance to Kosiewicz.

{¶ 9} Thereafter, PNC timely filed an appeal along with a motion requesting a stay of the distribution of proceeds. The trial court granted the stay and ordered the clerk to refrain from distributing the proceeds, seemingly unaware that the proceeds had already been distributed. Two days after the court's order, PNC moved

the court to order Kosiewicz to return the proceeds, which the trial court granted. On the same day, this court dismissed PNC's appeal as moot, finding that the stay was ineffective since the proceeds had already been distributed.

{¶ 10} PNC filed an application for reconsideration, arguing that because the trial court's order to return the funds was issued nearly concurrently with this court's dismissal, the circumstances of the appeal were changed. This court granted PNC's motion for reconsideration, and this appeal ensued. PNC raises one assignment of error for our review:

> The trial court erred when it unreasonably ordered distribution of excess proceeds from a foreclosure sale to the Commissioner of the Estate of Nancy Weisner over the motion to distribute excess proceeds from the foreclosure sale to PNC Bank, National Association, a creditor of the deceased.

II. Law and Analysis

{¶ 11} In its sole assignment of error, PNC argues that the trial court erred in distributing the excess proceeds from the foreclosure sale to Kosiewicz instead of PNC.

{¶ 12} Claims for equitable relief are reviewed for an abuse of discretion. *Sandusky Properties v. Aveni*, 15 Ohio St.3d 273, 473 N.E.2d 798 (1984). A trial court abuses its discretion only if its decision is unreasonable, arbitrary, or unconscionable. *State ex rel. DiFranco v. S. Euclid*, 144 Ohio St.3d 571, 2015-Ohio-4915, 45 N.E.3d 987, ¶ 13; *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). "'A decision is unreasonable if there is no sound reasoning process that would support that decision.'" *Ockunzzi v. Smith*, 8th Dist. Cuyahoga

No. 102347, 2015-Ohio-2708, ¶ 9, quoting *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). An abuse of discretion may also be found where the trial court "'applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact.'" *Ockunzzi* at ¶ 9, quoting *Thomas v. Cleveland*, 176 Ohio App.3d 401, 2008-Ohio-1720, 892 N.E.2d 454, ¶ 15 (8th Dist.).

{¶ 13} PNC argues that the trial court failed to utilize its equitable powers in distributing the excess proceeds, allowing the heirs of Weisner to enjoy a "windfall" while PNC is still owed $24,074.71 on the equity reserve agreement. Kosiewicz argues that PNC failed to obtain a judgment that would entitle it to the excess proceeds.

{¶ 14} The word "mortgage" encompasses a promissory note and a security instrument; the security instrument typically collateralizes real property as security for payment of the note. *Bank of N.Y. Mellon v. Primes*, 8th Dist. Cuyahoga No. 105678, 2018-Ohio-1833, ¶ 9. A creditor seeking to enforce a mortgage agreement has several remedies available. "Upon breach of condition of the mortgage agreement, a mortgagee has concurrent remedies. It may, at its option, sue in equity to foreclose, or sue at law directly on the note; or, bring an action in ejectment." *The Broadview S. &. L. Co. v. Crow*, 8th Dist. Cuyahoga Nos. 44690, 44691, and 45002, 1982 Ohio App. LEXIS 12139, 7 (Dec. 30, 1982). "'An action at law on a promissory note to collect a mortgage debt is separate and distinct from an action in equity to enforce the mortgage lien on the property.'" *United States Bank Natl. Assn. v.*

Franko, 2018-Ohio-687, 107 N.E.3d 142, ¶ 16 (8th Dist.), quoting *Deutsche Bank Natl. Trust Co. v. Holden*, 147 Ohio St.3d 85, 2016-Ohio-4603, 60 N.E.3d 1243, ¶ 35.

{¶ 15} "'A foreclosure action is a civil action in equity.'" *Bank of Am. v. Rogers*, 8th Dist. Cuyahoga No. 107464, 2019-Ohio-1443, ¶ 14, quoting *Chem. Bank of N.Y. v. Neman*, 52 Ohio St.3d 204, 210, 556 N.E.2d 490 (1990). The foreclosure action in the instant matter concluded before PNC ever appeared. Despite being served at the onset of the foreclosure proceedings, PNC failed to answer or otherwise assert an interest. Doing so would have informed the trial court's foreclosure decree, including setting a minimum bid and allowing PNC to share in the distribution of the sale proceeds. PNC does not dispute that the confirmation of sale entered by the trial court on April 25, 2019, extinguished its interest in the property. Thus, PNC's opportunity to receive equitable relief was extinguished when the foreclosure proceedings concluded.

{¶ 16} PNC nonetheless argues that it is entitled to the proceeds, even though it never asserted its interest in the foreclosure action. This court has previously noted that in a foreclosure action, a junior lienholder who has defaulted is not entitled to share in any proceeds realized from the foreclosure sale because its default can be construed as a disclaimer of interest in the property. *Treasurer of Cuyahoga Cty. v. Unknown Heirs of William W. Russell, Jr.*, 8th Dist. Cuyahoga No. 110540, 2022-Ohio-309, ¶ 28, citing *State ex rel., U.S. Bank Trust Natl. Assn. v. Cuyahoga Cty.*, 8th Dist. Cuyahoga No. 110297, 2021-Ohio-2524, ¶ 11. In the instant matter, the tax lien was the lien of first priority and PNC was the junior

lienholder. Accordingly, PNC is not entitled to a share of the proceeds in the foreclosure action because they defaulted on the foreclosure action.

{¶ 17} We therefore find that the trial court did not abuse its discretion in finding that PNC's equitable interest in the foreclosure, including the proceeds, was extinguished in the April 25, 2019 confirmation of sale.

{¶ 18} PNC further argues that the trial court limited its ability to recover the proceeds by suggesting that PNC obtain a judgment, and then pursue attachment of that judgment, when this option was unavailable to PNC due to Weisner's death. We find that this argument is without merit.

{¶ 19} The trial court correctly determined that PNC, as the mortgager-creditor, was not without remedy even though its right to foreclosure and the foreclosure proceeds had been extinguished. As this court has previously stated, the equitable action in foreclosure is not synonymous with enforcing the legal obligation to pay the note. *U.S. Bank Natl. Assn. v. Robinson*, 8th Dist. Cuyahoga No. 105067, 2017-Ohio-5585, ¶ 7. Even though PNC was barred from pursuing the foreclosed property or the sale proceeds, the trial court properly determined that PNC could still pursue an action at law to enforce the equity reserve agreement by obtaining a judgment and seeking attachment of that judgment.

{¶ 20} PNC had the right to commence an action against Weisner for breach of the equity reserve agreement during her lifetime. As the mortgager-creditor, PNC had the options to sue in equity to foreclose, bring an action at law on the note, or

pursue ejectment. *Crow*, 8th Dist. Cuyahoga Nos. 44690, 44691, and 45002, 1982 Ohio App. LEXIS 12139, at 7.

{¶ 21} Moreover, even after Weisner died, PNC maintained an ability to collect from her estate. R.C. 2117.06. However, under Ohio law, claims against an estate must be presented within six months after the death of the decedent; if not presented, the claims "shall be forever barred as to all parties." R.C. 2117.06(C). Weisner passed away on November 5, 2014, and there is no evidence in the record that PNC made a claim against Weisner's estate in the six months following her death. Furthermore, there is no evidence in the record before us that PNC ever attempted to remedy the mortgagee-debtor's deficiency prior to attempting to collect these excess proceeds.

{¶ 22} PNC correctly notes that this court has recently allowed a creditor who defaulted on the foreclosure proceeding to share in the proceeds of a foreclosure sale. *Treasurer of Cuyahoga Cty. v. Berger Properties of Ohio*, 8th Dist. Cuyahoga No. 110233, 2021-Ohio-3204. However, in *Berger*, the defaulting creditor introduced a valid judgment against the debtor. Since the mortgager-creditor in *Berger* had a valid and enforceable judgment against the debtor, the mortgager-creditor possessed a legal right to enforce the judgment against the debtor, and thus, the creditor was allowed to share in the proceeds that would have otherwise been distributed to the debtor. In the instant matter, PNC has not introduced a valid judgment on the equity reserve agreement into the record. The trial court afforded PNC the opportunity to obtain said judgment because doing so would give PNC a

legal right to the excess proceeds even though its equitable right was extinguished. It is no fault of the trial court that PNC did not obtain a judgment either during Weisner's lifetime or during the statutory time allotted to bring a claim against her estate.

{¶ 23} The trial court's suggestion that PNC obtain a judgment and seek attachment of the judgment is supported by law. The trial court correctly determined that PNC, as the mortgager-creditor, possessed an additional remedy and gave PNC a chance to pursue it. We cannot say that the trial court erred in suggesting that PNC obtain a judgment and seek attachment of that judgment because this was a valid option for PNC. PNC has not demonstrated that the trial court abused its discretion or erred in any manner; rather, PNC simply failed to obtain a judgment in a timely fashion and is consequently not entitled to the proceeds.

III. Conclusion

{¶ 24} The trial court did not err in denying PNC's motion to distribute excess funds and awarding the funds to Kosiewicz. PNC's sole assignment of error is overruled.

{¶ 25} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

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

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

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FRANK DANIEL CELEBREZZE, III, PRESIDING JUDGE

MARY EILEEN KILBANE, J., and
MARY J. BOYLE, J., CONCUR

[Cite as *Breen v. Group Mgt. Servs., Inc*, 2022-Ohio-2689.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JAMES P. BREEN, ET AL., :

Plaintiffs-Appellants, :

No. 111253

v. :

GROUP MANAGEMENT SERVICES, INC., :

:

Defendants-Appellees.

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: August 4, 2022

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-21-953272

Appearances:

Hoffman Legal Group, LLC, and W. Andrew Hoffman, III, *for appellants*.

Ross, Brittain & Schonberg Co., LPA, Nick A. Nykulak and Sean S. Kelly, *for appellees*.

EILEEN A. GALLAGHER, J.:

{¶ 1} James P. Breen ("Breen") individually and as trustee for Child One 2013 Trust, Child Two 2013 Trust and Child Three 2013 Trust (collectively "Appellants") appeals the judgment of the trial court dismissing their claims for

want of standing. However, Appellants had no relationship with Group Management Services, Inc., that could support a claim for breach of contract or a claim for breach of fiduciary duty. The trial court did not err in dismissing the action for want of standing. We overrule Appellants' assignment of error and affirm the judgment of the trial court.

I. Factual and Procedural Background

{¶ 2} Appellants appeal the trial court's dismissal of the complaint under Civ.R. 12(B)(6). Accordingly, these facts are taken from the complaint.

{¶ 3} Manchester Realty was a corporate entity. The complaint does not allege whether it is a corporation, limited liability company, limited partnership or some other vehicle[1] nor does it allege a state of incorporation. However, the complaint does allege that its dissolution is publicly available on the Ohio Secretary of State's website.

{¶ 4} The purpose of this entity was to own and operate the property located at 1360 E. 9th Street Cleveland, Ohio 44113 ("IMG Center"). In connection with managing the IMG Center, Manchester Realty entered into a contract ("Contract") with Group Management Services Inc. ("GMS"). Under this Contract, GMS employed any personnel that Manchester Realty needed and leased those personnel's services back to Manchester Realty.

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[1] Although the opposition to the motion to dismiss below and the assignment of error on appeal describes it as "Manchester Realty Limited Liability Company."

{¶ 5} 1360 LLC is the successor entity of Manchester Realty. Manchester Realty was dissolved at the end of 2018 as a precondition for taking out a loan on the IMG Center. James P. Breen ("Breen") is the principal of 1360 LLC as well as an owner. Additionally, three trust funds (Child One 2013 Trust, Child Two 2013 Trust and Child Three 2013 Trust) each have an interest in 1360 LLC and Breen is the trustee for each trust. The complaint alleges that the trusts have an ownership interest in 1360 LLC, but does not allege that the trusts have an ownership interest in the Manchester Realty entity. Accordingly, the ownership of Manchester Realty is somewhat unclear.

{¶ 6} In March 2018, the parties substituted 1360 LLC for Manchester Realty in the Contract. Appellants did not attach a copy of the Contract nor a copy of the substitution to the complaint. In October 2019, the Cuyahoga County Court of Common Pleas appointed Paul Downey ("Downey") as receiver over IMG Center. In January 2019, GMS began to use Manchester Realty's employer identification number ("EIN") to report payroll and file payroll taxes.

{¶ 7} Appellants allege that GMS's use of the EIN supports two causes of action: breach of contract and breach of fiduciary duty. GMS moved that the complaint be dismissed for lack of standing because there were no facts alleged in the complaint that would establish that the Appellants had standing to pursue either claim. According to GMS, only Downey, as successor in interest, has the standing to pursue either claim.

{¶ 8} The trial court below dismissed the complaint finding that:

In the instant action, 1360 East Ninth Cle, LLC is currently in active receivership in case CV-19-917685. The receiver is the only person who has standing to bring the suit on behalf of 1360 East Ninth Cle, LLC. Plaintiffs, an individual shareholder of 1360 East Ninth Cle LLC and the trusts of his children, do not have standing to pursue litigation on behalf of a company in active receivership. Plaintiffs' complaint is hereby dismissed for failure to state a claim upon which relief may be granted.

{¶ 9} Appellants appeal and assign the following error for our review:

The trial court erred when it held that the Plaintiffs lacked standing to bring a claim because the Plaintiffs were not bringing suit on behalf of 1360 East Ninth CLE, LLC ("1360 LLC"). Plaintiffs were bringing suit on behalf of themselves and Manchester Realty Limited Liability Company ("Manchester Realty").

II. Argument and Authorities

{¶ 10} Appellants' complaint alleges two causes of action breach of contract and breach of fiduciary duty. However, the complaint does not allege that Appellants are parties to a contract with GSM. Further, the complaint does not allege any relationship, let alone a fiduciary relationship, between Appellants and GMS. The trial court did not err in dismissing Appellants' complaint for want of standing.

{¶ 11} Appellants' sole assignment of error appeals the trial court's order granting GMS's motion to dismiss under Civ.R. 12(B)(6). We review rulings on Civ.R. 12(B)(6) motions to dismiss under a de novo standard. "A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. * * * Under a de novo analysis, we must accept all factual allegations of the complaint as true and all reasonable inferences must be drawn in favor of the nonmoving party." *NorthPoint Props. v. Petticord*, 179 Ohio

App.3d 342, 2008-Ohio-5996, 901 N.E.2d 869, ¶ 11 (8th Dist.). "For a trial court to grant a motion to dismiss for failure to state a claim upon which relief can be granted, it must appear 'beyond doubt from the complaint that the plaintiff can prove no set of facts entitling her to relief.'" *Graham v. Lakewood*, 2018-Ohio-1850, 113 N.E.3d 44, ¶ 47 (8th Dist.), quoting *Grey v. Walgreen Co.*, 197 Ohio App.3d 418, 2011-Ohio-6167, 967 N.E.2d 1249, ¶ 3 (8th Dist.).

{¶ 12} "It is well established that before an Ohio court can consider the merits of a legal claim, the person seeking relief must establish standing to sue." *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 469, 715 N.E.2d 1062 (1999). "An action brought by a party that lacks standing will be dismissed." *State ex rel. Ohio Stands Up!, Inc. v. DeWine*, Slip Opinion No. 2021-Ohio-4382, ¶ 5. To establish standing, Appellants must show they suffered "(1) an injury that is (2) fairly traceable to the appellees' allegedly unlawful conduct, and (3) likely to be redressed by the requested relief." *Torrance v. Rom*, 2020-Ohio-3971, 157 N.E.3d 172, ¶ 24 (8th Dist.).

{¶ 13} The complaint includes two alleged causes of action: breach of contract and breach of fiduciary duty.

{¶ 14} "In order to substantiate a breach of contract claim, a party must establish four elements: (1) a binding contract or agreement was formed; [(2)] the nonbreaching party performed its 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." *Telecom Acquisition Corp. I v. Lucic Ents.*, 2016-Ohio-1466, 62 N.E.3d 1034, ¶ 23 (8th Dist.).

{¶ 15} Where there are no allegations that a plaintiff is a party to a contract or a third party intended beneficiary to a contract, a court does not err in dismissing the complaint. *Skaff v. Khutorsky*, 6th Dist. Lucas No. L-15-1249, 2016-Ohio-4903, ¶ 21. The complaint does not allege anywhere that Breen individually, or as trustee, is an intended third-party beneficiary of the Contract. Nor does the complaint allege that Breen individually, or as a trustee, was intended by GMS to have "the benefit of the promised performance." *Huff v. FirstEnergy Corp.*, 130 Ohio St.3d 196, 2011-Ohio-5083, 957 N.E.2d 3, ¶ 10. "Generally, the parties' intention to benefit a third party will be found in the language of the agreement." *Torrance*, 2020-Ohio-3971, 157 N.E.3d 172, at ¶ 36. The only allegations in the complaint are that the beneficiaries of the Contract were Manchester Realty and 1360 LLC. The only benefits Appellants would receive from the contract with GMS is as members of Manchester Realty or 1360 LLC.

{¶ 16} Accordingly, the complaint fails to allege that Appellants have the standing to maintain a breach of contract cause of action against GMS.

{¶ 17} The complaint's second cause of action is breach of fiduciary duty. The elements of a breach of fiduciary duty are: "(1) the existence of a fiduciary duty; (2) the failure to observe the duty; and (3) an injury resulting proximately therefrom." *DPLJR, Ltd. v. Hanna*, 8th Dist. Cuyahoga No. 90883, 2008-Ohio-

5872, ¶ 19, citing *Strock v. Pressnell*, 38 Ohio St.3d 207, 216, 527 N.E.2d 1235 (1988).

{¶ 18} This court has previously determined that the principal of a firm may not assert, individually, a claim for breach of contract or breach of fiduciary duty against a vendor of that firm based on the relationship of the firm. *Torrance*, 2020-Ohio-3971, 157 N.E.3d 172, at ¶ 15-17 ("Having chosen to do business as a corporation, [Torrance] is bound by that choice. [The corporation] was a party to the property-management agreements, [Torrance] was not."). Appellants cite no case to the contrary.

{¶ 19} Appellants also contend that they brought "suit on behalf of themselves and Manchester Realty Limited Liability Company." However, the complaint does not identify Manchester Realty as a party. Manchester Realty does not appear in the caption as required by Civ.R. 10(A) and the Appellants did not attach the Contract to the complaint as required by Civ.R. 10(D)(1).

{¶ 20} In their brief, Appellants claimed that Manchester Realty "executed an assignment of rights that authorizes Plaintiffs to sue GMS on its behalf[.]"

{¶ 21} Regardless of the subsequent motion practice, "[i]n deciding whether a complaint should be dismissed pursuant to Civ.R. 12(B)(6), the court's review is limited to the four corners of the complaint along with any documents properly attached to or incorporated within the complaint." *Windsor Realty & Mgt., Inc. v. Northeast Ohio Regional Sewer Dist.*, 2016-Ohio-4865, 68 N.E.3d 327, ¶ 23 (8th Dist.).

{¶ 22} The complaint alleges that Manchester Realty was "dissolved at the end of 2018[.]" The dissolution of a limited liability company does not automatically divest it of authority to pursue civil actions: "A limited liability company's dissolution, in itself: * * * (2) Does not prevent the commencement of a proceeding by or against the limited liability company in its limited liability company name[.]" R.C. 1706.471.[2]

{¶ 23} However, the authority of a dissolved LLC to carry on litigation is limited. A dissolved Ohio LLC "may not carry on any activities except as is appropriate to wind up and liquidate its activities and affairs." R.C. 1706.471.[3] At some point, actions subsequent to the dissolution of the company are not within the authority granted by the Ohio Revised Code. *See ACV Realty, Ltd. v. Bayview Loan Servicing, LLC*, 7th Dist. Mahoning No. 15 MA 0059, 2016-Ohio-5467, ¶ 53 (decided under a previous analogous section of the Ohio Revised Code); *St. Clair Builders, Inc. v. Aetna Cas. & Sur. Co.*, 81 Ohio App.3d 675, 680, 611 N.E.2d 1009 (8th Dist.1992) (same but for corporations).[4] Appellants allege misconduct that all

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[2] The application of this provision relies on the presumption that Manchester Realty is an Ohio limited liability company, a fact not alleged. The complaint alleges that the document on file with the secretary of state is a "dissolution" and not a cancellation of registration, so this seems a reasonable inference. *Compare* R.C. 1706.514 (providing for cancellation of registration of foreign LLC) and R.C. 1706.471(B)(1) (requiring a dissolved Ohio LLC to file a certificate of dissolution).

[3] There is no case law concerning the application of the Revised Ohio Limited Liability Company Act to LLCs that were formed and dissolved under the Ohio Limited Liability Company Act. However, the two acts have similar limits on post-dissolution activity, so we need not decide which applies here.

occurred after the dissolution of Manchester Realty. There are no facts alleged that could support the inference that Appellants' causes of action arise out of the wind-up and dissolution of Manchester Realty.

{¶ 24} The complaint does not allege facts that establish standing on the part of Appellants based on an assignment from Manchester Realty.

{¶ 25} Finally, Appellants argue that they can demonstrate injury traceable to GMS's misconduct because Breen will likely be assessed as "the responsible person under the Employment Taxes and the Trust Fund Recovery Penalty ("TFRP"). 'Under 26 U.S.C. § 6672, the IRS may collect a TFRP against individual officers <u>who are responsible</u> for a corporation's failure to remit trust fund taxes — the tax withholdings from employee paychecks — to the government.'" (Emphasis added.), quoting *In re J.J. Re-Bar Corp., Inc.*, 644 F.3d 952, 954 (9th Cir.2011). The TFRP allows the IRS to recover a penalty "against individual officers who are responsible for a corporation's failure to remit trust fund taxes[.]" *Id.* at 954.

{¶ 26} Liability under TFRP attaches to "[a]ny person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment therof[.]" 26 U.S.C. 6672.

{¶ 27} GMS's alleged misconduct began in January 2019. GMS's misconduct began after Manchester Realty was no longer a party to the contract and after 1360 LLC took over management for the property. Further, the complaint

alleges that the "IMG Center" is in a receivership and the Contract at issue is for the purpose of managing the IMG Center. The complaint alleges facts that establish Downey was the "person required to collect, truthfully account for, and pay over any tax[.]" The complaint does not allege facts that could establish standing for Appellants based on potential liability under the TFRP.

{¶ 28} We overrule Appellants' sole assignment of error and affirm the judgment of the trial court.

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.

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EILEEN A. GALLAGHER, JUDGE

SEAN C. GALLAGHER, A.J., and
ANITA LASTER MAYS, J., CONCUR

[Cite as *Forsythe Fin., L.L.C. v. Yothment*, 2022-Ohio-2798.]

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

FORSYTHE FINANCE, LLC, : APPEAL NO. C-210606
TRIAL NO. 21CV-08067

Plaintiff, :

vs. :

JAMES YOTHMENT, :

Defendant/Third-Party Plaintiff-Appellant, :

:

vs.

NCP FINANCE OHIO, LLC, :

and :

SUNUP FINANCIAL, LLC, :

Third-Party Defendants-Appellees. :

FORSYTHE FINANCE, LLC, : APPEAL NO. C-210550
TRIAL NO. 21CV-07061

Plaintiff, :

vs. :

CATHLEEN SPELLMAN, :

Defendant/Third-Party Plaintiff-Appellant, :

:

vs.

NCP FINANCE OHIO, LLC, :

and :

SUNUP FINANCIAL, LLC, :

Third-Party Defendants-Appellees.	:	

FORSYTHE FINANCE, LLC,	:	APPEAL NO. C-210626 TRIAL NO. 21CV-05720
Plaintiff,	:	*O P I N I O N.*
vs.	:	
RICHARD SEIBERT,	:	
Defendant/Third-Party Plaintiff-Appellant,	:	
vs.	:	
BASTION FUNDING OH I, LLC,	:	
and	:	
SUNUP FINANCIAL, LLC,	:	
Third-Party Defendants-Appellees.	:	

Civil Appeals From: Hamilton County Municipal Court

Judgments Appealed From Are: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: August 12, 2022

McKinney & Namei Co., and *John A. Rebel,* for Defendants/Third-Party Plaintiffs-Appellants,

Taft Stettinius & Hollister LLP, Michael L. Meyer, Philip D. Williamson and *William E. Braff*, for Third-Party Defendants-Appellees.

BERGERON, Judge.

{¶1} In this collection of appeals, consolidated for opinion purposes, borrowers-appellants contend that each trial court below erred in granting motions to dismiss for failure to state a claim, dismissing their third-party complaints that challenged the legitimacy of certain loans issued to them. Given the allegations in the third-party complaints and the contracts attached thereto, we find that the borrowers satisfied the minimal requirements necessary to survive dismissal. We accordingly sustain the assignments of error and remand the cause to the trial courts for further proceedings consistent with this opinion.

I.

{¶2} Some lenders explore creative ways to try to charge excessive interest rates, often in a cat and mouse game with the legislature that endeavors to proscribe such efforts. These cases involved such an example, with a lender—prohibited from making certain loans directly—partnering with a third party to provide loans that require Ohio individuals to repay three times what they borrowed.

{¶3} Before launching into the facts at hand, we provide some context on the regulatory framework at play here. The version of the Ohio Mortgage Loan Act ("MLA") governing the transactions at issue required mortgage lenders and brokers to register with Ohio's Division of Financial Institutions ("DFI") before making certain loans. In exchange for becoming a registrant, lenders received the ability to conduct activities connected with residential mortgage loans other than first-lien loans. Registrants could advertise, solicit, and hold out that they were validly engaged in the business of providing residential mortgage loans. They could collect mortgage payments for themselves and on behalf of others. They could employ and compensate mortgage loan originators. And in the quirk directly implicating this case, they could

offer unsecured loans (or loans secured by something other than real property) with unlimited interest rates, provided the loan amounts fell below $5,000.

{¶4} NCP Finance Ohio ("NCP") is one such registrant. Founded in 2005, NCP is a consumer finance company which offers credit solutions to "alternative" lending companies and individual consumers. NCP provides only short-term loans, admonishing consumers on its website that there are less costly ways to manage their immediate need for cash. Borrowers who fear they cannot pay on time are advised that longer-term products through traditional banks could offer a better option. Because mortgages are not short-term loans, one might be puzzled as to why NCP registered under Ohio's MLA. Keep reading.

{¶5} In 2008, the General Assembly passed what was at the time the strongest payday lending reform bill in the country. The Ohio Short-Term Loan Act ("STLA") capped the interest rate of short-term loans at 28 percent (inclusive of all fees), limited the maximum loan amount to $500, and limited borrowers to four loans a year. *See* former R.C. 1321.39 to 1321.48. Like the MLA, it forced lenders to register with the DFI before engaging in the business of making short-term loans to borrowers. "And then a funny thing happened: nothing. It was as if the STLA did not exist. Not a single lender in Ohio is subject to the law. How is this possible? How can the General Assembly set out to regulate a controversial industry and achieve absolutely nothing? Were the lobbyists smarter than the legislators? Did the legislators realize that the bill was smoke and mirrors and would accomplish nothing?" *Ohio Neighborhood Fin., Inc. v. Scott*, 139 Ohio St.3d 536, 2014-Ohio-2440, 13 N.E.3d 1115, ¶ 43 (Pfeifer, J., concurring).

{¶6} The answer to Justice Pfeifer's question is that lenders such as NCP registered under the MLA, presumably to circumvent the STLA's restrictions. And while the MLA allowed unfettered interest and fees to be charged for loans under $5,000, there was still the pesky provision in former R.C. 1321.52(C) subjecting MLA registrants making unsecured loans to all the rules prescribed under sections R.C. 1321.51 to 1321.60. Two of those rules capped the interest rate that a registrant could contract for and receive at 21 percent of the unpaid principal balance of the loan, or any rate agreed on by the parties so long as it did not exceed 25 percent. *See* former R.C. 1321.57 and 1321.571. This meant that a lender registering under the MLA could bypass the STLA's maximum loan amount of $500, but it could not charge an interest rate exceeding 25 percent. What to do in such a circumstance?

{¶7} Enter SunUp, a credit services organization ("CSO") governed by the Ohio Credit Services Organization Act ("CSOA"). The CSOA is (ostensibly) a consumer-protection law promoted on the Ohio Attorney General's website as one of the "key protections that consumers have under the law." The CSOA regulates organizations that provide credit-repair assistance, debt counseling, and other debt-related services to consumers. Like the MLA (and supposedly the STLA), CSOs must register before conducting business in Ohio. In exchange, the CSO can advertise its services and charge consumers a fee for providing debt-related services. But unlike the MLA and the STLA, the version of the CSOA applicable here placed no restrictions on the fees charged by CSOs. And because CSOs can obtain extensions of credit for a borrower by law, the fees assessed by a CSO acting in a loan-broker capacity were essentially unregulated. Perhaps you can see where this is going.

{¶8} The CSOA specifically excludes organizations that make or collect loans and licensed mortgage brokers. By law then, MLA registrants cannot be CSOs, and CSOs cannot be MLA registrants. Under what certain lenders dubbed the "CSO model," the setup goes like this: the lender (NCP) registers under the MLA so that it can advertise and collect on the loan. But because that opens it up to interest limitations they prefer to avoid, the MLA registrant partners with a CSO (SunUp) to "assist" the consumer in obtaining the loan. The MLA registrant can only charge 25 percent interest on its portion of the loan. The CSO, however, can and does charge fees far exceeding 25 percent interest. A loan that would be otherwise impermissible for NCP to make under Ohio law was then (theoretically, at least) possible simply through its association with SunUp. Left unexplored is the degree to which the registrants and the brokers are working in concert, obfuscating the line between lawful and not. As we will see, the General Assembly subsequently promulgated provisions designed to outlaw this exact practice.

II.

{¶9} With that background in mind, we shift the focus to the facts at hand. SunUp brokered the loans between the borrowers and the lenders in this case. Borrowers who accept a loan facilitated by SunUp enter first into a credit services agreement ("CSA") and are charged a CSO fee, payable to SunUp. The CSA provides that the fee is due on the same day the loan is made. It further gives borrowers the option of paying the fee directly to SunUp or of having it financed by a third-party lender (more on this in a bit). In each of the consolidated cases before us on appeal, the CSO fee charged by SunUp exceeded the requested loan amount by nearly 200

percent. Unsurprisingly, all the borrowers elected to have the CSO fee financed with the loan.

{¶10} As part of this process, the borrowers also executed a promissory note with the third-party lender that SunUp arranged to fund the loan. From the total loan proceeds, each lender then distributed the requested loan amount to the borrower and paid the remainder to SunUp "on behalf" of the borrower, resulting in each borrower owing approximately three times more than the amount they received. For example, Cathleen Spellman financed a total amount of $5,013.38 with NCP. The promissory note between Ms. Spellman and NCP indicates that NCP disbursed $1,750 directly to Ms. Spellman and sent $3,263.38 to SunUp on behalf of Ms. Spellman to cover the CSO fee. But Ms. Spellman would make all of her payments to NCP. Likewise, James Yothment financed a total of $7,363.70 through NCP, with $2,700 going to Mr. Yothment and the other $4,663.70 sent to SunUp on his behalf. Richard Seibert's loan originated with the now-defunct registrant Bastion Funding OH I LLC, in the total amount of $5,916.63 ($2,000 went to Mr. Seibert and the remaining $3,916.63 to SunUp).

{¶11} All three borrowers defaulted on their loans, prompting the current assignee of the debts, Forsythe Finance, to sue for nonpayment. In response, each borrower filed a third-party complaint against SunUp as the CSO, and NCP or Bastion as the lender. Ms. Spellman's and Mr. Yothment's nearly identical third-party complaints presented four causes of action that alleged violations of the Ohio Second Mortgage Act (a.k.a. the Ohio Mortgage Loan Act), the Ohio Credit Services Act, the Consumer Sales Practices Act, and breach of contract. The third-party complaints invoked the protection of the MLA by contending that the CSO fee is "the addends of

the principal amount," thus imposing on Ms. Spellman an obligation to repay a principal amount of $5,013.38 plus 25 percent interest to NCP, and on Mr. Yothment an obligation to repay a principal amount of $7,363.70 plus 25 percent interest to NCP. The third-party complaints also presented arguments that the CSO fee is an unauthorized loan-guaranty fee, an unauthorized broker's fee, or excessive interest.

{¶12} Mr. Seibert's third-party complaint alleged violations of the Ohio MLA, the Ohio CSOA, and R.C. 1343.01. His allegations are in similar vein, stating variously that the MLA applied because the promissory notes imposed an obligation to "pay the principal amount of $5,916.63 to Bastion," that the CSO fee could be considered excessive interest, or that it could be another type of charge unauthorized by law. Alternatively, Mr. Seibert alleged that "in the event that the MLA does not apply because the loan is for $5,000 or less," then Bastion violated R.C. 1343.01, Ohio's usury statute which sets the maximum interest rate for promissory notes.[1]

{¶13} The third-party defendants (just NCP and SunUp at this point) moved to dismiss all the third-party complaints for failure to state a claim under Civ.R. 12(B)(6) or, in the alternative, to compel arbitration. Two primary defenses were raised by NCP and SunUp in the motions to dismiss: first, that the MLA in effect at the time of these loans did not apply because the loan amount did not exceed $5,000, and second, that even if the MLA did apply, SunUp is not subject to the MLA and therefore its actions do not violate the MLA. None of the trial courts addressed NCP and SunUp's request for arbitration.[2] The trial courts dismissed the third-party

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[1] Bastion is not an appellee to this appeal, and we thus decline to address the usury argument put forth solely against Bastion.

[2] Before each trial court, NCP and SunUp asked that this matter be sent to arbitration should the trial courts decline to grant their motion to dismiss. Now apparently content to litigate the matter, they dropped this argument on appeal and abandoned the point.

complaints "for the reasons stated in the Third Party Defendants' Combined Motion to Dismiss."

{¶14} We consolidated the borrowers' appeals into the case number assigned to Ms. Spellman's appeal, and therefore use her name and facts in this opinion for ease of discussion (and because the facts alleged with respect to the other borrowers are substantially similar). We take no position on how the CSO fee should ultimately be classified and note only that the question remains unresolved on the state of this record. The borrowers' third-party complaints and attached contracts all set forth facts that, even if somewhat inartfully pled, render dismissal premature at this stage. Because there is a set of facts here " 'consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant [the] defendant's motion to dismiss.' " *City of Cincinnati ex rel. Radford v. City of Cincinnati,* 1st Dist. Hamilton No. C-030749, 2004-Ohio-3501, ¶ 2, quoting *York v. Ohio State Hwy. Patrol*, 60 Ohio St.3d 143, 145, 573 N.E.2d 1063 (1991). Accordingly, we sustain the borrower's sole assignment of error (in each case) and reverse the judgments for the reasons explained more fully below.

III.

{¶15} Motions to dismiss should only be granted in situations where "the complaint, when construed in the light most favorable to the plaintiff and presuming all the factual allegations in the complaint are true, demonstrates that the plaintiff can prove no set of facts entitling him to relief." *State ex rel. Belle Tire Distribs. v. Indus. Comm. of Ohio*, 154 Ohio St.3d 488, 2018-Ohio-2122, 116 N.E.3d 102, ¶ 17. When deciding a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim, the trial court "must accept all factual allegations in the complaint as true and draw all reasonable

inferences in favor of the nonmoving party." *Fox Consulting Group, Inc. v. Mailing Servs. of Pittsburgh, Inc.*, 1st Dist. Hamilton No. C-210250, 2022-Ohio-1215, ¶ 6. Appellate courts review a trial court's ruling on a Civ.R. 12(B)(6) motion de novo. *Id.* at ¶ 7. The borrowers need not prove their case at this stage of the adjudication process; rather, they need only plead a set of facts that, if proved, would entitle them to recover. *See id.* at ¶ 7. Because the third-party complaints meet this liberal pleading standard, dismissal is inappropriate at this stage of the pleadings.

A.

{¶16} The thrust of NCP and SunUp's first defense is that the CSO fee is independent of the loan issued by NCP, thus rendering the MLA inapplicable. That conclusion strikes us as inconsistent with the framework of the loan and in conflict with many of the key factual points alleged in the third-party complaints. NCP claims that the borrower never pays the CSO fee to a registrant and that SunUp is the only party who charged or received fees relating to the CSO fee. But that premise requires us to construe the facts in NCP and SunUp's favor, rather than the borrower's favor. Take a look at the promissory note at issue, in which the borrower promises to pay NCP the principal amount plus interest, where the principal amount includes the CSO fee. No mention is made of payments going directly from the borrower to the CSO because that's not how the note is structured. NCP's efforts to render itself irrelevant for purposes of analyzing the CSO fee simply cannot be squared with the structure of the contract it prepared.

{¶17} The crux of this case turns legally on how the CSO fee should be classified, and factually on the murky (as far the record discloses) relationship between NCP and SunUp. We see at least three potential answers to the classification question

according to Ms. Spellman, all of which come with varying legal implications. Regarding potential violations of the MLA, the CSO fee could be considered principal pursuant to former R.C. 1321.51(D), or it could be interest under former R.C. 1321.51(E), but if it is neither principal nor interest, then it may constitute a prohibited charge under former R.C. 1321.57(H)(1). Ms. Spellman first posits that the CSO fee represents a part of the principal amount of her loan. "Principal" is defined in former R.C. 1321.51(D) as "the amount of cash paid to, or paid or payable for the account of, the borrower, and includes any charge, fee or expense that is financed by the borrower at origination of the loan or during the term of the loan."

{¶18} Characterizing the CSO fee as part of the principal amount certainly seems plausible based on the facts set forth in Ms. Spellman's third-party complaint. Neither side seems to dispute that the CSO fee was (1) a charge, fee, or expense, (2) financed by Ms. Spellman (the borrower), or (3) at the origination of her loan, thus her complaint seems to pass muster in meeting the statutory definition of "principal." Most tellingly, NCP and SunUp's combined motions to dismiss each include a characterization that "[t]he principal amount also included a Credit Services Organization (CSO) fee * * * for SunUp's services as outlined in the Credit Services Agreement." If we proceed from the premise that the CSO fee is principal, which seems plausible based on the face of Ms. Spellman's third-party complaint, the MLA would govern the transaction with respect to the contract between Ms. Spellman and NCP.

{¶19} NCP and SunUp rely on their broad argument that the MLA is inapplicable to these transactions because the version of the MLA in effect at the time only governed loans exceeding $5,000. But the promissory note provides that it is

"governed by the laws of the State of Ohio, *specifically the Ohio Mortgage Loan Act*." (Emphasis added.) That makes sense considering the total amounts of these loans (including the financed CSO fee) did exceed $5,000. The promissory note in Ms. Spellman's case further provides that the principal amount is $5,013.38 and that "[i]nterest will accrue on a daily basis on the unpaid Principal Amount." Our back-of-the-napkin math based on the lending disclosures between Ms. Spellman and NCP indicates that NCP did indeed charge the statutorily allowable maximum interest rate of 25 percent on the *total* amount of $5,013.38. We are perplexed to understand how NCP justifies charging interest on a financial transaction to which it simultaneously claims to not be involved. In other words, more information is needed surrounding this arrangement. Accepting all of Ms. Spellman's factual allegations as true, as we must at this stage, it appears she could prove a set of facts that would demonstrate that the CSO fee represents principal under the MLA. *See Thomas v. Othman*, 2017-Ohio-8449, 99 N.E.3d 1189, ¶ 18 (1st Dist.).

{¶20} The borrowers alternatively contend that if the CSO fee is not principal, then it constitutes a form of interest exceeding the permissible maximum rate allowed by the MLA. "Interest" is defined in former R.C. 1321.51(E) as "all charges payable *directly or indirectly* by a borrower to a registrant as a condition to a loan or an application for a loan." (Emphasis added.) Here again, NCP and SunUp dispute the applicability of the MLA in its entirety, pointing to the distinctions between registrants under the MLA (such as NCP) and nonregistrants (such as SunUp). They argue that "because borrowers never pay the CSO fee to a registrant lender, the CSO fee cannot be interest under the MLA." Simply parsed, they refute the notion that the MLA

applies or that the CSO fee could be interest because the fee is paid to SunUp, a nonregistrant, and not to NCP, a registrant.

{¶21} Accepting NCP and SunUp's argument on this point requires starting from the premise that the CSO fee is paid solely by the borrower to SunUp, a fact not yet established on this record. It also requires ignoring the plain text of the statutory definition of "interest." NCP freely admits to transferring the CSO fee directly to SunUp on behalf of the borrower and to receiving payments from the borrowers, but despite that admission, it proclaims that the CSO fee is not charged by NCP or payable to NCP. Again, we cannot reach such a conclusion without construing the facts in favor of NCP and SunUp. The statute defines interest as all charges payable directly or indirectly to a registrant as a condition of the loan. The promissory note charged Ms. Spellman with paying *NCP* back the full amount of $5,013.38, not SunUp, a potentially indirect way for the CSO fee to be paid by Ms. Spellman to NCP. Whether one views this as direct or indirect, the money appears to go in NCP's pocket, at least for statutory purposes. Furthermore, as noted above, it appears NCP charged interest on the CSO fee. We struggle to reconcile how NCP could front the funds to SunUp, facilitate the transfer, collect reimbursement (including interest) from the borrower, and then wash its hands of any involvement with the CSO fee. Especially on this record, which has yet to shed light on the relationship between NCP and SunUp.

{¶22} Another consequence of NCP and SunUp's argument here is that, if correct, SunUp had no constraint on its ability to charge its fee. If it wanted, it could have charged $10,000, or even $1,000,000. SunUp admits that the legislative loophole could allow for such mind-boggling charges but is quick to claim that such amounts would be fanciful because no borrower would agree to it. This argument,

however, strays out onto thin ice. After all, the borrowers here agreed to pay twice the amount of their loans. Maybe they would have refused our million-dollar example, but if they were truly desperate, why not three or four times the loan amount? This illustrates the problems inherent in this arrangement because the General Assembly sought to protect consumers, but SunUp is effectively saying that it can charge any fee amount without constraint.

{¶23} This concerning arrangement between the third-party defendants also raises serious questions about whether the CSO fee is indeed a condition of the loan, thus similarly rendering it interest as defined by statute. NCP insists that Ms. Spellman had the choice to pay the fee directly to SunUp as opposed to financing it through them, begging the obvious question: if Ms. Spellman had $3,263.38 at her disposal, why would she need a loan in the amount of $1,750? A choice that is wholly illusory is no choice at all. Dismissal at this stage leaves the record devoid of any examination into whether Ms. Spellman could have obtained her loan without incurring the CSO fee.

{¶24} NCP counters that Ms. Spellman ignores the plain language of the promissory note, which describes the fee as "not interest for purposes of Ohio law." Perhaps, but in contracts of adhesion involving consumer transactions in a regulated area, courts must pay closer attention to the substance of the contract. "This closer scrutiny is necessary for the preservation of the protections afforded consumers through legislation." *Eagle v. Fred Martin Motor Co.*, 157 Ohio App.3d 150, 2004-Ohio-829, 809 N.E.2d 1161, ¶ 45 (9th Dist.). And just because the loan documents proclaim that the CSO fee is only charged by and payable to SunUp does not make it so—that is a legal conclusion that the courts below should draw from a complete

record. The only thing we know for certain at this point is that Ms. Spellman has pled a plausible set of facts from which a more thorough discovery process may reveal that the CSO fee meets the statutory definition of interest.

{¶25} Finally, regarding potential violations of the MLA, Ms. Spellman offers one additional argument. If the CSO fee is not principal, and it is not interest, then she contends that it is verboten by Ohio law. In support of this argument, Ms. Spellman points to the part of the statute directing that "no further or other amount, whether in the form of broker fees, placement fees, or any other fees whatsoever, shall be charged or received by the registrant." Former R.C. 1321.57(H)(1). NCP maintained in its brief and at oral argument that the CSO fee is not principal or interest but is something else, "a fee that is independent of the loan issued by NCP." NCP goes on to insist that the CSO fee is not subject to the prohibitions in R.C. 1321.57(H)(1) because it only applies to registrants, and the fee is "only charged by and payable to SunUp," a nonregistrant. Again, this assertion requires us to construe facts in favor of NCP and SunUp. NCP's involvement with SunUp and the charging of the CSO fee is not yet fleshed out by the record. The question before us at this stage is whether, based on Ms. Spellman's third-party complaint, the CSO fee could be classified as unauthorized under the applicable version of R.C. 1321.57(H)(1). We believe it could, based on the pleadings at hand and the contracts in the record.

{¶26} NCP's only defense on this point features the now-familiar refrain that it played no role in the charging of CSO fee, professing that the MLA does not apply because "SunUp is the only party that charged or received fees relating to the CSO." NCP is correct that former R.C. 1321.57(H)(1) applied only to registrants. But NCP is a registrant, and the statute prohibits broker fees or any other fees whatsoever from

being charged *or received* by the registrant. SunUp appears to qualify as a broker, defined in the former R.C. 1321.51(J) as "a person who acts as an intermediary or agent in finding, arranging, or negotiating loans, other than residential mortgage loans, and charges or receives a fee for these services." Does Ms. Spellman's reimbursement of the broker fee to NCP equate to a broker fee being paid to a registrant? It is too soon to tell, but the parties structured these payments so that NCP received them from the borrowers. The statute includes the word "received," and while NCP can protest that it funneled the money back to SunUp, it has difficulty escaping the fact that it received these funds (or was supposed to) on the state of this record. Based on the alleged facts before us, if NCP is correct that the CSO fee is neither principal nor interest, then the contract plausibly could violate R.C. 1321.57(H)(1) if NCP received "a further or other amount" in the form of SunUp's fee as well as interest on the CSO fee.

{¶27} We appreciate that borrowers have taken a "kitchen sink" approach to challenging the CSO fee, but they can do that at this stage. Indeed, both parties have taken different, and sometimes inconsistent, positions on how the CSO fee should be characterized between their trial and appellate court briefings. That is likely attributable to the novel nature of the structure of these loans, and further factual probing will help illuminate the legal issues at play. Regardless of how the CSO fee is ultimately defined, Ms. Spellman's third-party complaint sets forth facts at this point from which it could be reasonably inferred that a violation of the MLA occurred. That is enough to allow these cases to proceed.

B.

{¶28} Ms. Spellman's breach-of-contract claim (Count II) similarly relies on an initial classification of the CSO fee. The claim alleges that NCP failed to refund any

amounts paid which exceeded the highest interest rate allowed by law. That determination cannot be made until the trial courts grapple with whether the CSO fee is interest or another type of unauthorized charge (or whether it rejects those claims and finds it perfectly permissible). There are simply too many unknowns that could tip the scales in Ms. Spellman's favor to conclude that she has pled no possible set of facts that would entitle her to relief.

C.

{¶29} In addition to violations of the MLA and the contractual claim, Ms. Spellman further suggests on appeal that the CSO fee is a type of insurance guaranty prohibited by the Ohio Insurance Producers Licensing Act. NCP and SunUp responded that the borrowers failed to raise this cause of action before the trial courts, including it only as part of their claim under the MLA. Our review of the complaint shows that Ms. Spellman included the credit-guaranty insurance as a type of unauthorized fee prohibited by the MLA, but in the context of Count I of her complaint alleging a violation of the MLA. NCP and SunUp's motion to dismiss contains a heading stating that the CSO fee is not a guaranty fee or credit-guaranty insurance, though they fail to develop the argument further.

{¶30} In other words, neither party focused on the insurance aspect of this claim below. At this stage of the proceedings, we have no cause of action alleging a violation of any insurance-related statutory regime to evaluate. We have already concluded, based on the analysis above, that Count I survives the motion to dismiss by virtue of the MLA alleged violation. In light of that, and given the absence of any real elaboration on this point below, we decline the invitation to wade into the insurance-related arguments that the parties present on appeal.

D.

{¶31} In addition to the preceding discussion, Ms. Spellman further alleged that SunUp engaged in fraudulent and deceptive consumer transactions (Counts III and IV). We have little hesitation drawing an inference of these violations in favor of Ms. Spellman, consistent with our analysis above and given the standard under Civ.R. 12(B)(6). SunUp may not be a registrant governed by the MLA, but it is a CSO subject to the provisions of the CSOA. The CSOA mandates that organizations that offer credit repair, debt counseling, or related services provide consumers with a clear and accurate description of the services to be provided and the costs for such services. SunUp claims it provided a service to Ms. Spellman and the other borrowers, namely "assisting in arranging an installment loan," "preparing and completing the information and documents," and "providing a guaranty to the lender to back the loan." When asked during oral argument what assistance SunUp provides to the customer in filling out what appears to be a standard online form, SunUp's counsel (correctly) declined to answer because that information fell outside the record considering that we are only at the motion to dismiss stage—precisely the point of why dismissal at this stage is improper. SunUp should be providing some substantial services to borrowers to charge them double the amount of their loans, but what those services are remains a mystery on the state of this record.

{¶32} On the face of Ms. Spellman's third-party complaint, which includes the CSA between her and SunUp, we find it plausible that SunUp provided little actual service to her. The agreement provides that Ms. Spellman is "request[ing] CSO to provide a guaranty to assure payment to Lender," but also that Ms. Spellman promises "to reimburse CSO for any amounts CSO pays the Lender pursuant to the guaranty."

Logically, this means that Ms. Spellman paid SunUp $3,263.38 (or NCP, or both, depending on what the trial courts find when they peek behind the veil covering this liaison) for nothing more than the word "guaranty" on a piece of paper. Because SunUp reserved the right to collect any fees incurred should it be forced to honor its "guaranty," it can (theoretically) collect twice on Ms. Spellman. Potentially three times when you count the money owed to NCP. (For instance, given Forsythe's complaint, it is apparently pursuing NCP's interests, but SunUp could separately pursue borrowers for any guaranty claim.)

{¶33} The CSOA also prohibits CSOs from engaging in unconscionable, unfair, or deceptive acts or practices as those terms are defined by the Ohio Sales Consumer Practice Act ("OCSPA") in R.C. Chapter 1345. The OCSPA describes seven circumstances in former R.C. 1345.03(B) that should be taken into consideration when determining whether an act or practice is unconscionable. Of relevance here is R.C. 1345.03(B)(4), which states that it is unconscionable for a supplier to make a transaction knowing that there was no reasonable probability of payment in full by the consumer. On the state of this record, we cannot answer whether SunUp inquired into Ms. Spellman's ability to repay the amounts borrowed. Other potential provisions could also be implicated. *See, e.g.,* R.C. 1345.03(B)(1) (whether a supplier took advantage of the consumer's inability to protect his or her own interest); R.C. 1345.03(B)(2) (whether a supplier knew the consumer transaction's price substantially exceeded similar transactions); R.C. 1345.03(B)(3) (whether a supplier knew the consumer was unlikely to receive a substantial benefit from the transaction); R.C. 1345.03(B)(5) (whether a supplier knew the terms of a consumer transaction were substantially one-sided).

{¶34} SunUp claims on appeal that any claim for a violation of the OCSPA is barred by the statute of limitations, but it has yet to broach this argument before the trial courts (failing to include it in any of the motions to dismiss), so we have no occasion to consider it at this point. *See State ex rel. Zollner v. Indus. Comm.*, 66 Ohio St.3d 276, 278, 611 N.E.2d 830 (1993) ("A party who fails to raise an argument in the court below waives his or her right to raise it here."). SunUp can certainly pursue the timeliness defense on remand if it believes the facts warrant it.

{¶35} As pleaded before us, however, this arrangement between SunUp and NCP seems incongruous with the purpose and intent of the CSOA, which is to protect consumers from credit repair service organizations that charge high fees but provide little service to consumers. Indeed, these types of concerns appear to have galvanized the General Assembly to pass H.B. 123, The Ohio Fairness in Lending Act, in 2018. In fact, none of the loans in this case would be allowed today, as H.B. 123 revised the CSOA to prohibit registered CSOs from assisting in the origination of short-term loans when the repayment term is less than a year, when the loan is less than $5,000, and when the annual percentage rate of the loan is greater than 28 percent. *See* R.C. 4712.071. We cannot turn a blind eye to the General Assembly's efforts to protect consumers from this exact scenario.

IV.

{¶36} In conclusion, the arrangement described in the borrowers' third-party complaints looks very concerning, and they have pled facts which may prove violative of Ohio law. Of course, at this stage of the proceedings, we have only heard their side of the story—but that is how motions to dismiss work, and we accordingly express no view on the merits of the borrowers' claims. For the reasons set forth above, the trial

courts below erred in granting NCP and SunUp's motions to dismiss for failure to state a claim. We reverse the judgments of the trial courts, sustain the borrowers' assignment of error, and remand the cause to the trial courts for proceedings consistent with this opinion.

Judgments reversed and cause remanded.

BOCK, J., concurs.
ZAYAS, P.J., concurs in judgment only.

Please note:

The court has recorded its own entry this date.

[Cite as *Jones v. BPR/RICO Mfg., Inc.*, 2022-Ohio-2715.]

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

DARRYL JONES	C.A. No. 21CA0084-M
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
BPR/RICO MANUFACTURING, INC.	COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO
Appellee	CASE No. 20CIV0695

DECISION AND JOURNAL ENTRY

Dated: August 8, 2022

HENSAL, Judge.

{¶1} Darryl Jones appeals an order of the Medina County Court of Common Pleas that granted summary judgment to BPR/RICO Manufacturing, Inc. ("BPR") on his promissory estoppel and breach of contract claims. For the following reasons, this Court affirms.

I.

{¶2} Mr. Jones began working for BPR as a project engineer in 2015. Under the terms of his hiring offer, Mr. Jones was entitled to receive a raise after six months on the job. After receiving it, however, Mr. Jones did not receive any additional salary increases. In October 2017, Mr. Jones asked his supervisor when he would receive a raise, and his supervisor told him that he would set up a meeting with the director of engineering. In January 2018, after the company assigned Mr. Jones additional responsibilities, he inquired again with his supervisor about when he would receive a raise. The supervisor told Mr. Jones that he would consult with the director of engineering, but he did not follow through.

{¶3} When Mr. Jones asked when he would receive a raise again in June 2018, his supervisor asked the director of engineering to take over supervising Mr. Jones. The director met with Mr. Jones twice about his request for a salary increase, which Mr. Jones believed had been promised to him. Instead, the director told Mr. Jones that he needed to evaluate the request. The director met with Mr. Jones again about a week later and presented Mr. Jones with an employee evaluation plan. The plan explained that the director would monitor Mr. Jones's performance over 90 days and it listed the criteria by which the director would assess whether Mr. Jones should receive a raise. Mr. Jones refused to agree to the plan and left the meeting. For leaving the meeting, the director suspended Mr. Jones for three days and sent him home. The director subsequently determined that he would not be able to continue working with Mr. Jones and terminated him.

{¶4} Mr. Jones sued BPR for breach of contract and promissory estoppel. Following discovery, BPR moved for summary judgment, arguing that there was no evidence that it ever promised to give Mr. Jones a raise. The trial court granted the motion over Mr. Jones's opposition, concluding that there were no genuine issues of material fact and that BPR was entitled to judgment on Mr. Jones's claims as a matter of law. Mr. Jones has appealed, assigning two errors.

II.

ASSIGNMENT OF ERROR

> THE COURT OF COMMON PLEAS ERRED TO THE MATERIAL PREJUDICE OF THE APPELLANT WHEN IT GRANTED THE APPELLEE OHIO CIVIL RULE 56 (C) MOTION FOR SUMMARY JUDGMENT ON APPELLANT'S PROMISSORY ESTOPPEL CLAIM.

{¶5} In his first assignment of error, Mr. Jones argues that the trial court incorrectly granted summary judgment to BPR on his promissory estoppel claim. Under Civil Rule 56(C), summary judgment is appropriate if:

> [n]o genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc., 50 Ohio St.2d 317, 327 (1977). To succeed on a motion for summary judgment, the party moving for summary judgment must first be able to point to evidentiary materials that demonstrate there is no genuine issue as to any material fact, and that it is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). If the movant satisfies this burden, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." *Id*. at 293, quoting Civ.R. 56(E). This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996).

{¶6} The elements necessary to establish a claim for promissory estoppel are "a promise, clear and unambiguous in its terms; reliance by the party to whom the promise is made; that the reliance was reasonable and foreseeable; and that the party claiming estoppel was injured by the reliance." *Davis v. Cinnamon Lake Assoc., Inc.*, 9th Dist. Wayne No. 19AP0052, 2020-Ohio-5374, ¶ 24, quoting *Rigby v. Fallsway Equip. Co., Inc.*, 150 Ohio App.3d 155, 2002-Ohio-6120, ¶ 25 (9th Dist.). Mr. Jones argues that, under *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100 (1985), whether an employer made representations that altered the terms of an employee's at-will employment, whether the employee relied upon the promises, and the applicability of the doctrine of promissory estoppel are issues to be resolved by the trier of fact.

{¶7} *Mers* concerned whether promissory estoppel could alter an otherwise at-will employment relationship. *Id*. at 102. The Ohio Supreme Court held that "the doctrine of promissory estoppel is applicable and binding to oral employment-at-will agreements when a promise which the employer should reasonably expect to induce action or forbearance on the part

of the employee does induce such action or forbearance, if injustice can be avoided only by enforcement of the promise." *Id.* at 106. Although the Court concluded that it was "unable to say that reasonable minds could reach but one conclusion" regarding the matters in that particular case, we do not agree with Mr. Jones that it held that whether the doctrine of promissory estoppel applies must be decided by a trier of fact in all cases. *Id.*

{¶8} Mr. Jones does not point to anything in the record that suggests that BPR made a clear and unambiguous promise to him that he would receive a raise if he continued to work for BPR. Instead, he appears to want such a promise implied because BPR strung him along for eight months about whether he would receive a raise. Mr. Jones also alleges that the employee evaluation plan was merely an attempt by the director of engineering to cover the companies' tracks after failing to give him the raise he had been promised. Mr. Jones argues that, under the circumstances, BPR should be estopped from denying that he had been promised a raise.

{¶9} At his deposition, Mr. Jones initially testified that his supervisor promised him a raise, but he later clarified that the supervisor merely promised him a meeting to discuss whether he should receive a raise. Despite Mr. Jones giving repeated reminders to his supervisor about his desire for a raise and receiving an increase in responsibilities, the director of engineering did not meet with Mr. Jones until June 2018. Mr. Jones acknowledged that, at the first two meetings, the director told Mr. Jones that he would have to get back to Mr. Jones about whether Mr. Jones should receive a raise. Mr. Jones also acknowledged that, when the director did get back to him, it was to present Mr. Jones with the employee evaluation plan.

{¶10} Viewing the evidence in a light most favorable to Mr. Jones, we cannot say that there is a genuine issue whether BPR made a clear and unambiguous promise to Mr. Jones that he would receive a raise. There is no evidence that BPR made such a promise, let alone indicated

any specific terms such as the amount of the raise or the date on which it would go into effect. We, therefore, conclude that the trial court did not err when it granted summary judgment to BPR on Mr. Jones's promissory estoppel claim. Mr. Jones's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> THE COURT OF COMMON PLEAS ERRED TO THE MATERIAL PREJUDICE OF THE APPELLANT WHEN IT GRANTED THE APPELLEE OHIO CIVIL RULE 56 (C) MOTION FOR SUMMARY JUDGMENT ON THE APPELLANT'S BREACH OF CONTRACT CLAIM.

{¶11} In his second assignment of error, Mr. Jones argues that the trial court incorrectly granted summary judgment to BPR on his breach of contract claim. Mr. Jones acknowledges that there is no express contract between the parties about his entitlement to a raise, but he argues that an implied contract existed.

{¶12} "An implied-in-fact contract hinges upon proof of all of the elements of a contract." *City of Akron v. Baum*, 9th Dist. Summit No. 29882, 2021-Ohio-4150, ¶ 15. The elements are "an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration." *Steen Elec. Inc. v. Haas Orthodontic Arts, Inc.*, 9th Dist. Summit No. 27900, 2016-Ohio-5025, ¶ 6, quoting *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, ¶ 16. "An implied-in-fact contract diverges from an express contract in the form of proof that is required to establish each contractual element." *Baum* at ¶ 15. "In express contracts, assent to the terms of the contract is actually expressed in the form of an offer and an acceptance." *Id.*, quoting *Dunn v. Bruzzese*, 172 Ohio App.3d 320, 2007-Ohio-3500, ¶ 28 (7th Dist.2007). "On the other hand, in implied-in-fact contracts the parties' meeting of the minds is shown by the surrounding circumstances, including the conduct and declarations of the parties, that make it inferable that the contract exists as a matter of tacit understanding." *Id.*, quoting *Dunn* at ¶ 28.

{¶13} In its motion for summary judgment, BPR argued that Mr. Jones could not establish that it made any oral or written assurances to him regarding his compensation, let alone that they had a meeting of the minds. Mr. Jones argues that BPR promised him a raise and alleges that its combined representations and business conduct satisfies the elements of offer, acceptance, performance of consideration, and damages. His argument, however, does not cite to any evidence in the record that supports his claim. *See* App.R. 16(A)(7). Upon review of the record, we cannot say that BPR's representations that it would schedule meetings to discuss Mr. Jones's salary and its assignment of additional responsibilities to Mr. Jones create a genuine issue of material fact regarding whether all the elements of an implied contact existed. Accordingly, we conclude that the trial court did not err when it granted summary judgment to BPR on Mr. Jones's breach of contract claim. Mr. Jones's second assignment of error is overruled.

III.

{¶14} Mr. Jones's assignments of error are overruled. The judgment of the Medina County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

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

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period

for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

JENNIFER HENSAL
FOR THE COURT

TEODOSIO, P. J.
CALLAHAN, J.
CONCUR.

APPEARANCES:

MICHAEL T. CONWAY, Attorney at Law, for Appellant.

BRIAN J. KELLY and JONATHAN M. SCANDLING, Attorneys at Law, for Appellee.