SLIP OPINION NO. 2022-OHIO-4543

MICHAEL, APPELLEE *v.* MILLER, APPELLANT, ET AL.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Michael v. Miller*, Slip Opinion No. 2022-Ohio-4543.]

Equitable liens—Before recognizing an equitable lien, a court must find a duty, debt, or obligation; an identifiable res; and an express or implied intent that property serve as security for payment of a debt or obligation, and it may also take into account traditional equitable considerations, such as whether third parties had notice of outstanding equitable interest, extent to which party seeking relief has come to court with clean hands, and whether that party has taken all reasonable steps to ensure that it obtained perfected lien—Parties to separation agreement lacked express or implied intent that ex-husband's stock would serve as security for his current obligation to pay monthly spousal-support payments in addition to his future quarterly obligation—Court of appeals' determination that ex-wife held equitable lien on ex-husband's stock securing his current monthly obligation reversed.

(No. 2021-0361—Submitted March 8, 2022—Decided December 19, 2022.)
APPEAL from the Court of Appeals for Cuyahoga County,
No. 109121, 2021-Ohio-307.

STEWART, J.

{¶ 1} In this discretionary appeal, there is no question that a perfected lien on stock shares in an Ohio corporation exists to secure six years of spousal-support payments set to begin in 2034. But we are asked to determine whether an equitable lien on the stock also exists to secure a current support obligation lasting 20 years. Third-party defendant-appellant, Cody Miller, appeals from a judgment of the Eighth District Court of Appeals, which concluded that plaintiff-appellee, Karen Michael (formerly known as Karen Miller), holds an equitable lien on the stock securing defendant-appellee David Miller's current obligation to pay Karen monthly spousal-support payments (totaling $3.6 million) over 20 years, in addition to the lien Karen holds on the stock to secure David's obligation to pay quarterly support payments (totaling $450,000) beginning in 2034. 2020-Ohio-307, ¶ 45-51. We conclude that an equitable lien does not exist on the stock to secure the current obligation, and we reverse the Eighth District's judgment.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} Karen Michael and David Miller were married in 1993. Cody is David and Karen's son. Ronald Miller, David's father and Cody's grandfather, owned a business, Ram Sensors, Inc. In 2009, Ronald gifted to David and Cody, who was 15 years old at the time, each 50 percent of the shares of Ram Sensors stock. David subsequently became the president of the company. Ronald also gifted Cody funds that "were held in a Vanguard brokerage account."

{¶ 3} Karen filed for divorce against David in November 2013. Karen and David entered into a separation agreement that was incorporated into their final judgment entry of divorce in January 2015. The separation agreement provided

that David would pay Karen spousal support in the amount of $15,000 a month for 20 years, terminating in December 2034. The agreement also provided that upon completion of the monthly support payments, David would pay Karen additional spousal support in 24 quarterly payments of $18,750 for six years, totaling $450,000.

{¶ 4} David and Karen's separation agreement also stated that David would repay Cody all monies due to him that David had withdrawn from Cody's Vanguard accounts and from Ram Sensors distributions to which Cody was entitled for the years 2011 through 2014.

{¶ 5} Karen also agreed to relinquish all rights and interest that she may have had in Ram Sensors, and David agreed to secure his spousal-support obligations by executing a cognovit note and stock-pledge agreement. David further agreed that he would not "encumber, transfer, assign, pledge or otherwise alienate his interest" in Ram Sensors without Karen's prior written consent.

{¶ 6} Soon after the divorce decree was finalized, David executed a cognovit note in the amount of $450,000 to be paid to Karen. David and Karen also entered into a stock-pledge agreement in which David pledged all of his Ram Sensors stock to Karen in consideration of and as security for the cognovit note.

{¶ 7} In November 2015, Cody and Ram Sensors filed suit against David in the Cuyahoga County Common Pleas Court "to both recover the funds stolen from [Cody] and to protect Ram Sensors." Cody alleged that David had breached his fiduciary duties and had misappropriated funds belonging to Cody and Ram Sensors. According to Cody, Karen told him that David had "stole[n] funds from [Cody's] Vanguard brokerage account [and] distributions to [Cody] from Ram Sensors, and that [David] was mismanaging and attempting to destroy Ram Sensors so that he would not have assets to pay [Karen]." Karen also gave Cody "many years worth of Ram Sensors bank statements, financial statements, and tax returns," which "provided the factual basis for [Cody's] claims" against David.

{¶ 8} In September 2016, Karen recorded a Uniform Commercial Code ("UCC") financing statement with the Ohio Secretary of State. The UCC financing statement describes the security interest as follows:

> Pursuant to the terms of a certain agreement between [David] and [Karen] entitled "Pledge Agreement," dated January 22, 2015, the security interest described herein is a first position lien on all of [David's] right, title and interest in and to [David's] equity interest in Ram Sensors Inc., an Ohio Subchapter S corporation, including all classes of stock whether certificated or uncertificated.

{¶ 9} Cody and David entered into a settlement agreement, which the trial court approved, entering an agreed order in April 2017 against David for $2,874,437.56 with interest. According to the agreed order, David was required to transfer all his stock in the company to Cody except as noted in the settlement agreement:

> David Miller is the true and lawful owner of the David Miller Stock [defined in the settlement agreement as David's 50% of Ram Sensors stock], he has not sold, transferred, assigned, conveyed, mortgaged, pledged or otherwise hypothecated or encumbered the David Miller Stock except pursuant to the certain stock pledge agreement provided in favor of Ms. Karen Michaels as evidence in ***Disclosure Schedule 3.1*** hereto.

(Boldface and italics sic.) The Disclosure Schedule 3.1 attached to the settlement agreement was the cognovit note for $450,000 and the stock-pledge agreement securing the cognovit note. According to Cody, he knew that Karen had a lien on

David's Ram Sensors stock to secure the $450,000 obligation, which would become "due to her on December 31, 2034." That is why he "agreed to take [David's] 50% of Ram stock subject to [his] mother's lien."

{¶ 10} Three weeks after the general-division litigation between Cody and David had concluded, Karen filed a postdecree pleading in her and David's divorce case in the domestic-relations division of the court of common pleas: a motion seeking transfer to Karen of David's 50 percent share of Ram Sensors stock pledged to her in the divorce and a request for a judgment declaring that David had assigned to her his rights to the stock and that David's transfer of the stock to Cody was "an illegal transfer." Nine months later, after requesting three continuances in the matter, Karen withdrew the postdecree pleading.

{¶ 11} Less than one month after Karen withdrew her postdecree pleading in the domestic-relations court and nearly one year after Cody and David settled their case in the general division, Karen attempted to intervene in the general-division case between Cody and David. She also filed a motion requesting that the court vacate the agreed judgment between Cody and David. The court denied her motions, and Karen appealed to the Eighth District. *Miller v. Miller*, 2019-Ohio-1886, 135 N.E.3d 1271 (8th Dist.).

{¶ 12} Karen argued in the Eighth District that intervention in the case was necessary "to protect her interest in David's 50 percent RAM Sensors stock" because "David's share of the stock [was] security for David's spousal support obligations—both current and future—and the conveyance of David's interest in the stock as partial satisfaction of the judgment was illegal." *Id.* at ¶ 31. The Eighth District rejected her arguments, explaining:

> Karen's interest in David's share of the RAM Sensors stock * * * is a lien that becomes due in the future; it is not a present interest in ownership of the stock. As part of the divorce settlement,

> David agreed to pay Karen $450,000 in additional support beginning December 2034. He then executed a cognovit note in the amount of $450,000 and secured it with a lien on his share of RAM Sensors stock, which was perfected by a stock pledge agreement and recorded with the Ohio Secretary of State. And the record shows that the transfer of David's 50 percent share to Cody was made subject to Karen's interest. Karen's interest in the stock, as a secured creditor, is therefore preserved. The evidence does not support Karen's argument that documents were executed entitling her to immediate transfer of David's stock for satisfaction of David's current support indebtedness, i.e., a new stock agreement, cognovit note, or UCC statement.

Id. at ¶ 32. The appellate court further reasoned:

> Karen's purported interest in the action is that of a lienholder—she has a lien on David's share of RAM Sensors stock that was transferred to Cody in partial satisfaction of the money judgment. Karen's interest in the stock becomes due in 2034, and the record establishes, through the settlement agreement and Cody's affidavit, that Cody takes David's stock subject to the lien created by the stock pledge agreement between Karen and David. The underlying action did not seek to foreclose or extinguish Karen's lien. And Karen fails to demonstrate how the disposition of the underlying action in her absence may impair or impede her ability to protect this interest.

Id. at ¶ 36. The Eighth District affirmed the trial court's denial of Karen's motions to intervene and vacate the agreed judgment entry. *Id*. at ¶ 44-46.

{¶ 13} In January 2019 (before the Eighth District released its decision in *Miller*), Karen filed another postdecree pleading in her and David's divorce case in the domestic-relations court: a complaint for a declaratory judgment and other equitable relief. This time, however, she named David and Cody as defendants. She sought a declaration that David's ownership of the Ram Sensors stock "secure[d] all [his] obligations" under the parties' divorce decree, including his monthly spousal-support payments. She further requested that the court order Cody to transfer and convey David's stock to her and order Cody to pay her "maintenance and support payments" because Cody had subjected himself to liability to Karen "by taking subject to her lien, her security for the payments."

{¶ 14} Cody filed an answer and a counterclaim against Karen for declaratory judgment, seeking, among other things, a declaration regarding the parties' respective ownership interests in Ram Sensors and that he was not personally responsible for David's obligations to Karen.

{¶ 15} Karen and Cody filed competing motions for summary judgment. In its decision, the trial court explained that "[a]t issue [was] whether Karen's security interest in the Ram stock extend[ed] to the monthly support payments due 2014-2034." The court found that "the express intent of the parties was that David would execute a cognovit note and stock pledge to secure the 240 monthly support payments, as well as the later quarterly support payments." The court granted Karen's motion in part, concluding that she held a perfected lien on the Ram Sensors stock securing the quarterly payments totaling $450,000 beginning in 2034 and an equitable lien on the stock securing the monthly spousal-support payments from 2014 until 2034.

{¶ 16} Cody appealed to the Eighth District,[1] arguing in part that "[t]he trial court erred in creating an equitable lien securing the entire spousal support obligation when the UCC financing statement recorded by Karen demonstrates that the lien contemplated by the divorce decree is to secure the $450,000 spousal support obligations." 2021-Ohio-307 at ¶ 29. He further argued that "[t]he trial court erred in creating an equitable lien on the RAM Sensors Stock when the parties created an actual, express lien that was properly perfected." *Id.*

{¶ 17} In a two-to-one decision, the Eighth District affirmed. The majority agreed with the trial court's finding that Karen and David intended to secure both the current monthly and the future quarterly spousal-support payments with the cognovit note and stock pledge. *Id.* at ¶ 50-51.

{¶ 18} Cody appealed the Eighth District's decision to this court, and we accepted the appeal on his two propositions of law:

> Proposition of Law No. 1: Ohio Court[s] must strictly adhere to policies supporting the princip[les] of the UCC and should limit application of equitable remedies, including the imposition of equitable liens, which impair or undermine the purpose of the UCC.
>
> Proposition of Law No. 2: An equitable lien should not be liberally extended to the prejudice of third-party creditors and the general public. Rather, an equitable lien should be established only after balancing the competing interests of the purported creditor, debtor, third-party creditors, and the public interest.

See 163 Ohio St.3d 1490, 2021-Ohio-2097, 169 N.E.3d 1268.

1. Karen cross-appealed to the Eighth District, but her arguments in support of the cross-appeal are not relevant to the appeal before us.

II. LAW AND ANALYSIS

{¶ 19} There is no dispute in this case that Karen has a lien on David's Ram Sensors stock shares that he transferred to Cody to secure the $450,000 in support that David must begin paying Karen in 2034. At issue in this case is whether Karen also has an equitable lien on David's stock securing his obligation to pay Karen $15,000 of support a month from 2014 until 2034, totaling $3.6 million.

A. Eighth District's Decision

{¶ 20} A majority of the Eighth District panel agreed with the trial court's finding that the plain language of Karen and David's separation agreement reflected that they both intended for David's Ram Sensors stock shares to secure his current spousal-support obligation as well as his future one. The trial court relied on the following provisions of the separation agreement:

> "Husband has an interest in Miller Wire & Cable Co. Inc. and RAM Sensors, Inc. In consideration of the terms of this Agreement and the specific terms set forth hereinbelow. Wife relinquishes all right[,] title[,] and interest she may have to the assets and income of both entities except that Husband shall secure his obligations by assigning to Wife his interest in RAM Sensors, Inc. to secure the payments due to Wife. Husband shall execute a Cognovit Note and stock pledge to secure the payments and he shall not encumber, transfer, assign, pledge or otherwise * * * alienate his interest in RAM Sensors, Inc. without Wife's prior written authorization until he has satisfied his obligations herein."

2021-Ohio-307 at ¶ 36, quoting Section 2.E of the separation agreement.

{¶ 21} The Eighth District explained that "[t]he trial court concluded that the use of 'the plural: obligations, payments' unambiguously in the agreement

means that the 'clause applies to more than one obligation, more than one payment.' " *Id*. at ¶ 37. According to the Eighth District, the trial court therefore found that "plural 'payments' " included all of David's obligations to Karen: " 'the monthly spousal support payments (Section 3(B)); the quarterly spousal support payments (Section 3(D)); and $10,000 spousal support towards legal fees (Section 10)." *Id*.

{¶ 22} The Eighth District acknowledged that David executed the stock-pledge agreement and cognovit note "on January 22, 2015, within 30 days of the divorce decree in accord with Section 17," *id*. at ¶ 43, that "[t]he [stock] pledge agreement lists as consideration the promissory note executed concurrently and states that it is issued 'pursuant to a Separation Agreement dated on or about the date hereof,' " *id.* at ¶ 44, that the note was issued for $450,000, and that "[t]he UCC-1 financing statement filed September 23, 2016, describes a secured interest in the RAM Sensors stock pursuant to the January 22, 2015 pledge agreement," *id*. But despite these documents, most of them executed nearly contemporaneously with the separation agreement, the Eighth District "agree[d] with the trial court's determination that the parties' intent as reflected by the plain language of the agreement was to secure the quarterly spousal support payments and the monthly spousal support payments." *Id*. at ¶ 45.

{¶ 23} The Eighth District added:

> Our conclusion is bolstered by the provision in [Section] 2E [of the separation agreement] that "Husband shall secure his obligations by assigning to Wife his interest in RAM Sensors, Inc. to secure the payments due to Wife. Husband shall execute a Cognovit Note and stock pledge to secure the payments." It is further supported by the statement in Section 3B setting forth the monthly payment provision: "[t]he parties acknowledge that the

> term of support is extended to satisfy Husband's obligation to pay Wife some value for the business interests."

Id., 2021-Ohio-307, at ¶ 46.

{¶ 24} The Eighth District concluded that the $450,000 stock interest in Ram Sensors was a perfected lien against the quarterly spousal-support payments, noting that it had "recognized that fact in [*Miller*] where [it] stated that Karen's secured interest of $450,000 for the RAM Sensors stock is a perfected 'lien that becomes due in the future; it is not a present interest in ownership of the stock.' " *Id*. at ¶ 47, quoting *Miller*, 2019-Ohio-1886, 135 N.E.3d 1271, at ¶ 32. The appellate court then stated, "However, as the trial court declared, the 'express intent of the parties was that David would execute a cognovit note and stock pledge to secure the 240 monthly support payments, as well as the later quarterly support payments.' " *Id*. at ¶ 48. The Eighth District observed that David did not execute a note and pledge to "also * * * cover the monthly payments," *id.*, but it agreed with the trial court's conclusion that Karen had an equitable lien on David's 50 percent share of the Ram Sensors stock to cover the monthly spousal-support payments, *id*. at ¶ 49-51.

B. Analysis

{¶ 25} Cody argues that the Eighth District erred when it did not consider "the impact of such equitable liens on third-party or non-party intervening creditors." He maintains that "to establish an equitable lien[,] traditional equitable factors should be required, *to wit*, the effect on third-parties, whether the equitable lien is injurious to the general public, and whether the proponent of the equitable lien has come to the court with clean hands." (Italics sic.) Karen argues that it was "not the stock pledge that Cody focuses upon that created Karen's lien on David's shares," but rather, as the trial court found and the Eighth District affirmed, it was "the separation agreement and divorce decree."

{¶ 26} A lien is " 'a hold or claim which one person has upon the property of another as a security for some debt or charge.' " *State ex rel. Tennant Fin. Corp. v. Davis*, 111 Ohio St. 569, 574, 146 N.E. 82 (1924), quoting *Bouvier's Law Dictionary*. "A lien becomes equitable in character when satisfaction of the lien is sought from a particular fund or specific property under principles of equity." *Landskroner v. Landskroner*, 154 Ohio App.3d 471, 2003-Ohio-4945, 797 N.E.2d 1002, ¶ 34 (8th Dist.), citing *Black's Law Dictionary* 933 (7th Ed.1999). Restatement of the Law, Restitution, Section 161, at 650 (1937) describes an equitable lien as arising when "property of one person can by a proceeding in equity be reached by another as security for a claim on the ground that otherwise the former would be unjustly enriched."

{¶ 27} Ohio courts have held that three elements are required to establish an equitable lien: (1) a duty, debt, or obligation, (2) an identifiable res, and (3) an express or implied intent that the property serve as security for the payment of a debt or obligation. *Landskroner* at ¶ 34; *Koon v. Clapp*, 11th Dist. Portage No. 89-P-2101, 1990 Ohio App. LEXIS 4818, *1, 7-8 (Nov. 2, 1990); *Donahoe v. Miller*, 12th Dist. Madison No. CA2005-02-007, 2005-Ohio-7034, ¶ 13. An equitable lien "may arise either from an *express written contract* which shows an intention to charge some particular property with a debt or obligation, *or* may be *implied* and declared by a court of equity on the general considerations of right and justice as applied to relations of the parties and the circumstances of their dealings." (Emphasis sic.) *Koon* at 6, citing *Syring v. Sartorious*, 28 Ohio App.2d 308, 277 N.E.2d 457 (4th Dist.1971).

{¶ 28} While the above elements are necessary to establish an equitable lien, they alone are not always dispositive. Courts also take into account traditional equitable considerations, such as whether third parties had notice of the outstanding equitable interest. *See, e.g., Wayne Bldg. & Loan Co. of Wooster v. Yarborough*, 11 Ohio St.2d 195, 200-203, 228 N.E.2d 841 (1967); *Whistler v. Allward*, 57 Ohio

App. 147, 148, 12 N.E.2d 299 (3d Dist.1936) (equitable lien enforceable against third parties with notice); *see also* Restatement of the Law, Restitution, Section 161, at 652. Courts applying equitable remedies also consider the extent to which the party seeking relief has come to court with clean hands, *Hotel Burnet Co. v. Union Cent. Life Ins. Co.*, 72 Ohio App. 453, 458, 52 N.E.2d 754 (1st Dist.1943), whether the party has taken "all reasonable steps to [en]sure that it obtained a perfected lien," *In re McCoy's Waste Industries & Mfg., Inc.*, Bankr.D.D.C. No. 94-00227, 1995 WL 908054, *1, 26 (Oct. 4, 1995), and other equitable considerations.

{¶ 29} We conclude that the Eighth District misconstrued the separation agreement and erred when it failed to consider the cognovit note, stock-pledge agreement, and UCC financial statement as evidence of the parties' intent to secure only the future obligation. The separation agreement expressly states that Cody had an interest in Ram Sensors and that Karen had relinquished her interest in the business "except that [David] shall secure his obligations by assigning to [Karen] his interest in RAM Sensors, Inc. to secure the payments due to [Karen]. [David] shall execute a Cognovit Note and stock pledge to secure the payments * * *." Approximately ten days after the domestic-relations court entered final judgment in the divorce, David executed the cognovit note for $450,000—the exact amount that David owed Karen for *additional* support beginning in 2034—and Karen and David executed the stock-pledge agreement to secure the note on the same day that David executed the note. The stock-pledge agreement states:

> WHEREAS, pursuant to a Separation Agreement dated on or about the date hereof by and between [David] and [Karen], [David] has acquired from [Karen], and [Karen] has transferred to [David], in exchange for a Promissory Note issued by [David] to [Karen] on or about the date hereof (the "Note"), all right, title and

> interest in and to all of [Karen's] equity interest in Ram Sensors Inc., a Sub S Corporation ("RAM"), consisting of a one-half (1/2) interest therein; and
>
> WHEREAS, to secure payment under the Note, [David] is pledging his entire interest to [Karen] upon the terms and conditions set forth in this Agreement.

(Underlining sic.)

{¶ 30} Moreover, approximately 20 months later—when David and Cody's case had been pending in the general division of the common pleas court for nearly 10 months—Karen filed the UCC financing statement. R.C. 1309.502(A) sets forth the required "[c]ontents of [a] financing statement," which are the name of the debtor, the name of the secured party, and the collateral covered by the financing statement. The official comment under that section states: "This section adopts the system of 'notice filing, [which] indicates merely that a person may have a security interest in the collateral indicated." Official Comment 2 to R.C. 1309.502. "The function of a financing statement is to give notice to interested third parties that the person filing it may have a security interest in property of the debtor named therein." *Natl. Bank of Fulton Cty. v. Haupricht Bros., Inc.*, 55 Ohio App.3d 249, 255, 564 N.E.2d 101 (6th Dist.1988) ("[P]erfection by filing a financing statement is predicated on notice. So long as the financing statement apprises a record searcher that certain collateral may be encumbered by a security interest, then such security interest continues perfected"), citing Official Comment to R.C. 1309.39.

{¶ 31} The judge dissenting in part from the Eighth District majority opinion stated, "If Karen believed herself entitled to a [nearly] $4 million lien against David's shares of RAM Sensors based on the terms of the separation agreement, the U.C.C. Statement would have been the mechanism to secure her rights, not the seeking of an equitable lien in excess of that which she claimed in

the U.C.C. Statement." *Id*. at ¶ 70 (Sean C. Gallagher, J., concurring in part and dissenting in part), citing *McCoy's*, 1995 WL 908054, at *26 (allowing the use of an equitable lien would defeat the policy behind the UCC financing statement of assuring notice to the public of the extent of the creditor's lien). We agree. Further, if Karen believed that the Ram Sensors stock secured both of David's support obligations, she could have filed a contempt motion in her and David's divorce case in the domestic-relations court immediately following David's execution of the cognovit note, which occurred approximately ten days after the final divorce decree was entered. Significantly, David promised in the cognovit note to pay Karen $450,000—*considerably less than $4.05 million*. Cody, well aware of his parents' divorce and settlement agreement, accepted his father's stock shares *subject to his mother's perfected lien*—a lien that she notified third-party creditors existed through the UCC financing statement.

{¶ 32} Although the first two elements of an equitable lien are present in this case (an obligation—David's obligation to pay $3.6 million in current spousal support, and the identifiable res—David's Ram Sensors stock), there is no express or implied intent here for the Ram Sensors stock to serve as security for David's current obligation to pay the 240 monthly payments totaling $3.6 million. *See Landskroner*, 154 Ohio App.3d 471, 2003-Ohio-4945, 797 N.E.2d 1002, at ¶ 34. "[O]ne of the fundamental maxims of equity is, 'Equity regards as done that which ought to be done.' " *Klaustermeyer v. Cleveland Trust Co*., 89 Ohio St. 142, 147, 105 N.E. 278 (1913), quoting 16 Cyc. 135.

{¶ 33} Although we agree with Cody that the Eighth District misconstrued the separation agreement and erred when it recognized an equitable lien securing David's current support obligation, we decline to adopt a bright-line rule that there can never be an equitable lien when a UCC financing statement has been filed. "Claims for equitable relief typically require the trial court to balance the equities of the parties" based on the facts of each case. *Blue View Corp. v. Rhynes*, 9th Dist.

Summit No. 23034, 2006-Ohio-4084, ¶ 14, citing *River Terrace Condominium Assn. v. Lewis*, 33 Ohio App.3d 52, 56, 514 N.E.2d 732 (1st Dist.1986). We therefore do not adopt Cody's first proposition of law. We agree, however, with Cody's second proposition of law that equitable liens should be recognized only after balancing the competing interests of the parties as well as third-party creditors and public interests, and therefore adopt it.

III. CONCLUSION

{¶ 34} For the reasons stated in this opinion, we conclude that the Eighth District erred when it determined that Karen held an equitable lien on David's Ram Sensors stock shares securing David's current obligation to pay monthly spousal support to Karen.

Judgment reversed.

O'CONNOR, C.J., and DEWINE, DONNELLY, and BRUNNER, JJ., concur.

KENNEDY, J., concurs in judgment only, with an opinion joined by FISCHER, J.

KENNEDY, J., concurring in judgment only.

{¶ 35} I concur in the majority's decision today to reverse the judgment of the Eighth District Court of Appeals affirming the trial court's imposition of an equitable lien to secure $3.6 million in spousal support. I disagree with the majority, however, to the extent that it suggests that an equitable lien could ever be created in combination with a separate lien evidenced by the filing of a Uniform Commercial Code ("UCC") financing statement. Consequently, I concur in the majority's judgment but not in its reasoning and analysis.

Facts and Procedural History

{¶ 36} I agree with the statement of facts recited by the majority, but I highlight the following facts. As part of their separation agreement incorporated into a divorce decree, appellee David Miller promised to pay appellee Karen

Michael $3.6 million over 20 years, followed by the payment of $450,000 over the next 6 years. David agreed to secure these obligations with a cognovit note and to enter into an agreement to pledge his shares of stock in Ram Sensors, Inc., as collateral. After the divorce was finalized, David executed a cognovit note in the amount of $450,000 along with a stock-pledge agreement. Karen later filed a UCC financing statement indicating that she had a lien on David's shares of Ram Sensors stock by virtue of the stock-pledge agreement, putting the world on notice that she had a lien on the stock securing David's six-year obligation to pay $450,000 in spousal support. Approximately four years after the divorce had been finalized, Karen filed a postdecree pleading in the divorce case seeking a declaration that the stock secured both of David's support obligations, for a total amount greater than $4 million. The trial court determined that the parties had intended for the stock to secure this entire amount, not just $450,000, and it imposed an equitable lien on the stock to secure David's 20-year obligation to pay $3.6 million. The court of appeals affirmed.

Law and Analysis

{¶ 37} In enacting R.C. Chapter 1309, the General Assembly created a statutory remedy to enforce secured transactions. *See, e.g.*, R.C. 1309.607. The purposes and policies of the UCC are to "simplify, clarify, and modernize the law governing commercial transactions," R.C. 1301.103(A)(1), to promote the continued expansion of commercial practices, R.C. 1301.103(A)(2), and to make the law among the various jurisdictions uniform, R.C. 1301.103(A)(3). Because the UCC is a creature of statute, other principles of law and equity do not apply if they are displaced by a provision of the UCC, *see* R.C. 1301.103(B), or if they are inconsistent with its purposes and policies, R.C. 1301.103, Official Comment 2; White, Summers, & Hillman, 1 *Uniform Commercial Code*, Section 1:2, 3-4 (6th Ed.2020). "[W]hile principles of common law and equity may *supplement* provisions of the Uniform Commercial Code, they may not be used to *supplant* its

provisions, or the purposes and policies those provisions reflect, unless a specific provision of the Uniform Commercial Code provides otherwise." (Emphasis sic.) R.C. 1301.103, Official Comment 2.

{¶ 38} In addition to preempting displaced or inconsistent law, the UCC advances its purposes and policies by providing in most cases for the centralized filing of financing statements with the secretary of state. R.C. 1309.501(A)(2). Replacing the recording of security interests locally with a single statewide location for filing financing statements has been described as a "major innovation" of the UCC, allowing parties to determine in one place whether a security interest has been created and perfected. 4 White & Summers, *Uniform Commercial Code*, Section 31:27, 239. This helps eliminate the risk that a creditor will be unprotected because of a mistake in filing notice of a security interest in the wrong place or using the wrong document. *Id.* at 247. It also helps ensure that security interests are discovered without requiring the search of records in multiple localities.

{¶ 39} The General Assembly created a legal remedy for a party to perfect a security interest and to have priority over other parties who subsequently perfect their security interest. *See* R.C. 1309.308(A) and 1309.322. Karen had the opportunity to use, and did use, the UCC's provisions to secure the collateral for David's support obligations, but she failed to file a UCC financing statement to protect and have priority over the collateral in the entire $4.05 million amount he owed her. *See* R.C. 1309.201(A), 1309.312(A), 1309.317(A)(2)(a), and 1309.501 et seq. Karen chose to avail herself of the law to the extent that she did, but when she filed her UCC financing statement, the stock-pledge agreement provided that David's shares of stock were collateral securing only $450,000 in future spousal support. She therefore gave notice to the world only that she had a lien on David's stock in the amount of $450,000. Because she chose to protect her security interest using the UCC, her priority over other creditors and transferees is limited to what

she filed under the UCC, leaving any security interest in the $3.6 million in current spousal support unprotected.

{¶ 40} Because Karen filed a UCC financing statement in order to secure a $450,000 lien, she cannot seek an equitable lien in an amount greater than the one she announced in her financing statement. Equitable liens are imposed when, "[i]n a transaction founded on contract, express or implied, there being no adequate remedy at law for its breach, equity will presume the parties to have done what, under the contract and in good conscience, they should have done." *Klaustermeyer v. Cleveland Trust Co*., 89 Ohio St. 142, 105 N.E. 278 (1913), paragraph one of the syllabus. But equitable relief is "a supplemental system, designed and administered for the purpose of supplying the deficiencies of the law," and therefore, "equity will intervene only when legal remedies are inadequate." *Salem Iron Co. v. Hyland*, 74 Ohio St. 160, 166, 77 N.E. 751 (1906),

{¶ 41} Karen had an adequate remedy at law. She negotiated a stock-pledge agreement that made David's shares of stock collateral securing the payment of spousal support, and the law permitted her to protect that security interest against subsequent creditors and transferees by filing a financing statement with the secretary of state. *See* R.C. 1309.310(A) and 1309.312(A). Karen could have ensured that the stock-pledge agreement and the financing statement encompassed the entire amount of spousal support that David owed her, but she did not. The fact that she failed to take advantage of a remedy at law does not make that remedy inadequate. "[E]quity aids the vigilant, not those who slumber on their rights." *Harris v. Wallace Mfg. Co*., 84 Ohio St. 104, 108, 95 N.E. 559 (1911). "Simply ignoring legal remedies does not open the door to equitable relief." *Guild Mtge. Co. v. Prestwick Court Trust*, 293 F.Supp.3d 1228, 1235 (D.Nev.2018). Therefore, there is no authority for Karen to use equity to go back and broaden what she filed under the UCC and protect a greater amount of interest in the collateral than she did.

{¶ 42} Moreover, a court should not grant equitable relief without considering where the public interest lies. *Sanders v. Mountain Am. Fed. Credit Union*, 689 F.3d 1138, 1144 (10th Cir.2012). Allowing equity to intervene in these circumstances would thwart the public policy the General Assembly codified in providing statutory rules governing secured transactions. Those rules determine when a security agreement is enforceable between the parties and against purchasers of the collateral and creditors. *See* R.C. 1309.201(A). They establish how and to what extent a secured party may enforce a security interest against collateral. *See* R.C. 1309.607. The rules also provide for centralized filing of financing statements, eliminating the need for a party to search the court records of every county in a state to determine whether an interest in collateral is the subject of an equitable lien. *See* R.C. 1309.501(A)(2) Lastly, the rules ensure that a person who gives value for the collateral without notice of the security interest takes it free and clear of the security interest. *See* R.C. 1309.317.

{¶ 43} Allowing a court to impose an equitable lien on collateral that is the subject of a UCC financing statement will undermine these statutory rules and potentially allow a lien to continue when it would be extinguished by operation of the statute. For this reason, I would adopt a bright-line rule that an equitable lien cannot attach to collateral subject to a secured transaction under R.C. Chapter 1309.

{¶ 44} Consequently, I concur only in the majority's judgment reversing the court of appeals' imposition of an equitable lien under these circumstances.

FISCHER, J., concurs in the foregoing opinion.

John V. Heutsche Co., L.P.A., and John V. Heutsche, for appellee Karen Miller.

Weston Hurd, L.L.P., and Scott J. Orille, for appellant.

[Cite as *McKinney v. LaMalfa Party Ctr.*, 2022-Ohio-4333.]

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

BRIANNA MCKINNEY, Plaintiff-Appellee, - vs - LAMALFA PARTY CENTER, Defendant-Appellant.	**CASE NO. 2022-L-023** Civil Appeal from the Painesville Municipal Court Trial Court No. 2021 CVF 00384

O P I N I O N

Decided: December 5, 2022
Judgment: Affirmed

Randy A. Vermilya, 41 East Erie Street, Suite 2, Painesville, OH 44077 (For Plaintiff-Appellee).

Monica R. Zibbel and *Glenn E. Forbes,* Forbes Law, LLC, 166 Main Street, Painesville, OH 44077 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, LaMalfa Party Center ("LaMalfa"), appeals the March 3, 2022 judgment of the Painesville Municipal Court adopting the February 25, 2022 Magistrate's Decision entering judgment in favor of appellee, Brianna McKinney. For the reasons set forth herein, the judgment is affirmed.

{¶2} The parties entered into a contract for a wedding reception to be held on October 31, 2020 at LaMalfa's place of business. The contract expressly stated that no terms of the contract could be changed once signed, and that monies paid as deposits would not be refunded if the event was cancelled by either party for any reason. In

February 2020, Ms. McKinney paid a deposit of $5,500 for the event, $500 of which was paid to reserve the October 31, 2020 date.

{¶3} During the summer of 2020, Ms. McKinney contacted LaMalfa and expressed her concerns regarding holding her reception during the COVID-19 pandemic; she requested to reschedule her wedding date. LaMalfa denied her request and set forth a series of COVID-19-related restrictions for the wedding reception, including but not limited to mandating masks, social distancing, and changing the buffet meal stated in the contract to a plated meal. The contract still required Ms. McKinney to have, and pay for, a minimum of 120 guests. Ms. McKinney failed to provide LaMalfa with a final headcount by the date set forth in the contract; by Ms. McKinney's uncontradicted testimony, LaMalfa cancelled the contract shortly thereafter, apparently in response to Ms. McKinney's failure to provide the required information. LaMalfa argues that it was at all relevant times ready, willing, and able to perform its obligations under the contract, even with the COVID-19 mandates in place. According to Ms. McKinney, she got married on the original October 31, 2020 wedding date in her parents' backyard with only her parents present.

{¶4} Ms. McKinney filed a claim against LaMalfa in the Mentor Municipal Court for the return of her deposit but due to a conflict, the matter was transferred to the Painesville Municipal Court, Small Claims Division. Upon LaMalfa's motion, it was transferred to the civil docket in the Painesville Municipal Court. The complaint filed by Ms. McKinney alleged that LaMalfa wrongfully withheld her $5,500 deposit for a wedding due to "impossibility of performance." LaMalfa admitted withholding the deposit but denied that the event was impossible and that the refusal to grant a refund was due to impossibility of performance.

{¶5} A trial was held before a magistrate in December 2021. Ms. McKinney testified that she understood the $500 deposit to save the date was forfeited, and that she could have had the reception at LaMalfa on the original wedding date, but that she did not want to risk her guests' health. The magistrate ultimately found in favor of Ms. McKinney, finding that LaMalfa materially breached the contract by adding the COVID-19 restrictions. LaMalfa filed a Motion for Findings of Fact and Conclusions of Law, which the court issued in January 2022. LaMalfa also filed Objections to the Magistrate's Decision and supplemental objections, which Ms. McKinney opposed. The court adopted the Magistrate's Decision in March 2022 and entered judgment against LaMalfa in the amount of $5,000 plus interest.

{¶6} It is from this judgment that LaMalfa now appeals, assigning four errors for our review. Ms. McKinney did not file an appellee's brief.

{¶7} "The standard of review generally employed to review a trial court's adoption of a magistrate's decision is abuse of discretion." *Echols v. Echols*, 11th Dist. Geauga No. 2021-G-0040, 2022-Ohio-1719, ¶23, citing *Degrant v. Degrant*, 11th Dist. Geauga Nos. 2019-G-0190 and 2019-G-0216, 2020-Ohio-70, ¶24. The term "abuse of discretion" is one of art, "connoting judgment exercised by a court, which does not comport with reason or the record." *State v. Underwood*, 11th Dist. Lake No. 2008-L-113, 2009-Ohio-2089, ¶30, citing *State v. Ferranto*, 112 Ohio St. 667, 676-678 (1925). Stated differently, an abuse of discretion is the "trial court's 'failure to exercise sound, reasonable, and legal decision-making.'" *Id.*, citing *State v. Beechler*, 2d Dist. Clark No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting Black Law's Dictionary (8 Ed.Rev.2004) 11.

"When a pure issue of law is involved in appellate review, the mere fact that the reviewing court would decide the issue differently is enough to find error." *Beechler, supra,* at ¶67.

{¶8} LaMalfa's first assigned error states:

{¶9} The trial court erred and abused its discretion by adopting the Magistrate's finding of fact, where the Magistrate's finding of fact was not based upon direct evidence and was clearly erroneous.

{¶10} Under this assignment of error, LaMalfa specifically challenges the magistrate's finding of fact that Ms. McKinney "did not want her wedding to proceed with the several changes that the LaMalfa made to the contract." LaMalfa argues there is no evidence to support this statement in the record. Instead, it argues the reason Ms. McKinney stopped performance on her contractual obligations was because LaMalfa would not change the date and she was concerned about putting her guests' health at risk due to COVID-19. Because this is a challenge to a factual determination, the issue is whether the magistrate's finding is supported by competent, credible evidence in the record.

{¶11} Ms. McKinney testified that she could have had her wedding on October 31, 2020 at LaMalfa with the new policies and precautions that it put in place based on the state COVID-19 mandates, but that she could not have invited as many people, and that she did not want to put her guests' health at risk.

{¶12} LaMalfa is technically correct; Ms. McKinney did not expressly testify that she did not want to proceed with the reception because of the restrictions LaMalfa put in place. However, the court's statement was a reasonable inference from Ms. McKinney's testimony. She testified that she did not want to put her guests' health at risk. Even with

the safety precautions LaMalfa put in place, Ms. McKinney would have had to invite, or at least pay for, 120 guests. Furthermore, as discussed under the third assigned error, the new COVID-19 procedures materially changed the contract. Thus, it was fair for the court to conclude that Ms. McKinney did not wish to proceed under the restrictions that LaMalfa put in place.

{¶13} Accordingly, LaMalfa's first assigned error is without merit.

{¶14} Its second states:

{¶15} The trial court erred and abused its discretion by adopting the Magistrate's conclusion of law that McKinney properly brought a claim under the theory of impossibility.

{¶16} Under this assignment of error, LaMalfa challenges the legal sufficiency of Ms. McKinney's pleading. Ms. McKinney's complaint sought reimbursement for the deposit on the grounds of "impossibility of performance." As LaMalfa correctly argues on appeal, impossibility of performance is not a cause of action. *Lehigh Gas-Ohio, L.L.C. v. Cincy Oil Queen City, L.L.C.*, 1st Dist. No. C-150572, 2016-Ohio-4611, ¶15 ("The doctrine is an affirmative defense to a breach-of-contract claim. * * * It cannot be used * * * as a means of recovering damages under a contract."). However, the court did not find for Ms. McKinney on the grounds of impossibility of performance, but on the grounds that LaMalfa materially breached the contract.

{¶17} Moreover, the fact that Ms. McKinney did not expressly argue a breach of contract cause of action in her complaint is not fatal. "'Because Ohio is a notice-pleading state, Ohio law does not ordinarily require a plaintiff to plead operative facts with particularity. * * * Rather, Civ.R. 8(A) requires only a short and plain statement of the claim that gives the defendant fair notice of the plaintiff's claim and the grounds upon which it

is based. * * * Thus, a plaintiff is not required to plead the legal theory of the case at the pleading stage and need only give reasonable notice of the claim.' (Internal citations omitted.)" *McWreath v. Cortland Bank*, 11th Dist. Trumbull No. 2010-T-0023, 2012-Ohio-3013, ¶38, quoting *Ogle v. Ohio Power Co.*, 180 Ohio App.3d 44, 2008-Ohio-7042, ¶5. "When filing a claim pursuant to Civ.R. 8(A),'[a] party is not required to 'plead the legal theory of recovery'; furthermore, 'a pleader is not bound by any particular theory of a claim but that the facts of the claim as developed by the proof establish the right to relief.'" *Fancher v. Fancher*, 8 Ohio App.3d 79 (1st Dist.1982), quoting *Illinois Controls, Inc. v. Langham*, 70 Ohio St.3d 512, 526 (1994). However, "'the complaint must contain either direct allegations on every material point necessary to sustain a recovery on any legal theory, even though it may not be the theory suggested or intended by the pleader, or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial.'" *Fancher, supra*, quoting 5 Wright & Miller, Federal Practice & Procedure: Civil (1969), at 120-123, Section 1216.

{¶18} LaMalfa does not argue it did not have fair notice of Ms. McKinney's claims, and we find the complaint did provide LaMalfa fair notice. Thus, the fact that Ms. McKinney's complaint did not expressly state it was pursuing a claim for breach of contract does not preclude the trial court's finding that LaMalfa breached the contract.

{¶19} LaMalfa's second assigned error is without merit.

{¶20} Its third states:

{¶21} The trial court erred and abused its discretion by adopting the Magistrate's conclusions of law that Defendant materially breached the contract.

{¶22} Under this assigned error, LaMalfa challenges the court's factual finding that it materially breached the contract. Specifically, it argues the changes it made to the contract were "insignificant, technical departures and clearly had only a nominal effect upon the essential purpose." The original contract outlines a minimum of 120 guests, a buffet dinner, drinks, dancing, and additional enhancements options. LaMalfa argues that Ms. McKinney was still able to invite at least 120 guests, have dinner, drinks, dancing, and add-on enhancements, if selected. It also notes it provided a sit-down dinner as an alternative to the buffet.

{¶23} "'[A] material breach occurs when a party violates a term essential to the purpose of the agreement.'" *Troy Oaks Homes & Residential Club, Inc. v. Sokolowski*, 11th Dist. Geauga No. 2016-G-0081, 2016-Ohio-8427, ¶50, quoting *Ohio Educ. Ass'n v. Lopez*, 10th Dist. Franklin No. 09AP-1165, 2010-Ohio-5079, ¶12. "'Mere nominal, trifling, or technical departures will not result in a breach of contract; slight departures, omissions, and inadvertencies should be disregarded.'" *Sokolowski, supra,* quoting *Tucker v. Young*, 4th Dist. Highland No. 04CA10, 2006-Ohio-1126, ¶25.

{¶24} "As to what constitutes a material breach of a contract, Ohio courts have considered the following factors:

{¶25} '(1) the extent to which the injured party will be deprived of the benefit that he reasonably expected, (2) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived; (3) the extent to which the party failing to perform or to offer to perform will suffer forfeiture, (4) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances, and (5) the extent

to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.'" *Berk Ents., Inc. v. Polivka*, 11th Dist. Trumbull No. 2012-T-0073, 2013-Ohio-4961, ¶28-29, quoting *Brakefire, Inc. v. Overbeck*, 144 Ohio Misc.2d 35, 2007-Ohio-6464, ¶44.

{¶26} LaMalfa downplays the significance of the changes and ignores the fact that the contract itself stated that the terms of the contract could not be changed once signed. LaMalfa's changes mandated masks for all guest unless actively eating or drinking, a maximum number of 10 guests per table, proper social distancing of all people at all times, no buffet or family serving, and no open food on table "when possible."

{¶27} With these unilateral changes, Ms. McKinney would have had a substantially different wedding reception than the one for which she contracted. The mandates, while appropriate COVID-19 safety measures in general, materially altered the contract. Such restrictions impacted every single person at the wedding, which would have been a minimum of 120 people, per the terms of the contract. It would prevent hugs or close interpersonal contact from guests as is common for the occasion; it would limit the photographs able to be taken due to social distancing; it would mean photographs of the bridal party and guests with their faces concealed behind masks. And even providing a plated meal alternative, the elimination of the buffet was a material change to the contract that "could not" be altered after signed as the price of the buffet and the plated meals were different.

{¶28} The purpose of the contract was for a wedding and reception. However, because at the time of the signing of the contract COVID-19 restrictions were not anticipated, the changes LaMalfa made to the contract altered the wedding and reception

that both parties initially envisioned and limited the extent to which the bridal party, friends, and family could celebrate. The fact that Ms. McKinney got married on October 31, 2020 does not change our opinion. She testified that she was married in her parents' backyard with only her parents present, a very different wedding day than she contracted for with LaMalfa. Accordingly, we find the trial court's determination that LaMalfa materially breached the contract is supported by competent, credible evidence in the record.

{¶29} Finally, contrary to LaMalfa's argument, it is not "clear" that Ms. McKinney wanted out of the contract because she changed her mind and did not want to hold her wedding at LaMalfa's Party Center. The record shows that up until LaMalfa cancelled the date, she wanted to reschedule with LaMalfa for a later date, not cancel altogether.

{¶30} Accordingly, LaMalfa's third assigned error is without merit.

{¶31} Its final assigned error states:

{¶32} The trial court erred in adopting the magistrate's Decision determining McKinney is entitled to the return of her $5000.00 deposit.

{¶33} Under this assigned error, LaMalfa challenges the trial court's application of a contractual term. Specifically, it argues the trial court erred in granting Ms. McKinney the return of her $5,000 deposit because the contract expressly stated "[i]n the event you or we have to cancel the event, for any reason, all deposits are non-refundable." LaMalfa argues the court erred in adopting the magistrate's decision because the contract contained a no refund policy. We disagree.

{¶34} "[M]oney damages awarded for breach of contract are designed to place an aggrieved party in the same position he or she would have been had the contract not been breached." *Kumar v. USA Insulation*, 11th Dist. Lake No. 2018-L-058, 2018-Ohio-

5332, ¶24, quoting *Buckley v. Ollila*, 11th Dist. Trumbull No. 98-T-0177, 2000 WL 263739, *2 (Mar. 3, 2000), citing *Schulke Radio Prod., Ltd. v. Midwestern Broadcasting Co.*, 6 Ohio St.3d 436, 439 (1983).

{¶35} LaMalfa drafted a contract which expressly stated that the terms of the contract could not be altered once signed. The unforeseen effects of COVID-19 changed the circumstances on both sides of the contract. Ms. McKinney requested a reasonable alteration to the contract, which LaMalfa denied while simultaneously imposing its own alterations to the contract, which Ms. McKinney did not have any control over but was required to abide by. Those restrictions materially altered the terms of the contract. Moreover, those changes were not permitted pursuant to the terms of LaMalfa's contract. By unilaterally imposing alterations to the contract, LaMalfa breached the contract. Because of LaMalfa's breach, Ms. McKinney lost her $5,000 deposit and the benefit for which she contracted. Awarding Ms. McKinney $5,000 put Ms. McKinney back in the position she would have been in had LaMalfa not breached the contract.

{¶36} Accordingly, LaMalfa's fourth assigned error is without merit.

{¶37} In light of the foregoing, the March 3, 2022 judgment of the Painesville Municipal Court is affirmed.

MARY JANE TRAPP, J., concurs,

JOHN J. EKLUND, P.J., concurs in part and dissents in part, with a Concurring/Dissenting Opinion.

_____

JOHN J. EKLUND, P.J., concurs in part and dissents in part, with a Concurring/Dissenting Opinion.

{¶38} While I concur with the Majority's analysis of assignment of error number two, regarding notice pleading, I respectfully dissent from the balance of the opinion. I do not agree with the majority's view that the COVID-19 precautions LaMalfa put in place materially breached the contract.

{¶39} The decision to adopt a magistrate's decision is typically reviewed under an abuse of discretion standard. *Banks v. Shark Auto Sales LLC*, 11th Dist. Trumbull No. 2022-T-0018, 2022-Ohio-3489, ¶ 7. "'The term "abuse of discretion" is one of art, connoting judgment exercised by a court which neither comports with reason, nor the record.' *State v. Underwood*, 11th Dist. Lake No. 2008-L-113, 2009-Ohio-208, ¶ 30, citing *State v. Ferranto*, 112 Ohio St. 667, 676-678 [148 N.E. 362] (1925)." *State v. Raia*, 11th Dist. Portage No. 2013-P-0020, 2014-Ohio-2707, 2014 WL 2881994, ¶ 9. Stated differently, an abuse of discretion is "the trial court's 'failure to exercise sound, reasonable, and legal decision-making.'" *Id.*, quoting *State v. Beechler*, 2d Dist. Clark No. 09-CA-54, 2010-Ohio-1900, 2010 WL 1731784, ¶ 62, quoting *Black's Law Dictionary* 11 (8th Ed.Rev.2004). "When an appellate court is reviewing a pure issue of law, 'the mere fact that the reviewing court would decide the issue differently is enough to find error[.] * * * By contrast, where the issue on review has been confined to the discretion of the trial court, the mere fact that the reviewing court would have reached a different result is not enough, without more, to find error.'" *Id.*, quoting *Beechler* at ¶ 67.

{¶40} "'A material breach occurs when a party violates a term essential to the purpose of the agreement.'" *Troy Oaks Homes & Residential Club, Inc. v. Sokolowski*,

11th Dist. No. 2016-G-0081, 2016-Ohio-8427, 78 N.E.3d 365, ¶ 28, quoting *Ohio Educ. Ass'n v. Lopez*, 10th Dist. Franklin No. 09AP-1165, 2010-Ohio-5079, ¶ 12. "'Mere nominal, trifling, or technical departures will not result in a breach of contract; slight departures, omissions, and inadvertencies should be disregarded." *Id.*, quoting *Tucker v. Young*, 4th Dist. Highland No. 04CA10, 2006-Ohio-1126, ¶ 25. "Where there has been a material breach of contract by one party, the other party may treat the contract as terminated and rescind it or may sue for damages." *McDonagh v. Cortland Sav. & Banking Co.,* 11th Dist. Trumbull No. 2002-T-0138, 2004-Ohio-1146, ¶ 38.

{¶41} Whether a party's breach was material "'requires, inter alia, an examination of the parties' injuries, whether and how much the injured parties would or could have been compensated, and whether the parties acted in good faith. * * * All of these inquires turn on subjective facts." *Alloush v. Physician Cardiovascular Venture, L.L.C*., 11th Dist. Trumbull No. 2011-T-0112, 2013-Ohio-2400, ¶ 32., quoting *O'Brien v. Ohio State Univ.,* 10th Dist. Franklin No. 06AP-946, 2007-Ohio-4833, ¶ 11.

{¶42} Accepting the trial court's findings of fact as true, the court of appeals must "independently determine – without deference to the trial court's conclusion – whether those facts satisfy the trial court's legal conclusion." *O'Brien* at ¶ 12, citing *State v. Wilson,* 113 Ohio St.3d 382, 2007-Ohio-2202*,* 865 N.E.2d 1264, ¶ 40. *"Mere disagreement* with the trial court's findings is not sufficient to overturn them." *Wilson,* at ¶ 40.

{¶43} Here, LaMalfa imposed certain COVID-19 related precautions, some of which were mandated by the Ohio Department of Health. [1] Those precautions included

1. *See Ohio Department of Health Director's Dine Safe Ohio Orders* June 5, 2020, and September 23, 2020.

masks for all guests unless actively eating or drinking, a maximum number of 10 guests per table, proper social distancing, and no buffet or open food to remain on the table.

{¶44} In an email sent in August, LaMalfa indicated it could not offer the buffet dinner but suggested, "[i]t just might be a little too early to tell but currently we are unable to move forward with the buffet dinner. We can talk further as time move's [sic] forward pertaining to your alternate buffet considerations."

{¶45} The Magistrate's findings of fact determined that McKinney "did not want to proceed with her wedding for fear of exposing guests to COVID and did not want her wedding to proceed with the several changes that the Defendant made to the contract." However, this finding of fact is not supported by the record and does not support the legal conclusion that "the terms of the contract were materially changed by the Defendant[.]"

{¶46} At trial, McKinney did not express a desire to proceed with the reception without COVID-19 precautions in place. Instead, she wanted to change the date of the reception "because I was uncomfortable having the date since COVID, and I didn't want anyone to get sick." She had a single request – to move the date of the reception to a later date due to health concerns for herself and her guests. The trial court abused its discretion in adopting the magistrate's decision because the evidence did not demonstrate a material breach of the contract. Instead, McKinney merely desired a later reception date regardless of whether LaMalfa's COVID-19 precautions were in place.

{¶47} The contract between McKinney and LaMalfa did not address the issues of masks, the number of guests seated at a table, or social distancing. None of these precautions were a term of the contract or essential to the purpose of the contract. Thus, when LaMalfa imposed those precautions to comply with the Ohio Department of Health

regulations, they cannot have resulted in a material breach of the contract. More importantly, none of these requirements deprived appellee of the benefit she reasonably expected or constituted a failure of appellant to reasonably perform its duties under the contract.

{¶48} As for the buffet, the contract did specify the "Wingate Grand Buffet" package, and LaMalfa's precautions altered that term. However, I do not believe that this alteration constituted a "material breach." First, the "Wingate Grand Buffet" had a price point of $42.50 per person while the most comparable plated option, the "Formal Sit Down Dinner" had a price point of $38.50 per person. This change would have resulted in a lower cost for McKinney. Second, while some may have an opinion on the aesthetic difference between a "grand buffet" and a "formal sit down dinner," my view of the law suggests that any difference is not material.

{¶49} The essential purpose of the agreement – to have a wedding reception – was intact. Indeed, the other essential purposes of the agreement were unchanged. LaMalfa was still going to hold the wedding ceremony, the grand ballroom was still going to open, dinner would still be served, the bridal party still introduced, the first dance and cake cutting would still happen. Guests would still be free to toast, drink, and dance.

{¶50} The only difference of contractual significance was that the dinner would be a formal plated dinner rather than a grand buffet. This is the epitome of a "nominal," "technical" departure that "should be disregarded." *Tucker, supra*, at ¶ 25. The lack of the buffet was not a material breach, and when McKinney failed to provide a final number count as the contract required, she forfeited her $5,000 deposit.

{¶51} Finally, the deposit was non-refundable. The contract specifically stated, "in the event you or we have to cancel the event, for any reason, all deposits are non-refundable." Therefore, under the terms of the contract, LaMalfa would have been within its rights to cancel the event entirely due to COVID-19 and to retain the deposit. Instead, McKinney herself testified that LaMalfa was "ready, willing and able" to hold the reception on the October 31 date.

{¶52} Moreover, retention of the deposit would not represent a windfall to LaMalfa as the final cost of the event would have exceeded the deposit amount. Instead, retention of the deposit is a means to protect the vendor if the event is cancelled because scheduling a new event on that same date is often difficult or impossible.

{¶53} For the reasons stated above, I respectfully concur in part and dissent in part. I would reverse the order of the trial court refunding the (non)refundable deposit to McKinney.

[Cite as *U.S. Bank v. Williams*, 2022-Ohio-4590.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

U.S. Bank Trust National Association as Trustee of the Lodge Series III Trust,	:	
Plaintiff-Appellee,	:	No. 21AP-576
	:	(C.P.C. No. 19CV-7085)
v.	:	(REGULAR CALENDAR)
Charles Williams, Jr.,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 20, 2022

On brief: *Sottile & Barile LLC*, *Ethan Hill*, and *Susan B. Klineman*, for appellee. **Argued:** *Ethan Hill*.

On brief: *Bruce M. Broyles*, for appellant. **Argued:** *Bruce M. Broyles*.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶ 1} Defendant-appellant, Charles Williams, Jr., appeals a judgment of the Franklin County Court of Common Pleas that granted summary judgment to plaintiff-appellee, U.S. Bank Trust National Association as trustee of the Lodge Series III Trust. For the following reasons, we reverse that judgment and remand this case to the trial court.

{¶ 2} On August 30, 2019, U.S. Bank filed a foreclosure complaint against Williams. In the complaint, U.S. Bank alleged that it was the holder of a promissory note executed by Williams and Regina Blount-Williams. U.S. Bank also alleged that it was the holder of the mortgage that secured the note. Additionally, U.S. Bank stated that Williams

and Blount-Williams had defaulted on the note and owed $377,862.90, plus interest, costs, and expenses. U.S. sought a monetary judgment, foreclosure of the mortgage, sale of the mortgaged property, and payment of the monetary judgment from the sale proceeds.

{¶ 3} U.S. Bank moved for summary judgment against Williams on June 2, 2021.[1] To support its motion, U.S. Bank relied on the affidavit of Jordan Kahoalii, an asset manager for SN Servicing Corporation, which acted as the servicing agent for the Williams' mortgage loan. Kahoalii testified in her affidavit that, in her capacity as asset manager, she had access to U.S. Bank's loan accounts, which were maintained in the ordinary course of business. The Williams' loan account included the promissory note, loan modification documents, the mortgage, the payment history, and servicing records. Kahoalii averred that:

> [d]ata entries in the Loan Account [were] made at or near the time of occurrence by a person, with knowledge of the occurrence, and [were] compiled and recorded as part of [U.S. Bank's] regularly conducted business activity. Such records [were] kept, maintained, and relied upon in the course of [U.S. Bank's] ordinary and regularly conducted business activity. The statements [she made] in [her] Affidavit [were] based upon [her] personal review of those entries relating to the Loan Account of Charles Williams, Jr. and Regina Blount-Williams, and from [her] own personal knowledge of how the records [were] kept and maintained.

(Kahoalii Aff. at ¶ 2.)

{¶ 4} Kahoalii then stated that the Williams' note was in U.S. Bank's possession, and that U.S. Bank had acquired the note prior to the filing of the complaint. Kahoalii also stated that the mortgage was assigned to U.S. Bank as reflected in the assignments of mortgage attached to her affidavit. Finally, according to Kahoalii, the Williams had defaulted under the terms of the note, and there was "due and owing [ ] the principal sum of $377,862.90, together with interest on the unpaid principal [sum] from August 10, 2017, at the rate of 2%, and including the additional sum of $12,941.90 of non-interest bearing principal, as set forth in the Note and Loan Modification * * *." *Id.* at ¶ 11. To substantiate

[1] Blount-Williams did not answer the complaint. Consequently, U.S. Bank moved for and received default judgment against Blount-Williams.

the amount due, Kahoalii attached a copy of the payment history, which Kahoalii indicated "reflect[ed] payments and charges associated with the Loan Account." *Id.*

{¶ 5} In response to U.S. Bank's motion for summary judgment, Williams argued that U.S. Bank lacked standing to enforce the mortgage. Williams pointed out gaps in the chain of recorded assignments of the mortgage, and Williams claimed that those gaps deprived U.S. Bank of the standing it needed to proceed with foreclosure. Additionally, Williams argued that Kahoalii could not testify regarding the amount owed because she based her testimony on a payment history created by a prior loan servicer, which Williams alleged was inadmissible hearsay.

{¶ 6} In a judgment dated October 11, 2021, the trial court granted U.S. Bank summary judgment and issued a decree of foreclosure. Williams now appeals that judgment and assigns the following errors:

> [1.] THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WHEN A GENUINE ISSUE OF MATERIAL FACT REMAINED AS TO APPELLEE'S RIGHT TO ENFORCE THE MORTGAGE AS DEMONSTRATED BY THE CHAIN OF ASSIGNMENTS OF THE MORTGAGE.
>
> [2.] THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WHEN A GENUINE ISSUE OF MATERIAL FACT REMAINED AS TO THE AMOUNT OF PRINCIPAL AND INTEREST DUE.
>
> [3.] THE TRIAL COURT ERRED IN FAILING TO CONSIDER THE ARGUMENTS OF APPELLANT REGARDING THE INADMISSIBLE HEARSAY AND THE CONFUSING NATURE OF THE PAYMENT HISTORY WHEN RENDERING SUMMARY JUDGMENT.

{¶ 7} All Williams' assignments of error challenge the trial court's decision to grant U.S. Bank summary judgment. A trial court must grant summary judgment under Civ.R. 56 when the moving party demonstrates that: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion when viewing the evidence most strongly in favor of the nonmoving party, and that conclusion is adverse to the nonmoving party. *Hudson v. Petrosurance, Inc.*, 127 Ohio St.3d 54, 2010-Ohio-4505, ¶ 29; *Sinnott v. Aqua-Chem, Inc.*, 116 Ohio St.3d 158, 2007-Ohio-5584, ¶ 29. Appellate review of a trial court's ruling on a

motion for summary judgment is de novo. *Hudson* at ¶ 29. This means that an appellate court conducts an independent review, without deference to the trial court's determination. *Zurz v. 770 W. Broad AGA, LLC*, 192 Ohio App.3d 521, 2011-Ohio-832, ¶ 5 (10th Dist.); *White v. Westfall*, 183 Ohio App.3d 807, 2009-Ohio-4490, ¶ 6 (10th Dist.).

{¶ 8} The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). The moving party does not discharge this initial burden under Civ.R. 56 by simply making conclusory allegations. *Id.* Rather, the moving party must affirmatively demonstrate by affidavit or other evidence allowed by Civ.R. 56(C) that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.* If the moving party meets its burden, then the nonmoving party has a reciprocal burden to set forth specific facts showing that there is a genuine issue for trial. Civ.R. 56(E); *Dresher* at 293. If the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party. *Id.*

{¶ 9} By his first assignment of error, Williams argues that the trial court erred in granting U.S. Bank summary judgment because U.S. Bank failed to establish its right to enforce the mortgage. We disagree.

{¶ 10} Initially, we must determine whether Williams challenges U.S. Bank's standing to foreclose or, instead, Williams contends U.S. Bank cannot satisfy an element of its foreclosure action. In the trial court, Williams argued that U.S. Bank lacked standing because it could not establish its right to enforce the mortgage. Now, before this court, Williams argues that U.S. Bank cannot prove an element of its foreclosure action because it is unable to enforce the mortgage. Having lost in the trial court, a party cannot change its theory of the case in an attempt to succeed on appeal. *State ex rel. Gutierrez v. Trumbull Cty. Bd. of Elections*, 65 Ohio St.3d 175, 177 (1992). We will consequently review the argument Williams raised in the trial court: U.S. Bank lacked standing due to its alleged inability to enforce the mortgage.

{¶ 11} "[T]he fundamental requirement of standing is that the party bringing the action must have a personal stake in the outcome of the controversy, i.e., that it must be the injured party." *Deutsche Bank Natl. Trust Co. v. Holden*, 147 Ohio St.3d 85, 2016-Ohio-

4603, ¶ 32. To establish standing generally, a claimant must show that it suffered an injury that is fairly traceable to the defendant's allegedly unlawful conduct, and that the requested relief is likely to redress the injury. *Id.* at ¶ 20. At its core, standing turns on the nature and source of the claim asserted. *Id.*

{¶ 12} Typically, a foreclosure action consists of a legal action to collect on the defaulted note together with an equitable action to force a sale of the mortgaged property. *Id.* at ¶ 5. In such an action, "[t]he person entitled to enforce the note pursuant to R.C. 1303.31 has standing to seek a personal judgment against the promisor on that obligation, while the mortgagee or its successor and assign has standing to foreclose on the mortgage." *Id.* at ¶ 35. The plaintiff must possess the requisite stake in the action on the date that it files the action. *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, ¶ 24-25.

{¶ 13} Here, in its foreclosure action, U.S. Bank sought both a monetary judgment on the note and the forced sale of the Williams' property for the satisfaction of the mortgage debt. U.S. Bank had standing, therefore, if it was the person entitled to enforce the Williams' note and the holder of the Williams' mortgage on the date it filed the complaint.

{¶ 14} On appeal, Williams does not contest that U.S. Bank is the person entitled to enforce the note. The law and evidence supports this conclusion.

{¶ 15} A plaintiff qualifies as the "[p]erson entitled to enforce" a negotiable instrument if the plaintiff is "[t]he holder of the instrument." R.C. 1303.31(A)(1). The definition of "holder" varies depending on whether the negotiable instrument at issue is made payable to a particular person. If the instrument is payable to an identified person, the holder is the identified person when in possession of the instrument. R.C. 1301.01(T)(1)(b).[2] If an instrument is payable to the bearer, the holder is the person in possession of the instrument. R.C. 1301.01(T)(1)(a). A blank indorsement makes the instrument payable to the bearer. R.C. 1303.25(B).

[2] Effective June 29, 2011, Am.H.B. No. 9, 2011 Ohio Laws File 9, repealed R.C. 1301.01, amended the provisions of R.C. 1301.01, and renumbered that section so that it now appears at R.C. 1301.201. R.C. 1301.201 only applies to transactions entered into after the effective date of that statute. The Williams executed their note in 1987, well before the effective date of R.C. 1301.201. Consequently, we apply R.C. 1301.01 to this appeal.

{¶ 16} Kahoalii, the asset manager for the servicing agent, authenticated the Williams' note and the accompanying allonges in her affidavit. The Williams' note was indorsed in blank. According to Kahoalii's affidavit testimony, U.S. Bank acquired the Williams' note prior to filing the complaint, and U.S. Bank maintains the note in its possession. U.S. Bank, therefore, provided evidence establishing itself as the person entitled to enforce the Williams' note.

{¶ 17} Williams, however, disputes U.S. Bank's contention that it is the holder of the Williams' mortgage. Williams argues that gaps in the chain of the recorded mortgage assignments prevented U.S. Bank from acquiring any interest in the mortgage. In response, U.S. Bank first asserts that Williams cannot question the assignments that resulted in its status as the holder of the mortgage. According to U.S. Bank, the mortgage assignments were contractual matters not involving Williams, and as a non-party to those transactions Williams lacks the privity necessary to challenge their validity.

{¶ 18} U.S. Bank's argument fails for two reasons. First, U.S. Bank did not raise it in the trial court, and thus, waived the right to raise it on appeal. *West v. Bode*, 162 Ohio St.3d 293, 2020-Ohio-5473, ¶ 43. Second, we have previously found the argument unavailing. As a defendant, a homeowner may challenge the plaintiff bank's standing to bring a foreclosure action: " '[T]he maker of the note or mortgage has standing to challenge their enforcement against the maker, even if not a party in privity to the particular transfer or assignment challenged.' " *Green Tree Servicing LLC v. Asterino-Starcher*, 10th Dist. No. 16AP-675, 2018-Ohio-977, ¶ 23, quoting *United States Bank Natl. Assn. v. George*, 10th Dist. No. 14AP-817, 2015-Ohio-4957, ¶ 27.

{¶ 19} We therefore turn to analyzing whether the chain of recorded mortgage assignments culminates in U.S. Bank's acquisition of the mortgage. In total, eight assignments of the mortgage were recorded with the Franklin County Recorder prior to the filing of the complaint. The first three assignments maintain the chain. In the first, Washington Mutual Bank FA, successor in interest of the original mortgagee, assigned the mortgage to EMC Mortgage Corporation. In the second, EMC Mortgage Corporation assigned the mortgage to LaSalle Bank National Association as trustee for the certificate holders of EMC Mortgage Loan Trust 2004-A, Mortgage Loan Pass-Through Certificates,

Series 2004-A ("LaSalle Bank"). In the third, LaSalle Bank assigned the mortgage to EMC Mortgage LLC.[3]

{¶ 20} In the fourth assignment, which was signed June 11, 2015 and recorded July 8, 2015, EMC Mortgage Corporation assigned the mortgage to Wilmington Trust, National Association, as trustee for VM Trust Series 3 ("Wilmington Trust"). Because EMC Mortgage *LLC*—not EMC Mortgage *Corporation*—owned the mortgage prior to the fourth assignment, the fourth assignment broke the chain. However, a "gap assignment" attempted to fix the problem. The next recorded assignment, entitled "GAP ASSIGNMENT OF MORTGAGE," expressly stated, "THE ASSIGNMENT OF THE BELOW REFERENCED LIEN IS FILED OUT OF SEQUENCE * * *." (Kahoalii Aff. at Ex. C.) Indeed, the gap assignment was executed on April 27, 2015—*before* the fourth assignment—but recorded on February 25, 2016—*after* the fourth assignment. Therefore, when placed in chronological sequence, the gap assignment belongs before the fourth assignment.

{¶ 21} But the gap assignment did not accomplish its goal of mending the break in the chain. In the gap assignment, LaSalle Bank assigned the mortgage to EMC Mortgage Corporation. The entity at the end of the assignment chain was EMC Mortgage LLC, not LaSalle Bank. LaSalle Bank had already assigned its interest to EMC Mortgage LLC in the third assignment, and thus had no interest in the mortgage to assign in the gap assignment. To fill the gap, EMC Mortgage LLC, the assignee in the third mortgage, would have to assign the mortgage to EMC Mortgage Corporation, the assignor in the fourth mortgage. Because no such gap assignment was recorded, the gap went unfilled.

{¶ 22} As an alternative argument, U.S. Bank asserts that, if the gap assignment is disregarded as invalid, the chain of recorded mortgage assignments is not broken. According to U.S. Bank, EMC Mortgage Corporation and EMC Mortgage LLC are the same entity, so EMC Mortgage Corporation could legally assign to another entity a mortgage first assigned to EMC Mortgage LLC. If correct, this would eliminate the gap between the third and fourth assignments.

{¶ 23} We, however, cannot review U.S. Bank's argument because it rests upon evidence that U.S. Bank did not introduce in the trial court. U.S. Bank attaches various

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[3] In the third assignment and the gap assignment, LaSalle's successor in interest, The Bank of America, National Association, actually assigned the mortgage. However, to avoid excessive complication, we will refer to the assignor in these two assignments as "LaSalle."

business records to its appellate brief to support its assertion that EMC Mortgage Corporation and EMC Mortgage LLC are the same entity. The trial court did not have these records before it when ruling on the motion for summary judgment.

{¶ 24} An appellate court's review is limited to the same evidentiary materials that were before the trial court when it ruled on the motion for summary judgment. *Guernsey Bank v. Milano Sports Ents., LLC*, 177 Ohio App.3d 314, 2008-Ohio-2420, ¶ 30 (10th Dist.). " 'A reviewing court cannot add matter to the record before it, which was not part of the trial court's proceedings, and then decide the appeal on the basis of the new matter.' " *Morgan v. Eads*, 104 Ohio St.3d 142, 2004-Ohio-6110, ¶ 13, quoting *State v. Ishmail*, 54 Ohio St.2d 402 (1978), paragraph one of the syllabus.

{¶ 25} U.S. Bank asserts that this court can consider the new evidentiary material under Loc.R. 9.1 of the Tenth District Court of Appeals because the material pertains to U.S. Bank's standing to defend this appeal. Pursuant to Loc.R. 9.1, this court "may admit additional evidence pertaining to the * * * [s]tanding of a party to prosecute or defend the appeal." However, U.S. Bank's standing to defend this appeal is not at issue. We are reviewing a different question: whether U.S. Bank has standing to pursue a foreclosure action. We thus find U.S. Bank's argument unpersuasive, and we strike the evidentiary material attached to U.S. Bank's brief from the record.

{¶ 26} Returning to the chain of recorded mortgage assignments, in the fifth assignment, Wilmington Trust assigned the mortgage to V Mortgage Reo 3, LLC. The sixth assignment, once again, broke the chain of mortgage assignments because in it, Wilmington Trust purported to assign the mortgage it had already assigned; this time to U.S. Bank Trust National Association, as trustee of the Bungalow Series III Trust. Finally, in the seventh assignment, U.S. Bank Trust National Association, as trustee of the Bungalow Series III Trust, assigned the mortgage to U.S. Bank Trust National Association, as trustee of the Lodge Series III Trust.

{¶ 27} As Williams points out, there are two breaks in the chain of the mortgage assignments. Nevertheless, even with these breaks, U.S. Bank can still enforce the mortgage pursuant to equitable assignment. Negotiation of a note secured by a mortgage operates as an equitable assignment of the mortgage, even if the mortgage is not assigned or delivered. *Deutsche Bank Natl. Trust Co. v. Stone*, 10th Dist. No. 20AP-94, 2021-Ohio-

3007, ¶ 21; *Asterino-Starcher*, 10th Dist. No. 16AP-675, 2018-Ohio-977, at ¶ 37; *Huntington Natl. Bank v. Miller*, 10th Dist. No. 14AP-586, 2016-Ohio-5860, ¶ 19; *UAP-Columbus JV326132 v. Young*, 10th Dist. No. 14AP-422, 2014-Ohio-4590, ¶ 30; *Wells Fargo Bank, N.A. v. Byers*, 10th Dist. No. 13AP-767, 2014-Ohio-3303, ¶ 18; *United States Bank Natl. Assn. v. Gray*, 10th Dist. No. 12AP-953, 2013-Ohio-3340, ¶ 32. " 'In other words, "[t]he physical transfer of the note endorsed in blank, which the mortgage secures, constitutes an equitable assignment of the mortgage, regardless of whether the mortgage is actually (or validly) assigned or delivered." ' " *Stone* at ¶ 21, quoting *Asterino-Starcher* at ¶ 37, quoting *Deutsche Bank Natl. Trust Co. v. Najar*, 8th Dist. No. 98502, 2013-Ohio-1657, ¶ 65; *accord Miller* at ¶ 19; *Chenault v. Deutsche Bank Natl. Trust Co.*, 10th Dist. No. 14AP-669, 2015-Ohio-1850, ¶ 16; *Byers* at ¶ 18; *Gray* at ¶ 32.

{¶ 28} Ohio's version of the Uniform Commercial Code incorporates the common-law doctrine of equitable assignment. *Gray* at ¶ 33. Under R.C. 1309.203(G), "[t]he attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien." This division "codifies the common-law rule that a transfer of an obligation secured by a security interest or other lien on personal or real property also transfers the security interest or lien." UCC Official Comment, Section 9-203, Comment 9 (2000).

{¶ 29} Here, Williams does not dispute that U.S. Bank is the person entitled to enforce the note, or that U.S. Bank came into possession of that note prior to the filing of the complaint. Transfer of the note into U.S. Bank's possession effectuated the equitable assignment of the mortgage to U.S. Bank, regardless of the invalidity of certain recorded assignments. Consequently, pursuant to the doctrine of equitable assignment, U.S. Bank was the holder of the mortgage when it filed suit.

{¶ 30} Williams argues that the two breaks in the chain of the recorded mortgage assignments evidence the separation of the mortgage from the note, which precludes us from applying the doctrine of equitable assignment. But Williams' argument assumes the inapplicability of the doctrine in the first place. Pursuant to equitable assignment, the mortgage transfers with the note, regardless of whether the transfer is memorialized with a valid mortgage assignment that appears in the record. Consequently, defects in the chain

of recorded mortgage assignments do not affect the operation of the doctrine. When applying the doctrine of equitable assignment, the operative question, instead, is whether the plaintiff bank is the person entitled to enforce the note.

{¶ 31} In sum, we conclude that U.S. Bank established that, at the time it filed the complaint, it was the person entitled to enforce the Williams' note, and it was the holder of the Williams' mortgage. U.S. Bank, therefore, had standing to enforce both the note and mortgage. Accordingly, we overrule Williams' first assignment of error.

{¶ 32} We next consider Williams' third assignment of error. By that assignment of error, Williams argues that the trial court erred in not explicitly ruling on his argument that Kahoalii impermissibly relied on hearsay to testify to the amount due on the note. We find no error because it is clear from the grant of summary judgment that the trial court rejected Williams' argument. In finding that "there is due the Plaintiff on the promissory note * * * the principal balance of $377,862.90," the trial court necessarily found Kahoalii's testimony admissible. (Jgmt. Entry & Decree of Foreclosure at 2.) Accordingly, we overrule the third assignment of error.

{¶ 33} By Williams' second assignment of error, he argues that the trial court erred in granting summary judgment when a genuine issue of material fact remained regarding the amount due on the note. Williams contends that the trial court could not rely on Kahoalii's affidavit testimony regarding the amount due because she based her testimony on hearsay. We agree.

{¶ 34} Affidavits offered in opposition to summary judgment must be made on personal knowledge, must set forth admissible evidence, and must show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. Civ.R. 56(E). " 'Personal knowledge' is 'knowledge gained through firsthand observation or experience, as distinguished from a belief based on what someone else has said.' " *Bonacorsi v. Wheeling & Lake Erie Ry. Co.*, 95 Ohio St.3d 314, 2002-Ohio-2220, ¶ 26, quoting *Black's Law Dictionary* 875 (7th Ed.1999). " 'Information in affidavits that is not based on personal knowledge and does not fall under any of the permissible exceptions to the hearsay rule may be properly disregarded by the trial court when granting or denying summary judgment.' " *Ohio Receivables, LLC v. Dallariva*, 10th Dist. No. 11AP-951, 2012-Ohio-3165,

¶ 16, quoting *Cincinnati Ins. Co. v. Thompson & Ward Leasing Co.*, 158 Ohio App.3d 369, 2004-Ohio-3972, ¶ 13 (10th Dist.).

{¶ 35} Here, Kahoalii based her testimony regarding the amount owed on a payment history, which she attached to her affidavit. Williams asserts that the payment history constitutes inadmissible hearsay because it includes a business record of a prior servicing agent. Because Kahoalii's knowledge regarding the amount owed arises from hearsay, Williams argues, the trial court should have rejected Kahoalii's testimony as not meeting the Civ.R. 56(E) standard.

{¶ 36} In her affidavit, Kahoalii does not identify what entity created the payment history; instead, she just states that the payment history "reflect[s] payments and charges associated with the Loan Account." (Kahoalii Aff. at ¶ 11.) The payment history consists of two spreadsheets; one untitled and one titled "SN Servicing Corporation; Loan History General." *Id.* at Ex. E. The untitled spreadsheet has entries for transaction dates spanning from April 2, 2012 to January 10, 2019. The SN Servicing spreadsheet begins with an entry with a transaction date of January 14, 2019 and a transaction description of "New Loan." *Id.*

{¶ 37} Given the configuration of and information contained in the spreadsheets, we conclude that SN Servicing became the servicing agent for the Williams' loan on January 14, 2019. Consequently, the untitled spreadsheet—detailing transactions dated prior to January 14, 2019—is the business record of the prior servicer. This conclusion is buttressed by U.S. Bank's admission in its appellate brief that "records from prior servicers" are attached to Kahoalii's affidavit. (Appellee's Brief at 13.)

{¶ 38} In response to Williams' argument, U.S. Bank asserts that Kahoalii could rely on the prior servicer's payment history for the amount owed because that payment history is admissible evidence under the hearsay exception for business records. Pursuant to Evid.R. 803(6), business records that meet the enumerated requirements are excepted from the hearsay rule. Evid.R. 803(6) permits the admission of business records of an entity even when the entity was not the maker of the records, so long as the other requirements of Evid.R. 803(6) are met and circumstances indicate that the records are trustworthy. *Cach v. Alderman*, 10th Dist. No. 15AP-980, 2017-Ohio-5597, ¶ 17; *Dallariva*, 10th Dist. No. 11AP-951, 2012-Ohio-3165, at ¶ 20. Consequently, records need not be

prepared by the entity offering them if the entity received, maintained, and relied on the records in the ordinary course of business, and incorporated the records into the business records of the testifying entity. *Cach* at ¶ 17; *Dallariva* at ¶ 20.

{¶ 39} Here, because Kahoalii did not acknowledge that another entity created the payment history, her affidavit does not address the elements necessary to establish the foundation for admission of an adoptive business record. Without that foundation, the payment history constitutes hearsay, which renders Kahoalii's testimony regarding the amount owed on the note inadmissible evidence. Accordingly, we conclude the trial court erred in granting U.S. Bank summary judgment, and we sustain Williams' second assignment of error.

{¶ 40} For the foregoing reasons, we overrule Williams' first and third assignments of error, and we sustain his second assignment of error. Additionally, we grant Williams' motion to strike the evidentiary material attached to U.S. Bank's appellate brief. We reverse the judgment of the Franklin County Court of Common Pleas, and we remand this cause to that court for further proceedings consistent with law and this decision.

Motion to strike granted;
judgment reversed; cause remanded.

DORRIAN and McGRATH, JJ., concur.

[Cite as *Cafaro-Peachcreek Joint Venture Partnership v. Spanggard*, 2022-Ohio-4468.]

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

CAFARO-PEACHCREEK JOINT VENTURE PARTNERSHIP, Plaintiff-Appellee/ Cross-Appellant, - v - JILL SPANGGARD d.b.a. VAPOR GUY, Defendant-Appellant/ Cross-Appellee.	**CASE NO. 2022-T-0004** Civil Appeal from the Court of Common Pleas Trial Court No. 2020 CV 01043

O P I N I O N

Decided: December 12, 2022
Judgment: Reversed and remanded

Leonard D. Hall and *Ronald J. Yourstowsky*, 5577 Youngstown-Warren Road, Niles, OH 44446 (For Plaintiff-Appellee/Cross-Appellant).

Steven W. Mastrantonio and *Daniel J. Orlando*, Weisensell, Mastrantonio & Niese, LLP, The Nantucket Building, 23 South Main Street, Suite 301, Akron, OH 44308 (For Defendant-Appellant/Cross-Appellee).

MARY JANE TRAPP, J.

{¶1} Defendant-appellant/cross-appellee, Jill Spanggard ("Ms. Spanggard"), and plaintiff-appellee/cross-appellant, Cafaro-Peachcreek Joint Venture Partnership ("Cafaro"), appeal from the judgments of the Trumbull County Court of Common Pleas granting summary judgment in favor of Cafaro on its breach of contract claim against Ms. Spanggard and on Ms. Spanggard's counterclaims and awarding Cafaro damages of $18,513.67.

{¶2} Ms. Spanggard asserts two assignments of error. First, Ms. Spanggard contends that the trial court erred in granting summary judgment to Cafaro on its breach of contract claim by failing to void the parties' agreement based on the doctrine of frustration of purpose, by failing to "balance the equities" in the case, and by failing to find that Cafaro materially breached the parties' agreement. Second, Ms. Spanggard contends that the trial court erred in calculating Cafaro's damages.

{¶3} Cafaro asserts one cross-assignment of error, contending that the trial court erred in failing to award post-judgment interest at a contractual rate of 18% per annum.

{¶4} After a careful review of the record and pertinent law, we find as follows:

{¶5} (1) The trial court erred by granting summary judgment to Cafaro on its breach of contract claim. The trial court did not err in failing to void the parties' agreement based on the doctrine of frustration of purpose or by failing to "balance the equities." However, the record reflects there are genuine issues of material fact regarding whether Cafaro performed its contractual obligations.

{¶6} (2) Because we reverse the trial court's summary judgment in favor of Cafaro on its breach of contract claim, we necessarily reverse the trial court's damages award in favor of Cafaro.

{¶7} (3) In light of our disposition of Ms. Spanggard's assignments of error, Cafaro's cross-assignment of error is moot.

{¶8} Thus, we reverse the judgments of the Trumbull County Court of Common Pleas and remand for further proceedings consistent with this opinion.

Substantive and Procedural History

{¶9} Cafaro is an Ohio general partnership with a principal place of business in Niles, Ohio. Ms. Spanggard is a resident of Erie, Pennsylvania, who conducted business

under the name, “Vapor Guy.” In November 2019, the parties entered into an “In-Line License Agreement,” whereby Cafaro granted Ms. Spanggard a license to occupy and use the premises known as unit 410 at the Millcreek Mall in Erie, Pennsylvania, for a term of 14 months. Ms. Spanggard agreed to use the unit “for the sole purpose of the first-class operation of a retail unit selling electronic cigarettes and accessories, and for no other purpose.” She further agreed to pay monthly charges for rent, marketing, and trash removal. The parties’ agreement contains no “force majeure” provision.

{¶10} On March 16, 2020, the Governor of Pennsylvania issued an order requiring non-essential businesses to close for 14 days in an effort to stop the spread of COVID-19. On the same date, Cafaro issued a notice informing Ms. Spanggard that the mall would close for business at 6:00 p.m. and would remain closed until the governor’s order was lifted. According to Ms. Spanggard, Cafaro ordered her to vacate the unit, locked the mall’s entryways, and denied her access to retrieve her inventory and other assets. In an email sent later that evening, Ms. Spanggard challenged the legality of Cafaro’s actions and alleged that it had effectively breached the parties’ agreement.

{¶11} Several weeks later, on May 4, Ms. Spanggard’s associate, Andrew Book (“Mr. Book”), informed Cafaro that Ms. Spanggard was no longer conducting business at the mall and returned custody and control of the unit to Cafaro. According to Ms. Spanggard, Cafaro permitted her to retrieve her property from the unit three days later. The mall eventually reopened on June 26.

{¶12} In September 2020, Cafaro filed a “complaint for money only” against Ms. Spanggard in the Trumbull County Court of Common Pleas, seeking a judgment of

$19,324.27, subsequently incurred charges, and interest at a contractual rate of 18% per annum.[1]

{¶13} Ms. Spanggard filed an answer, affirmative defenses, and counterclaims for wrongful retention of security deposit, breach of implied warranty of quiet enjoyment, breach of the license agreement, wrongful eviction, and equitable relief. Cafaro filed a reply to Ms. Spanggard's counterclaim.

{¶14} Cafaro filed a motion for summary judgment on its breach of contract claim and on Ms. Spanggard's counterclaims and requested $42,644.26 in damages, including $24,130.59 in liquidated damages, plus interest at a contractual rate of 18% per annum. Ms. Spanggard filed a brief in opposition.

{¶15} On November 17, 2021, the trial court filed a judgment entry denying Cafaro's motion for summary judgment. The trial court found that Ms. Spanggard quit the premises and that her frustration of purpose defense was not available based on this court's decision in *Wroblesky v. Hughley*, 2021-Ohio-1063, 169 N.E.3d 709 (11th Dist.), *appeal not accepted*, 164 Ohio St.3d 1421, 2021-Ohio-2923, 172 N.E.3d 1049. The trial court found that Ms. Spanggard breached the agreement but that Cafaro's request for liquidated damages constituted an unenforceable penalty.

{¶16} Cafaro filed a motion for summary judgment "on all matters except for liquidated damages," incorporating its prior motion for summary judgment and all other pleadings and briefs previously filed. Ms. Spanggard filed a brief in opposition.

1. The parties' agreement required Cafaro to file suit for nonpayment of rent or breach of the agreement in either the Mahoning or Trumbull County Court of Common Pleas. It further provided that Ms. Spanggard waived any defense of improper venue or lack of personal jurisdiction and that Ohio law governed.

{¶17} On December 21, 2021, the trial court filed a judgment entry granting summary judgment in favor of Cafaro on its breach of contract claim and on Ms. Spanggard's counterclaims and awarded Cafaro $18,513.67 in damages for rent, trash removal, marketing, fire safety, storm sewer, and finance charges. The entry does not expressly reference post-judgment interest.

{¶18} Ms. Spanggard appealed and raises the following two assignments of error:

{¶19} "[1.] The trial Court erred in its decision to grant Appellee's Motion for Summary Judgment on Appellee's claim for breach of contract in its Order and Judgment Entry Dated November 17, 2021, finding that Spanggard quit the premises, that the doctrine of frustration of purpose was unavailable as a defense, and that Spanggard breached the Lease.

{¶20} "[2.] The trial Court erred in its calculation of damages that it awarded to Appellee in its Order and Judgment Entry Dated December 21, 2021, by finding that Appellee was entitled to $18,513.67 for rental payments, trash removal, marketing, fire safety, storm sewer, and finance charges, many of which were not actually incurred by Appellee after Appellant vacated the premises, or were incurred only after the mall was reopened." [Sic throughout.]

{¶21} Cafaro cross-appealed and raises the following cross assignment of error:

{¶22} "The trial court erred in failing to include the contractual post-judgment interest rate in its December 21, 2021, Judgment Entry for Plaintiff-Appellee/Cross-Appellant, such made necessary by Defendant-Appellant/Cross-Appellee's breach of the contract."

Standard of Review

{¶23} This appeal involves the trial court's summary judgment orders, which we review de novo. *See Sabo v. Zimmerman*, 11th Dist. Ashtabula No. 2012-A-0005, 2012-Ohio-4763, ¶ 9. A reviewing court applies the same standard a trial court is required to apply, which is to determine whether any genuine issues of material fact exist and whether the moving party is entitled to judgment as a matter of law. *Id*.

{¶24} "Since summary judgment denies the party his or her 'day in court,' it is not to be viewed lightly as docket control or as a 'little trial.' The jurisprudence of summary judgment standards has placed burdens on both the moving and the nonmoving party." *Welch v. Ziccarelli*, 11th Dist. Lake No. 2006-L-229, 2007-Ohio-4374, ¶ 40.

{¶25} "'Because summary judgment represents a shortcut through the normal litigation process by avoiding a trial, the burden is strictly upon the moving party to establish, through the evidentiary material permitted by the rule, that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law.'" *Ames v. Portage Cty. Budget Comm.*, 11th Dist. Portage No. 2021-P-0074, 2022-Ohio-1905, ¶ 38, quoting *Fugate v. Volck*, 79 Ohio App.3d 263, 266, 607 N.E.2d 78 (2d Dist.1992). Where a party seeks affirmative relief on its own claim as a matter of law under Civ.R. 56(A), it bears the burden of affirmatively demonstrating that there are no genuine issues of material fact with respect to every essential element of its claim. *Capital Fin. Credit, L.L.C. v. Mays*, 191 Ohio App.3d 56, 2010-Ohio-4423, 944 N.E.2d 1184, ¶ 5 (1st Dist.).

{¶26} "[I]f the moving party's burden is not met in the first instance, the burden never shifts to the nonmoving party, and the motion for summary judgment must be denied." *Hicks v. Cadle Co*., 2016-Ohio-4728, 66 N.E.3d 1255, ¶ 20 (11th Dist.). "If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden

* * * to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party fails to do so, summary judgment, if appropriate, shall be entered against the nonmoving party * * *." *Welch* at ¶ 40.

Breach of Contract

{¶27} In her first assignment of error, Ms. Spanggard contends that the trial court erred in granting summary judgment in favor of Cafaro on its breach of contract claim.

{¶28} To establish a breach of contract claim, a party must demonstrate (1) the existence of a binding contract or agreement; (2) the non-breaching party performed its contractual obligations; (3) the breaching party failed to fulfill its contractual obligations without legal excuse; and (4) the non-breaching party suffered damages as a result of the breach. *Utz v. Stovall*, 11th Dist. Portage No. 2012-P-0135, 2013-Ohio-4299, ¶ 28.

Frustration of Purpose

{¶29} In her first issue for review, Ms. Spanggard argues that the trial court erred by failing to void the agreement pursuant to the doctrine of frustration of purpose. According to Ms. Spanggard, the purpose of the parties' agreement was frustrated when the Governor of Pennsylvania shut down the mall due to COVID-19.

{¶30} This court recently discussed the doctrine of frustration of purpose in *Wroblesky*, *supra*. As we explained, Ohio courts that have recognized the doctrine have adopted the standard set forth in the Restatement of the Law:

{¶31} "Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the

contrary." Restatement of the Law 2d, Contracts, Section 265, at 334 (1981); *see Wroblesky* at ¶ 57-58.

{¶32} However, we noted that the doctrine is not widely accepted in Ohio and that neither the Supreme Court of Ohio nor this court has adopted it. *See id*. at ¶ 54-55. Thus, we expressly declined to adopt it. *See id*. at ¶ 56.

{¶33} This court is generally bound by past precedent produced by our own district. *Keytack v. Warren*, 11th Dist. Trumbull No. 2005-T-0152, 2006-Ohio-5179, ¶ 51. Accordingly, the trial court did not err by failing to void the parties' agreement based on the doctrine of frustration of purpose.

Balancing of Equities

{¶34} In her second issue for review, Ms. Spanggard argues that the trial court erred by failing to "balance the equities" in the case. According to Ms. Spanggard, an "equitable solution" would have been to find that her contractual obligations were suspended while the mall was closed.

{¶35} Ms. Spanggard did not present this argument to the trial court in opposition to summary judgment. If the nonmoving party fails to raise an issue when responding to the moving party's motion for summary judgment, the nonmoving party has waived that issue on appeal. *Great Lakes Window, Inc. v. Resash, Inc.*, 11th Dist. Trumbull No. 2006-T-0114, 2007-Ohio-5378, ¶ 24.

{¶36} Even if Ms. Spanggard had properly preserved this issue for appeal, she has failed to identify the equitable defense she is asserting or cite any authority in support of her argument. *See* App.R. 16(A)(7) (requiring an appellant to include citations to "authorities" and "statutes" in its brief).

{¶37} In essence, Ms. Spanggard argues that her performance should have been excused based on principles of "force majeure." Force majeure is a term from French law that literally means "a superior force." *Haverhill Glen, LLC v. Eric Petroleum Corp*., 2016-Ohio-8030, 67 N.E.3d 845, ¶ 25 (7th Dist.). It is commonly defined as "an event or effect that can be neither anticipated nor controlled." *Id*. Commentators have characterized the COVID-19 pandemic as "'the very definition of force majeure.'" Bernhardt & Fersko, *The Impacts of the Coronavirus Pandemic on Real Estate Contracts*, 35 Probate and Property 34 (Jan./Feb.2021).

{¶38} While force majeure has some overlap with the common law defenses of impossibility or impracticability, it is based in contract. *See Haverhill Glen* at ¶ 26. "[F]undamental principles of contract law teach us that parties to a commercial transaction should remain free to govern their own affairs." *Chemtrol Adhesives, Inc. v. Am. Mfrs. Mut. Ins. Co.*, 42 Ohio St.3d 40, 41-42, 537 N.E.2d 624 (1989). Therefore, courts must look to the language of a contract's force majeure provision to determine its applicability. *Haverhill Glen* at ¶ 26. For instance, a force majeure provision may not excuse all of a party's contractual obligations, such as its obligation to pay rent. *See*, *e.g.*, *Wroblesky* at ¶ 65-66.

{¶39} Here, the parties' agreement contained no force majeure provision, much less one that excluded Ms. Spanggard's payment obligations under these circumstances. Accordingly, we find no error in the trial court's failure to "balance the equities."

Cafaro's Performance

{¶40} In her third issue for review, Ms. Spanggard argues that the trial court erred by failing to find that Cafaro materially breached the agreement by revoking her access to the unit. Ms. Spanggard contends that Cafaro did not establish the second element of

its breach of contract claim, i.e., that it performed its contractual obligations. *See Utz, supra*, at ¶ 28.

{¶41} The parties' agreement is referred to as a "license."[2] In the context of real property, a license is "'an authority to do a particular act or series of acts upon another's land, without possessing any estate therein.'" *Mosher v. Cook United, Inc*., 62 Ohio St.2d 316, 317, 405 N.E.2d 720 (1980), quoting *Rodefer v. Pittsburg, O. V. & C. Rd. Co*., 72 Ohio St. 272, 281, 74 N.E. 183 (1905). "One who possesses a license thus has the authority to enter the land in another's possession without being a trespasser." *Id*. Here, Cafaro granted Ms. Spanggard "a license to occupy and use" the unit for the operation of her retail business, "subject to the stated terms and conditions."

{¶42} On summary judgment, Cafaro did not contend or purport to establish that it performed its contractual obligations. In disputing the merits of Ms. Spanggard's counterclaims, Cafaro contended that it "had nothing to do with [Ms. Spanggard] not being permitted to operate" due to the governor's shut-down order. However, the governor's order does not establish that Cafaro *performed* its contractual obligations. At most, the governor's order *precluded* Cafaro from performing. As explained above, there is no force majeure provision in the agreement that would excuse Cafaro's performance under that circumstance. Thus, Cafaro did not meet its initial burden on summary judgment. *See Hicks*, *supra*, at ¶ 20. For this reason alone, Cafaro's motion for summary judgment should have been denied. *See id.*

2. The parties appear to dispute whether their agreement is a license or a lease. "Whether an instrument is a license or a lease depends generally on the manifest intent of the parties gleaned from a consideration of the entire contents of the instrument." *Di Renzo v. Cavalier*, 165 Ohio St. 386, 135 N.E.2d 394 (1956), paragraph two of the syllabus. However, the legal distinction between a license and a lease is immaterial to the issues on appeal.

{¶43} Even if Cafaro had met its initial burden, Ms. Spanggard set forth specific facts showing there is a genuine issue for trial. *See Welch*, *supra*, at ¶ 40. In her brief in opposition, Ms. Spanggard attached an affidavit from Mr. Book, who averred that on March 16, 2020, Cafaro "cut off our access to the Premises by ordering us to vacate the Premises"; "closed and locked all entryways into the Premises"; and "denied us access even to retrieve our inventory and other assets which were still located at the Premises."

{¶44} This court has recognized that "'[w]here * * * the evidence is conflicting as to which [party] committed the breach, or first breach, that issue should be submitted to the jury * * *.'" *Sentinel Consumer Prods. Inc. v. Mills, Hall, Walborn & Assocs., Inc*., 110 Ohio App.3d 211, 216, 673 N.E.2d 967 (11th Dist.1996), quoting *Mays v. Hartman*, 81 Ohio App. 408, 77 N.E.2d 93 (1st Dist.1947), paragraph four of the syllabus.

{¶45} At oral argument, Cafaro countered that the agreement granted it a lien on Ms. Spanggard's inventory and business assets, which precluded her from retrieving them as a matter of law. However, a party cannot raise an argument for the first time at oral argument, particularly when it had ample opportunity to explore such issues in its brief. *Hughes v. Hughes*, 2020-Ohio-4653, 159 N.E.3d 893, ¶ 19 (10th Dist.). Further, the contractual provision cited by Cafaro does establish this contention as a matter of law.

{¶46} In sum, there are genuine issues of material fact as to whether Cafaro performed its contractual obligations. Accordingly, the trial court erred by granting summary judgment to Cafaro on its breach of contract claim.

{¶47} Ms. Spanggard's first assignment of error has merit in part. We reverse the trial court's November and December 2021 judgments.

Damages

{¶48} In her second assignment of error, Ms. Spanggard contends that the trial court erred in calculating Cafaro's damages. Based on our disposition of Ms. Spanggard's first assignment of error, in which we have reversed the trial court's summary judgment in favor of Cafaro on its breach of contract claim, we necessarily reverse the trial court's damages award in favor of Cafaro.

{¶49} Ms. Spanggard's second assignment of error has merit in part.

Post-Judgment Interest

{¶50} In its cross-assignment of error, Cafaro contends that the trial court erred in failing to award it contractual post-judgment interest of 18% per annum. In light of our disposition of Ms. Spanggard's first and second assignments of error, Cafaro's cross-assignment of error is moot. *See* App.R. 12(A)(1)(c).

{¶51} For the foregoing reasons, the trial court's November and December 2021 judgments are reversed, and this matter is remanded for further proceedings consistent with this opinion.

MATT LYNCH, J., concurs,

THOMAS R. WRIGHT, J., concurs in judgment only.