

[Cite as *Roth v. Natl. City Bank*, 2010-Ohio-5812.]

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

THOMAS ROTH,	:	APPEAL NO. C-100216
	:	TRIAL NO. A-0900917
CINCINNATI CONCRETE TROWEL, LLC,	:	
	:	<i>DECISION.</i>
and	:	
	:	
OSCAR USA, LLC,	:	
	:	
Plaintiffs-Appellants,	:	
	:	
vs.	:	
	:	
NATIONAL CITY BANK,	:	
	:	
Defendant-Appellee.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: December 1, 2010

James V. Magee, Jr., for Plaintiffs-Appellants,

Vorys, Sater, Seymour & Pease LLP, Glenn V. Whitaker, and Kent A. Britt, for
Defendant-Appellee.

Please note: This case has been removed from the accelerated calendar.

DINKELACKER, Judge.

{¶1} Plaintiffs-appellants, Thomas Roth, Oscar USA, LLC, and Cincinnati Concrete Trowel, LLC (collectively “Roth”), filed a complaint against defendant-appellee, National City Bank, alleging that National City had breached an oral contract and had acted in bad faith. National City filed a counterclaim seeking judgment on four promissory notes signed by Roth. The trial court granted summary judgment in favor of National City on all of Roth’s claims and on National City’s counterclaim. We find no merit in Roth’s sole assignment of error, and we affirm the trial court’s judgment.

I. Facts and Procedure

{¶2} The record shows that Roth approached National City in 2006 about obtaining a business loan. He needed funding to research and develop a product line in conjunction with a Turkish company in the same business. The Turkish company sold the product in other countries, and Roth wanted to modify the design for distribution in the United States. Roth initially sought \$50,000, and National City approved a line of credit.

{¶3} Subsequently, Roth, on behalf of Cincinnati Concrete, applied for a larger loan of \$350,000 to start production and sales of his product. National City denied the application because, among other things, Cincinnati Concrete had excessive obligations related to its income and insufficient time in business.

{¶4} Brian Rose, the business loan specialist from National City with whom Roth was working, advised him that National City would not approve a loan of that size because Roth did not have a track record of payments. He stated that if Roth made payments on a smaller loan for six to eight months, a \$350,000 loan

could be approved. But Rose did not have authority to approve loan applications. Rob Roewer, the branch manager, characterized Rose's role as sales. He stated that he felt that Rose was leading Roth on and that National City would never approve a loan of that size to Roth.

{¶5} Roth then submitted two loan applications, one for \$50,000 and one for \$40,000, to National City. Though he needed at least \$350,000 to produce his product, he agreed to the two loans of lesser amounts on the understanding that if he made payments on those loans on time for six to eight months, National City would lend him a larger amount.

{¶6} Subsequently, National City approved those two loans on the condition that they were guaranteed by the Small Business Administration. After the SBA agreed to guarantee the loans, Roth, on behalf of Cincinnati Concrete and Oscar USA, signed two promissory notes to National City in the principal amounts of \$40,000 and \$50,000.

{¶7} After making payments for more than eight months, Roth submitted a small-business loan application for \$250,000 to National City. While he was waiting to hear about that application, National City approved a short-term loan of \$20,000, which it required Roth's wife to guarantee. Subsequently, Roth learned that Rose no longer worked for National City and that National City had denied the application for the \$250,000 loan. He later submitted two more loan applications, one for \$250,000 and one for \$800,000, both of which National City eventually denied.

{¶8} As a result of the denial of the loans, Roth could not continue to do business and could not fulfill his obligations with the Turkish company. He was forced to cease operations and was left personally and professionally broke. He subsequently filed his complaint for breach of contract and bad faith against

National City. And National City filed its counterclaim seeking judgment on the four promissory notes.

II. Oral Contract – Statute of Frauds

{¶9} In his sole assignment of error, Roth contends that the trial court erred in granting National City’s motion for summary judgment and in dismissing his complaint. He argues that National City entered into an enforceable oral contract to lend him money in the future and that its failure to do so, with the knowledge that he needed the funds to conduct his business, was in bad faith. This assignment of error is not well taken.

{¶10} First, we doubt whether an oral contract was even created. For a contract to exist, both parties must consent to its terms. A meeting of the minds must occur, and the terms of the contract must be definite and certain.¹ In this case, the purported terms of the alleged contract were not sufficiently definite to show a meeting of the minds between the parties.

{¶11} Even if an oral contract existed between Roth and National City, Ohio’s statute of frauds would have barred enforcement of that contract. The statute of frauds is an evidentiary safeguard that requires certain agreements, including loan agreements, to be in writing.²

{¶12} R.C. 1335.02(B) states that “[n]o party to a loan agreement may bring an action on a loan agreement unless the agreement is in writing and is signed by the party against whom the action is brought or by the authorized representative of the

¹ *Episcopal Retirement Homes, Inc. v. Ohio Dept. of Industrial Relations* (1991), 61 Ohio St.3d 366, 369, 575 N.E.2d 134; *NSIC Industries, Inc. v. Bayloff Stamped Products Kinsman, Inc.*, 9th Dist. No. 24777, 2010-Ohio-1171, ¶8; *Reedy v. Cincinnati Bengals, Inc.* (2001), 143 Ohio App.3d 516, 521, 758 N.E.2d 678.

² *Stonecreek Properties, Ltd. v. Ravenna Savings Bank*, 11th Dist. No. 2002-P-0129, 2004-Ohio-3679, ¶32; *Winton Savings & Loan Co. v. Eastfork Trace, Inc.*, 12th Dist. No. CA2001-07-064, 2002-Ohio-2600, ¶8.

party against whom the action is brought.” R.C. 1335.02(C) further states that “[t]he terms of a loan agreement subject to this section, including the rights and obligations of the parties to the loan agreement, shall be determined solely from the written loan agreement, and shall not be varied by any oral agreements that are made or discussions that occur before or contemporaneously with the execution of the loan agreement. Any prior oral agreements between the parties are superseded by the loan agreement.”

{¶13} Roth presents no compelling reason why the statute of frauds would not bar enforcement of the alleged oral agreement to lend more money to Roth if he made payments on the small loans for several months. He first argues that valid causes of action exist for breach of an oral contract to lend money in the future. He cites no Ohio cases for this proposition, and we find none after the effective date of R.C. 1335.02.

{¶14} He also argues that the doctrines of partial performance and promissory estoppel can remove an agreement from the operation of the statute of frauds.³ As to the partial-performance doctrine, the Ohio Supreme Court has held that it only takes a contract out of the statute of frauds in cases involving the sale or leasing of real estate in which a delivery of the real estate in question has occurred, and in settlements made in consideration of marriage.⁴ Neither of those exceptions apply in this case.

{¶15} As to promissory estoppel, in a case in which the plaintiff claimed that promissory estoppel precluded a statute-of-fraud defense, this court held that

³ See *Monea v. Lanci*, 5th Dist. No. 2009-CA-0083, 2009-Ohio-6446, ¶21; *Saydell v. Geppetto's Pizza & Ribs Franchise Sys., Inc.* (1994), 100 Ohio App.3d 111, 131, 652 N.E.2d 218.

⁴ *Hodges v. Ettinger* (1934), 127 Ohio St. 460, 189 N.E. 113, syllabus; *Spectrum Benefit Options, Inc. v. Medical Mut. of Ohio*, 174 Ohio App.3d 29, 2007-Ohio-5562, 880 N.E.2d 926, ¶44; *Niehaus v. Haven Park West, Inc.* (1981), 2 Ohio App.3d 24, 27, 440 N.E.2d 584.

promissory estoppel should be asserted as a separate cause of action,⁵ which did not occur in this case. Further, this exception only applies when there was (1) a misrepresentation that the statute-of-fraud requirements had been complied with, or (2) a promise to make a memorandum of the agreement.⁶ Neither of these circumstances were present in this case.

{¶16} No material issue of fact exists. Construing the evidence most strongly in Roth's favor, we hold that reasonable minds can come to be one conclusion—that the alleged oral contract was unenforceable under the statute of frauds. National City was entitled to judgment as matter of law, and the trial court did not err in granting summary judgment in its favor on Roth's breach-of-oral-contract claim.⁷

III. Bad Faith

{¶17} On the bad-faith claim, we have difficulty discerning what sort of claim Roth is raising. He makes generalized allegations that National City acted in bad faith by promising Roth a larger loan if he made payments on the smaller loans.

{¶18} This court has held that an implied duty of good faith exists in every contract.⁸ But it is part of a claim for breach of the contract, not a separate tort claim.⁹ A separate tort claim does not exist except against insurance companies.¹⁰

⁵ *Jones v. R/P Internatl. Technologies, Inc.* (Sept. 27, 1995), 1st Dist. No. C-940567. Accord *Spectrum Benefits*, supra, at ¶40; *Eske Properties, Inc. v. Sucher*, 2nd Dist. No. 19840, 2003-Ohio-6520, ¶61.

⁶ *Spectrum Benefits*, supra, at ¶40; *Eske*, supra, at ¶60; *Landskroner v. Landskroner*, 154 Ohio App.3d 471, 2003-Ohio-5077, 797 N.E.2d 1002, ¶46.

⁷ See *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267; *Greene v. Whiteside*, 181 Ohio App.3d 253, 2009-Ohio-741, 908 N.E.2d 975, ¶23; *Stinespring v. Natorp Garden Stores* (1998), 127 Ohio App.3d 213, 215, 711 N.E.2d 1104.

⁸ *Blair v. McDonagh*, 177 Ohio App.3d 262, 2008-Ohio-3698, 894 N.E.2d 377, ¶43; *Littlejohn v. Parrish*, 163 Ohio App.3d 456, 2005-Ohio-4850, 830 N.E.2d 49, ¶21.

⁹ *Littlejohn*, supra, at ¶21.

¹⁰ *Gator Dev. Corp. v. VHH, Ltd.*, 1st Dist. No. C-080193, 2009-Ohio-1802, ¶24.

{¶19} Further, improper or defective contractual performance does not create a cause of action in tort.¹¹ It is “no tort to breach a contract, regardless of motive.”¹² To establish tort liability, the plaintiff must establish a breach of a duty that would have existed if no contract had existed. The plaintiff must also establish actual damages attributable to the defendant’s wrongful acts that are separate from those attributable to the breach of contract.¹³

{¶20} Roth seems to be arguing his bad-faith claim as a tort claim. He cites a tort case for his definition of bad faith. He also argues the tort of negligent misrepresentation, which he never argued in the trial court. Since he did not raise the issue in the trial court, he cannot now raise it for the first time on appeal.¹⁴

{¶21} Since Roth cannot raise what is essentially a breach-of-contract claim as a bad-faith tort, the trial court did not err in granting summary judgment in favor of National City on that claim. Further, even if we treat his bad-faith claim as a breach of the implied duty of good faith inherent in every contract, it is related to the unenforceable oral contract. Consequently, his bad-faith claim also fails on that basis, and consequently, we overrule his assignment of error and affirm the trial court’s judgment.

Judgment affirmed.

HILDEBRANDT, P.J., and HENDON, J., concur.

Please Note:

The court has recorded its own entry this date.

¹¹ *Corsaro v. ARC Westlake Village, Inc.*, 8th Dist. No. 84858, 2005-Ohio-1982, ¶27; *Horen v. Summit Homes*, 6th Dist. No. WD-04-001, 2004-Ohio-6656, ¶13.

¹² *Labate v. Natl. City Corp.* (1996), 113 Ohio App.3d 182, 190, 680 N.E.2d 693, quoting *Hoskins v. Aetna Life Ins. Co.* (1983), 6 Ohio St.3d 272, 276, 452 N.E.2d 1315.

¹³ *Textron Fin. Corp. v. Nationwide Ins. Co.* (1996), 115 Ohio App.3d 137, 151, 684 N.E.2d 1261; *Nationwide Mut. Ins. Co. v. Sonitrol, Inc.* (1996), 109 Ohio App.3d 474, 485, 672 N.E.2d 687.

¹⁴ *Stores Realty Co. v. Cleveland* (1975), 41 Ohio St.2d 41, 43, 322 N.E.2d 629; *Thomas v. Cincinnati*, 1st Dist. No. C-050643, 2006-Ohio-3598.