**[Cite as *Heinz & Assoc., Inc. v. Diamond Cellar Holdings, L.L.C.*, 2012-Ohio-1422.]**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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| Heinz & Associates, Inc., | : | |
| Plaintiff-Appellant, | : | |
| | | No. 11AP-688 |
| v. | : | (C.P.C. No. 10CVH-04-6672) |
| Diamond Cellar Holdings, LLC et al., | : | (REGULAR CALENDAR) |
| Defendants-Appellees. | : | |

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D E C I S I O N

Rendered on March 30, 2012

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*Fry, Waller & McCann Co., L.P.A.*, and *Barry A. Waller*, for appellant.

*Harris McClellan Binau & Cox*, and *Garth G. Cox*, for appellees.

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APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

**{¶ 1}** Plaintiff-appellant, Heinz & Associates, Inc., dba Godfry's, appeals from a judgment of the Franklin County Court of Common Pleas granting the summary judgment motion of defendants-appellees, Diamond Cellar Holdings, LLC and Andrew Johnson, on plaintiff's claims for promissory estoppel, fraudulent misrepresentation, and negligent misrepresentation arising out of a proposed sublease agreement between the parties. Plaintiff assigns a single error:

> The trial court erred in granting Defendants' Motion for Summary Judgment in regard to the claims for promissory

> estoppel, fraudulent misrepresentation and negligent misrepresentation.

Because plaintiff, as a matter of law, could not justifiably rely on defendants' oral representations, we affirm.

**I. Facts and Procedural History**

**{¶ 2}** On April 30, 2010, plaintiff filed a complaint against defendants in the Franklin County Court of Common Pleas alleging claims for breach of contract, promissory estoppel, fraudulent misrepresentation, and negligent misrepresentation. Heinz Ellrod solely owns plaintiff, an Ohio corporation that owns and operates the retail store Godfry's selling high-end men's and women's clothing and apparel. Diamond Cellar is an Ohio limited liability corporation that owns retail stores selling high-end men's and women's jewelry and accessories. Johnson is the Chief Executive Officer and partial owner of Diamond Cellar.

**{¶ 3}** Ellrod and Johnson were friends; they knew each other professionally, were customers in each other's stores, and on occasion saw each other socially. In 2007, Ellrod decided to move Godfry's from Worthington Mall, where the store had been located since 1986, and he began negotiating with other shopping malls in the Columbus region, including Easton Mall and Polaris Fashion Place ("Polaris"). When Ellrod told Johnson about his plan to move Godfry's to a new location, Johnson told Ellrod "he would like to put a corner into" the new Godfry's store. Because Godfry's and the Diamond Cellar shared many high-end customers, the idea of doing a "shop-in-shop" seemed to be a "win-win" for both parties. (Ellrod Depo. 31, 107, 110, Exhibit T; Johnson Depo. 20; Fry Depo., 15.)

**{¶ 4}** Ellrod ultimately decided to move Godfry's to Polaris and entered into a lease agreement with Polaris on January 31, 2008. The Polaris store was not yet constructed, and Ellrod negotiated with the owners of Polaris to have the store constructed to his specifications. According to Ellrod, when he informed Johnson that Godfry's would move to Polaris, Johnson said "he basically was 100 percent in." (Ellrod Depo. 108.) Johnson remembered discussing the possibility of Diamond Cellar occupying space in Godfry's Polaris store but described the discussions as "more concept oriented." (Johnson Depo. 22.)

**{¶ 5}** Based on his friendship with Johnson, Ellrod believed the men had "a handshake, you know, * * * a gentlemen's agreement." (Ellrod Depo. 128.) Ellrod advised Johnson of the progress at the Polaris store, showing Johnson different floor plans and layouts as they became available. Ellrod's goal was to have the Polaris store open by late August or early September 2008; his goal placed the construction and build out of the Polaris store on a "tight timetable." (Ellrod Depo. 81; Von Doersten Depo. Exhibit 1.)

**{¶ 6}** Ellrod turned the matter over to his attorney, Carl Fry, to negotiate and draft the sublease agreement between Godfry's and Diamond Cellar; Johnson gave Doug Von Doersten, Diamond Cellar's Chief Financial Officer, the responsibility to negotiate the sublease agreement. From February through June 2008, Fry and Von Doersten emailed each other, initially to confirm the basic terms of the proposed sublease agreement and later with drafts of the proposed sublease agreement. The parties never were able to execute a final sublease agreement.

**{¶ 7}** In May of 2008, at a trade show in Las Vegas, Nevada, Johnson spoke with a representative of David Yurman jewelry, the brand Diamond Cellar was "hoping to power a lot of the business" at Godfry's. (Johnson Depo. 52-54.) The representative informed Johnson they would not allow Diamond Cellar to sell Yurman merchandise in a store within a store. Upon returning from the trade show, Johnson informed Ellrod that "this shop-in-shop was not going to go through" because the Yurman brand backed out. (Ellrod Depo. 163.) Ellrod asked Johnson why he could not put another line of jewelry at the Polaris store, and Johnson informed him "that Yurman was going to be a big part of that shop." (Ellrod Depo. 164.) Johnson explained he felt "sooner or later that John Hardy or some of the other collections he had would basically follow suit, and he was afraid to do that, and so it was basically off the table." (Ellrod Depo. 164.)

**{¶ 8}** At the time Diamond Cellar decided the Polaris store would not be feasible, the architectural firm working on the build out of the store had drawn the plans for the store, including Diamond Cellar's proposed space, and the store was in the initial phases of construction. Because Ellrod felt the construction was "already running late," he did not want to stop the construction in order to redesign the proposed Diamond Cellar space. As a result, Ellrod told the construction crew to build the Diamond Cellar space as planned and that Ellrod "would deal with the space later." (Ellrod Depo. 167; R. 60.)

Plaintiff's complaint alleged the planning, design, and construction cost for the store totaled over $2,000,000.

**{¶ 9}** On March 31, 2011, defendants filed a Civ.R. 56 motion for summary judgment, asserting plaintiff's contract claim failed under the statute of frauds and his non-contract claims failed because plaintiff could not have relied reasonably on Johnson's interest in the proposed project, absent a signed written sublease agreement. Defendants supported their motion with citations to the parties' deposition testimony and the affidavit of Robert Steele, the project manager for the construction of Godfry's Polaris store. Plaintiff filed a memorandum opposing the motion on April 18, 2011, alleging not only that defendants' part performance of the parties' oral agreement removed it from the statute of frauds but that plaintiff justifiably relied on defendants' promise to sublease space in plaintiff's Polaris store.

**{¶ 10}** After defendants filed a reply supporting its motion, the trial court issued a journal entry on June 20, 2011 granting defendants' motion for summary judgment and a judgment entry on July 18, 2011, consistent with its journal entry, ordering plaintiff's complaint dismissed with prejudice. The trial court concluded the statute of frauds barred plaintiff's claim for breach of an oral contract and found the doctrine of part performance inapplicable since Diamond Cellar never took possession of the proposed space.

**{¶ 11}** Regarding the claims for promissory estoppel, negligent misrepresentation, and fraudulent misrepresentation, the trial court concluded "those theories would end-run the statute of frauds, contrary to the recent decision in *Olympic Holding Co., LLC v. Ace Ltd.*, 122 Ohio St.3d 89, 2009-Ohio-2057." (Decision, 7.) The trial court further determined that, even if plaintiff theoretically could recover damages on the non-contract based claims, those claims failed because plaintiff could not establish justifiable reliance. The trial court had "no doubt about the fact that for these commercial parties a written sublease was the end-game." (Decision, 8.)

## II. Summary Judgment Properly Granted

**{¶ 12}** Plaintiff's single assignment of error contends the trial court erred in granting defendants' summary judgment on plaintiff's promissory estoppel, fraudulent misrepresentation, and negligent misrepresentation claims; plaintiff does not contest the trial court's ruling on plaintiff's breach of contract claim.

**{¶ 13}** An appellate court's review of summary judgment is conducted under a de novo standard. *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41 (9th Dist.1995); *Koos v. Cent. Ohio Cellular, Inc.*, 94 Ohio App.3d 579, 588 (8th Dist.1994). Summary judgment is proper only when the parties moving for summary judgment demonstrate: (1) no genuine issue of material fact exists, (2) the moving parties are entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in its favor. Civ.R. 56; *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181 (1997).

A. *The Statute of Frauds & Promissory Estoppel*

**{¶ 14}** Plaintiff asserts the trial court misconstrued the holding of *Olympic Holding* in disposing of plaintiff's non-contract based claims. In *Olympic Holding*, the Supreme Court of Ohio held that "[a] party may not use promissory estoppel to bar the opposing party from asserting the affirmative defense of the statute of frauds." *Id.* at paragraph two of the syllabus.

**{¶ 15}** The statute of frauds provides that "[n]o lease, estate, or interest, either of freehold or term of years, * * * shall be assigned or granted except by deed, or note in writing, signed by the party assigning or granting it." R.C. 1335.04. The statute of frauds further states that "[n]o action shall be brought whereby to charge the defendant * * * upon an agreement that is not to be performed within one year from the making thereof; unless the agreement upon which such action is brought * * * is in writing and signed by the party to be charged therewith." R.C. 1335.05. The agreement at issue contemplated a ten-year commercial sublease; as such, the statute of frauds required the agreement to be in writing and signed by the party to be charged.

**{¶ 16}** In *Olympic Holding*, the Supreme Court recognized that, if a party could use promissory estoppel "as a bar to the writing requirements imposed by the statute of frauds, * * * the predictability that the statute of frauds brings to contract formation would be eroded." *Id.* at ¶ 35. "Parties negotiating a contract would no longer know what signifies a final agreement. Promissory estoppel used this way would open contract negotiations to fraud, the very evil that the statute of frauds seeks to prevent." *Id.*

**{¶ 17}** Although the Supreme Court held promissory estoppel could not bar the enforcement of the statute of frauds, it also stated "[a]n action for damages under promissory estoppel provides an adequate remedy for an unfulfilled or fraudulent promise." *Id*. at ¶ 39. Promissory estoppel thus remains a viable remedy for a fraudulent oral promise or breach of an oral promise, absent a signed agreement. *Id*. at ¶ 40.

**{¶ 18}** Although the trial court expressed its concern that plaintiff's non-contract based claims were an attempt to "trump the statute of frauds," it also acknowledged that plaintiff theoretically had a "promissory estoppel claim based upon 'fraudulent' or 'negligent' statements during contract negotiations." (Decision, 8.) The court determined any claim for promissory estoppel failed, not pursuant to the statute of frauds, but because the record, construed in plaintiff's favor, did not support a finding that plaintiff reasonably relied on a false representation.

**{¶ 19}** The trial court thus did not misconstrue the holding of *Olympic Holding* but properly focused on whether plaintiff presented facts supporting justifiable reliance.

B. *No Justifiable Reliance*

**{¶ 20}** Reasonable or justifiable reliance is an element of promissory estoppel, fraudulent misrepresentation, and negligent misrepresentation. See *McCroskey v. State*, 8 Ohio St.3d 29, 30 (1983), quoting *Talley v. Teamsters Loc. No. 377*, 48 Ohio St.2d 142, 146 (1976), adopting Restatement of the Law, Contracts 2d (1973), Section 90 (regarding elements of promissory estoppel); *Fifth Third Bank v. Cope*, 162 Ohio App.3d 838, 2005-Ohio-4626, ¶ 25 (12th Dist.), citing *Cardi v. Gump*, 121 Ohio App.3d 16, 22 (8th Dist.1997) (regarding elements of fraudulent misrepresentation); *Three-C Body Shops, Inc. v. Welsh Ohio, LLC*, 10th Dist. No. 02AP-523, 2003-Ohio-756, ¶ 19, citing *Delman v. Cleveland Hts.*, 41 Ohio St.3d 1, 4 (1989) (regarding elements of negligent misrepresentation). " 'While the making, keeping and relying upon of alleged promises are factual issues, typically for the jury, a court may deem certain circumstances objectively unreasonable, as when it finds that "reasonable minds could come to but one conclusion." ' " *Interstate Gas Supply, Inc. v. Calex Corp.*, 10th Dist. No. 04AP-980, 2006-Ohio-638, ¶ 105, quoting *Telxon Corp. v. Smart Media of Delaware, Inc.*, 9th Dist. No. 22098, 2005-Ohio-4931, ¶ 59, quoting Civ.R. 50(A)(4) and (B).

**{¶ 21}** "Establishing justifiable reliance does not require a showing that the party's reliance conformed to what a 'reasonable man' would have believed." *Three-C Body Shops* at ¶ 21, citing *Amerifirst Savings Bank of Xenia v. Krug*, 136 Ohio App.3d 468, 496 (2d Dist.1999). " 'Reliance is justified if the representation does not appear unreasonable on its face and if, under the circumstances, there is no apparent reason to doubt the veracity of the representation.' " *Id.*, quoting *Crown Property Dev., Inc. v. Omega Oil Co.*, 113 Ohio App.3d 647, 657 (12th Dist.1996). Courts may consider various factors in determining whether reliance is justifiable, including the nature of the transaction, the form and materiality of the representation, the relationship of the parties, the respective intelligence, experience, age, and mental and physical condition of the parties, and their respective knowledge and means of knowledge. *Findlay Ford Lincoln-Mercury v. Huffman*, 3d Dist. No. 5-02-67, 2004-Ohio-541, ¶ 22, quoting *Finomore v. Epstein*, 18 Ohio App.3d 88, 90 (8th Dist.1984), quoting *Feliciano v. Moore*, 64 Ohio App.2d 236, 241 (10th Dist.1979).

**{¶ 22}** Plaintiff contends defendants repeatedly and continuously led plaintiff to believe Diamond Cellar would sublease the space at Godfry's. To support its contentions, plaintiff points to Ellrod's testimony that, as Godfry's move from Worthington Mall to Polaris developed, Johnson told Ellrod "he basically was 100 percent in." (Ellrod Depo. 108, 130-131.) According to Ellrod, Johnson pursued Ellrod regarding the shop-in-shop concept, such that Ellrod "never for one moment ever thought that [Johnson] would not go into [Ellrod's] store." (Ellrod Depo. 107, 112.) Johnson seemed to Ellrod to be "for this deal all the way through," and the attorneys merely had to work out "the smaller details on the lease." (Ellrod Depo. 183.) As Ellrod explained the situation, "all year long" Johnson reviewed plans for the space, "approving plans and floor plans and this and signage packages," so that Ellrod "just assumed that basically * * * this was a done deal." (Ellrod Depo. 183.)

**{¶ 23}** Johnson admitted he met with Fitch, the individual responsible for designing the Godfry's Polaris store, "[t]o view the conceptual layout, architectural concept of what a store within a store would look like." (Johnson Depo. 23-24.) Johnson also admitted to proposing and approving specific changes to the layout of the store concerning size of the entryway, location of the fitting rooms, placement of windows

adjacent to Diamond Cellar's space, placement of Diamond Cellar's sign on the outside of the building, and possible office space for Diamond Cellar in the back of the store.

**{¶ 24}** To further bolster its argument, plaintiff points to Von Doersten's February 23, 2008 email to Ellrod. The email sent to godfrys@godfrys.com states, "Heinz, * * * if you could let me know I have all the details correctly: 8% of Gross sales rent * * * 10 year lease, 3 year 'kick out' at our option with 6 month notice, Godfry's to cover leasehold improvements." (Ellrod Depo. Exhibit R.) The email, however, concludes with Von Doersten pointing out the board contingency: "Please let me know and I can then * * * obtain final approval from our board (expected March 4th)." (Ellrod Depo. Exhibit R.) Ellrod thus could not rely on the February 23, 2008 email.

**{¶ 25}** Moreover, although Ellrod testified he "did not have email" during this transaction and had no idea who would have been using the email address godfrys@godfrys.com, the remaining emails from Von Doersten to Ellrod present no basis for justifiable reliance. (Ellrod Depo. 70-71, 145-46.) Because no one responded to the February 23 email, Von Doersten sent follow-up emails to godfrys@godfrys.com on February 27, 2008 and March 14, 2008. The March 14 email concludes, "Heinz, if we are going to proceed on this, I will need your confirmation of this email, * * * I will also be quite frank, if we cannot reach agreement on this with this go round, I will advise [Johnson] to pursue other more lucrative projects." (Ellrod Depo. Exhibit M; Von Doersten Depo. Exhibit 5.) Whether or not Ellrod received the emails, they do not support plaintiff's argument, as they definitively demonstrate Von Doerston gave Ellrod no basis to assume a deal, even if not written, was complete.

**{¶ 26}** The remainder of the pertinent email traffic concerning the sublease was between Fry and Von Doersten. It, too, fails to demonstrate a basis to believe the parties agreed on lease terms. Fry viewed his role in the matter as that of the "scrivener" and stated he was not involved in the negotiations regarding the Diamond Cellar sublease. (Fry Depo. 9, 12.) Fry sent Von Doersten an email on February 1, 2008 listing the "basics" of the agreement, including terms that Diamond Cellar would occupy 900 of the store's 8,000 square feet, the lease would be for ten years with two five-year renewal options, the base rent would be eight percent of gross sales premised on different averages and percentages for the different renewal periods, and the percentage rent would be based on

gross sales over $5 million. Von Doersten responded on February 2 stating, "[T]his gives me enough to get started." (Von Doersten Depo. Exhibit 1.)

**{¶ 27}** On April 3, 2008, Fry sent Von Doersten an email with an initial draft of the lease attached. Von Doersten responded on April 7 stating, "[A]s part of standard operating procedure on agreements of this duration and nature, I am running [it] by our attorneys and will get back to you with all comments at that time – running asap..." (Ellrod Depo. Exhibit N.) Fry, in turn, informed Ellrod that defendants were going to have their attorneys review the draft lease.

**{¶ 28}** Von Doersten sent Fry an email on April 21 stating, "[A]ttached are observations from my review and that of our attorneys." (Ellrod Depo. Exhibit O.) The revised version of the sublease added to and changed the initial lease draft. (*Cf*. Ellrod Depo. Exhibit J & K.) Von Doersten emailed Fry on May 23 with a question Von Doersten had about the store's hours and sent Fry another email on June 4 stating "Carl, please confirm you received the below email and are considering." (Ellrod Depo. Exhibit P.) Fry never responded to Diamond Cellar's proposed revisions to the lease. Fry stated he would have related any changes in the lease "back to [Ellrod] and said, [Ellrod], you need to talk with [Johnson] because I'm not negotiating." (Fry Depo. 52.)

**{¶ 29}** Other facts in the record further demonstrate plaintiff's reliance was not reasonable. Johnson stated he went to Polaris in the early phases of construction "to see how [the building] was progressing." (Johnson Depo. 38.) Johnson testified he told both Steele, the construction project manager, and Ellrod, "[D]on't construct anything until we get a deal put together." (Johnson Depo. 39.) Steele corroborated Johnson's statement, averring that on or about March 3, 2008 he met with Johnson "and at that time Johnson advised [him] that no expenses should be incurred on the part of [Diamond Cellar] due to the fact that [Diamond Cellar] and Ellrod had not agreed to lease terms and had not entered into a written sublease for the premises." (R. 60.)

**{¶ 30}** Indeed, Fry testified that when he first spoke with Von Doersten, "just the tenor of his conversation was such that [Fry] didn't think there would be a deal, which had nothing to do with the lease." (Fry Depo. 62-63.) Ellrod admitted that, after Fry's initial conversation with Von Doersten, Fry told Ellrod "that Von Doersten's attitude towards

this whole business deal, it appeared that [Von Doersten] just didn't care for it from day one and just really didn't want it to happen." (Ellrod Depo. 121.)

**{¶ 31}** With that evidence and relying on *Carcorp, Inc. v. Chesrown Oldsmobile-GMC Truck, Inc.*, 10th Dist. No. 06AP-329, 2007-Ohio-380 and *Mansfield Square, Ltd. v. Big Lots, Inc.*, 10th Dist. No. 08AP-387, 2008-Ohio-6422, the trial court concluded plaintiff could not have justifiably relied, in the absence of a signed written agreement, on defendants' oral statements regarding their intent to sublease space. *Carcorp* involved a seller's oral promise to sell that "was, at most, a promise to pursue a formal asset purchase agreement." *Id.* at ¶ 20. In concluding "there could be no reasonable reliance on such a promise as a matter of law," this court noted that " '[r]eliance on a statement of future intent made prior to the conclusion of negotiations in a complex business transaction is unreasonable as a matter of law.' " *Id.*, quoting *Continental Fin. Servs. Co. v. First Natl. Boston Corp.*, D.Mass. No. CA-82-1505-T (Aug. 30, 1984) (stating that " '[u]ntil the documents are signed and delivered the * * * game is not over' ").

**{¶ 32}** *Mansfield Square* similarly held that, "[u]nder well-established Ohio law, courts will give effect to the manifest intent of the parties where clear evidence demonstrates they do not intend the terms of an agreement to bind them until the agreement is formalized in a written document that both parties sign." *Id.* at ¶ 20, citing *Richard A Berjian, D.O., Inc v. Ohio Bell Tel. Co.*, 54 Ohio St.2d 147, 151 (1978). In *Mansfield Square*, the parties exchanged letters of intent indicating neither party intended to be bound until the parties executed a final lease agreement, and they circulated proposed lease drafts stating the written lease agreement would "set forth 'all' promises between the parties" and would be of no force or effect until the parties executed it. *Id.* at ¶ 4, 6. Because Big Lots manifested an intent "that it would not become obligated until the lease was reduced to writing, its legal department reviewed and approved it, and one of its officers signed it, plaintiff's reliance on Big Lots' oral assurances of intending to finalize an agreement with plaintiff was unreasonable as a matter of law." *Id.* at ¶ 20.

**{¶ 33}** Here, in addition to the email stating the need for a written agreement and board approval, Ellrod testified he wanted a written sublease agreement with Diamond Cellar. *See also* Draft Lease Agreement, Exhibits J and K (noting no agreement apart from the written document). Moreover, plaintiff's lease agreement with Polaris provided that

"upon consent from Landlord, [plaintiff could] sublease no greater than twenty-five percent (25%) of the Premises to operators such as, but not limited to, 'Diamond Cellar.' " (Ellrod Exhibit G.) The same lease agreement obligated plaintiff to give Polaris "written notice within thirty (30) days of such leasehold" and "a copy of the executed leasehold * * * within fifteen (15) days after the effective date thereof." (Ellrod Exhibit G.) Although the lease specifically lists Diamond Cellar as a proposed subtenant, plaintiff's needing to obtain Polaris' consent to the sublease and provide Polaris with a copy of the executed sublease further underscores the unreasonableness of plaintiff's reliance on defendants' oral assurances. *Carcorp* at ¶ 21.

**{¶ 34}** Plaintiff contends *Carcorp* and *Mansfield Square* differ from the present case, as both "were complex business cases, substantially larger and much more intricate than the simple lease agreement" between plaintiff and defendants. (Appellant's brief, 8, 10.) While the amount of money at issue here may be less, the present case involved experienced attorneys drafting subleases of between 16 and 20 pages with highly detailed provisions. The ten-year commercial sublease the parties contemplated was not a simple lease transaction.

**{¶ 35}** Indeed, the emails and draft lease agreements demonstrate both the complexity of the transaction and the evolving nature of the parties' negotiations. For example, through negotiations the parties created, edited, and revised a proposed "kick-out" provision. Fry's February 1 email to Von Doersten indicated the lease term would be ten years with two five-year options to renew. Von Doersten's February 23 email to godfrys@godfrys.com referenced a "3 year 'kick out' at our option with 6 month notice." (Ellrod Depo. Exhibit R.) In the first draft of the sublease, the kick-out provided Diamond Cellar could terminate the lease after three years, but would pay plaintiff $19 per day "for each calendar day between the early termination date and the last day of the tenth Lease Year" as well as costs incurred to remove Diamond Cellar's sign and to remodel the space. (Ellrod Depo. Exhibit J.) In the revised draft of the sublease sent from Von Doersten to Fry, defendants changed the kick-out provision so Diamond Cellar would pay $34.25 per day until the last day of the tenth lease year but would not pay remodeling costs.

**{¶ 36}** Plaintiff further contends *Mansfield Square* is distinguishable because there "the parties involved were sophisticated in the leasing business," but here plaintiff "is

sophisticated in the sale of high end men's clothing, not real estate transactions." (Appellant's brief, 9.) The record indicates, however, that Ellrod was a sophisticated businessman who appreciated the importance of written documents and had experience in real estate transactions. During the 20-some years Godfry's was located at Worthington Mall, Ellrod signed written documents in order to buy the store, to acquire and renew the lease, and then to enter into new leases when ownership of the mall changed. Ellrod acknowledged a shopping center's requiring a tenant to have a lease agreement was "customary," so that "when you go into your shops, you always sign a lease." (Ellrod Depo. 61.)

**{¶ 37}** More particular to the dispute between the parties, Ellrod entered into a written agreement with the Zegna Company to do a "shop-in-shop" at the Worthington Mall, and Ellrod at Polaris entered into a written consignment agreement with Scott Kay to sell Scott Kay jewelry. (Ellrod Depo. 31-38, Exhibit A.) Ellrod also had signed, written agreements with William Shaffer & Associates, the contractors who constructed the Polaris store, and Fitch, the design company "laying out what they were going to do and what [he was] going to pay." (Ellrod Depo. 76.)

**{¶ 38}** The cases plaintiff relies on to establish justifiable reliance are distinguishable. Neither case involved parties in the protracted and sometimes intricate process of negotiating and drafting a written commercial lease. *See Guernsey Bank v. Milano Sports Enterprises L.L.C.*, 10th Dist. No. 09AP-1015, 2011-Ohio-2162, ¶ 54 (addressing whether the bank reasonably could rely on a title insurance company's failure to respond to the bank's letter to indicate the insurance company would indemnify the bank if a court concluded certain mechanics liens held priority over the bank's mortgage); *McGonagle v. Somerset Gas Transmission Co.*, 10th Dist. No. 11AP-156, 2011-Ohio-5768, ¶ 4, 17, 19-22 (finding justifiable reliance where the prospective employee signed a letter indicating the employee accepted an offer of employment and, although the parties never executed a formal employment agreement, determining the letter constituted a partially integrated contract and an enforceable agreement regarding the employee's stock option).

**{¶ 39}** Plaintiff lastly contends "the trial court should have considered the reasonableness of reliance in the context of the relationship between Godfry's and Johnson." (Appellant's brief, 10.) *See Findlay Ford* at ¶ 22; *Mussivand v. David*, 45 Ohio

St.3d 314, 322 (1989). Ellrod and Johnson both testified they were friends for over 15 years, saw each other socially, and shopped in each other's store. Such a long-term relationship arguably aids plaintiff's claim of justifiable reliance. *See Morgan v. Mikhail*, 10th Dist. No. 08AP-87, 2008-Ohio-4598, ¶ 2, 75 (concluding that where plaintiff and defendant "were acquaintances from college," maintained a cordial relationship in the two decades following college, and plaintiff knew defendant's father was a finance professor, plaintiff was "predisposed to trust" defendant's financial advice).

**{¶ 40}** Although Ellrod may have been predisposed to trust Johnson's statements as a result of their long-term friendship, other factors present in the record overcome the effect the parties' relationship may have had on the reasonableness of plaintiff's reliance. Initially, the nature of the transaction, a ten-year commercial sublease between a high-end clothing store and a high-end jewelry store where the store had yet to be constructed, was too complex for plaintiff to reasonably rely on defendants' oral assurances.

**{¶ 41}** Secondly, the exchange of emails discussing proposed lease terms and the exchange of lease drafts between the parties indicates the parties were working toward a signed, written sublease. As such, plaintiff's alleged reliance on Johnson's "100 percent in" statement was unreasonable as a matter of law. *Carcorp* at ¶ 20. *See also McCroskey* at 31 (determining developer did not have a claim for promissory estoppel against the state because "any reasonable interpretation of the letter of intent and proposed leases compels the conclusion that these documents merely represent that on the occurrence of future eventualities an agreement would be entered into on behalf of the state").

**{¶ 42}** Thirdly, the parties' statements to each other during the negotiations reveal the absence of reasonable reliance. Johnson told Steele and Ellrod not to incur costs until a deal finalized, and Fry told Ellrod following his initial discussion with Von Doersten that Diamond Cellar was not going to go through with the deal. Finally, in the email plaintiff cites to support his justifiable reliance, Von Doersten stated that any deal was contingent on Diamond Cellar's board approving such a deal. *Cf. Greeno v. Bd. of Trustees*, 10th Dist. No. 88AP-906 (Mar. 28, 1989) (concluding that although the plaintiff "expended a great deal of energy attempting to get his proposed [collegiate] program approved and implemented," and representatives of the university "were enthusiastic, and communicated to [plaintiff] their belief that the program would go through," the plaintiff

could not have justifiably relied on the statements of the university representatives when he knew "that approval of the Board of Trustees was required before there was a binding agreement").

**{¶ 43}** Plaintiff essentially seeks to hold defendants responsible for the risk plaintiff undertook in proceeding with the construction of its Polaris store, including the space designed for Diamond Cellar, without first securing a signed, written sublease agreement. Because defendants expressed their intent that neither party would be bound until they executed a written sublease, plaintiff as a matter of law cannot establish justifiable reliance as a matter of law.

**{¶ 44}** For the reasons stated here, we overrule plaintiff's assignment of error and affirm the judgment of the trial court.

*Judgment affirmed.*

BROWN, P.J., and CONNOR, J., concur.

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