[Cite as *Garb-Ko, Inc. v. Benderson*, 2013-Ohio-1249.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Garb-Ko, Inc.,	:	
Plaintiff-Appellant,	:	
		No. 12AP-430
v.	:	(C.P.C. No. 11CV-15213)
Nathan Benderson, Trustee of the Randal Benderson 1993-1 Trust Dated September 22, 1993 et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	
Randall Benderson 1993-1 Trust, c/o Nathan Benderson, Ronald Benderson and David H. Baldauf, Trustees,	:	No. 12AP-474 (M.C. No. 2012CVG-9503)
Plaintiff-Appellee,	:	No. 12AP-475 (M.C. No. 2012CVG-9504)
v.	:	
Garb-Ko, Inc.,	:	No. 12AP-476 (M.C. No. 2012CVG-9505)
Defendant-Appellant.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on March 29, 2013

Hrabcak & Company, L.P.A., Michael Hrabcak and *Benjamin B. Nelson*; *Varnum, LLP*, and *William E. Rohn*, for Appellant Garb-Ko, Inc.

Porter, Wright, Morris & Arthur, LLP, James A. King, and *Eric B. Gallon*, for appellee Benderson.

APPEAL from the Franklin County Court of Common Pleas
APPEALS from the Franklin County Municipal Court

BRYANT, J.

{¶ 1} Plaintiff-appellant, Garb-Ko, Inc. ("Garb-Ko") appeals in these consolidated appeals from (1) a judgment of the Franklin County Court of Common Pleas granting the Civ.R. 12(C) motion for judgment on the pleadings of defendants-appellees, Nathan Benderson, Ronald Benderson and David H. Bauldauf, Trustees of the Randall Benderson 1993-1 Trust dated September 22, 1993 ("the trust") and Benderson Development Company, Inc. ("Benderson Development"), and denying Garb-Ko's request for declaratory and injunctive relief, and (2) judgments of the Franklin County Municipal Court granting the trust's motion for summary judgment and denying Garb-Ko's motion to dismiss. Because Garb-Ko's complaint fails to state a basis for recovery against defendants or for the right to possession of the property at issue, we affirm the judgments of both courts.

I. Facts and Procedural History

A. *Underlying Facts*

{¶ 2} The genesis for these appeals lies in three commercial leases commencing December 1, 1986 and ending December 31, 2011, each lease additionally providing a right to renew the lease for two additional terms of ten years each. Although the agreements originally were between Wilson Farms, Inc. ("Wilson Farms") and Niagara Frontier Services, Inc. ("Niagara"), subsequent assignments occurred. Tops Markets, Inc. ("Tops Markets") succeeded to Niagara's interest as lessee and on June 1, 1989 assigned its interest in the unexpired original term of the lease to Garb-Ko. The agreement, among Wilson Farms, Tops Markets, and Garb-Ko, provided that the assignment was intended to be a complete and full assignment of all rights but did not include the assignment of any rights to exercise options to renew and extend the term of the leases. In 1998, defendants Nathan Benderson, Ronald Benderson and David H. Bauldauf, Trustees of the trust, became the owners and lessors of the buildings at issue; defendant Benderson Development is the administrator of the leases (collectively, "defendants").

{¶ 3} At the end of the leases, the lessor sent Garb-Ko correspondence that indicated the leases were at an end, so Garb-Ko must vacate the premises. Garb-Ko objected, contending correspondence between the parties in 2000 and in 2008 modified

the leases in writing and granted Garb-Ko the right to exercise the options in the three leases.

B. *Common Pleas Court Action*

{¶ 4} On December 7, 2011, Garb-Ko filed a complaint against defendants in the common pleas court seeking damages for breach of contract, estoppel, negligent misrepresentation, negligence, unjust enrichment and quantum meruit, as well as declaratory and injunctive relief. Garb-Ko followed its complaint with a December 30, 2011 motion on its requests for declaratory and injunctive relief. After an evidentiary hearing on Garb-Ko's motion, the common pleas court denied Garb-Ko's motion and granted defendants' motion for judgment on the pleadings.

C. *Municipal Court Actions*

{¶ 5} On March 15, 2012, the trust filed three separate lawsuits in the Franklin County Municipal Court against Garb-Ko for possession of the properties. Garb-Ko filed a motion to dismiss the consolidated cases, arguing the court lacked jurisdiction because the trust's claim for possession was a compulsory counterclaim that the trust waived when the trust did not assert it as a compulsory counterclaim in the common pleas court action. The trust responded with a motion for summary judgment, arguing that res judicata precluded Garb-Ko from relitigating the issue of right to possession or equitable estoppel. On May 8, 2012, the municipal court denied Garb-Ko's motion to dismiss and later that month granted the trust's motion for summary judgment.

II. Assignments of Error

{¶ 6} On appeal, Garb-Ko assigns four errors:

> I. THE DECISION OF THE FRANKLIN COUNTY COURT OF COMMON PLEAS GRANTING BENDERSON'S MOTION FOR JUDGMENT ON THE PLEADINGS IS IN ERROR AND MUST BE REVERSED.
>
> II. THE FRANKLIN COUNTY COURT OF COMMON PLEAS ERRED IN DENYING GARB-KO'S MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, PERMANENT INJUNCTION, AND DECLARATORY JUDGMENT.

III. THE DECISION OF THE FRANKLIN COUNTY MUNICIPAL COURT DENYING GARB-KO'S MOTION TO DISMISS IS IN ERROR AND MUST BE REVERSED.

IV. THE FRANKLIN COUNTY MUNICIPAL COURT ERRED IN DETERMINING THAT THE DECISIONS RENDERED IN THE FRANKLIN COUNTY COURT OF COMMON PLEAS CASE PRECLUDE GARB-KO'S EQUITABLE ESTOPPEL DEFENSE AND THAT BENDERSON IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

III. First Assignment of Error - Civ.R. 12(C) Motion for Judgment on the Pleadings

A. *The Civ.R. 12(C) Standard*

{¶ 7} Civ.R. 12(C) provides that "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." "Civ.R. 12(C) motions are specifically for resolving questions of law." *State ex rel. Midwest Pride IV, Inc. v. Pontious,* 75 Ohio St.3d 565, 570 (1996), citing *Peterson v. Teodosio*, 34 Ohio St.2d 161, 166 (1973). Appellate review of motions for a judgment on the pleadings is de novo, without deference to the trial court's determination. *Fontbank, Inc. v. CompuServe, Inc.*, 138 Ohio App.3d 801, 807 (10th Dist.2000), citing *Flanagan v. Williams*, 87 Ohio App.3d 768, 772 (4th Dist.1993). An appellate court is restricted to the allegations in the pleadings, as well as material incorporated by reference or attached as exhibits to those pleadings, in determining the motion for judgment on the pleadings. *Curtis v. Ohio Adult Parole Auth.*, 10th Dist. No. 04AP-1214, 2006-Ohio-15, ¶ 24, citing *Drozeck v. Lawyers Title Ins. Corp.*, 140 Ohio App.3d 816, 820 (8th Dist.2000).

{¶ 8} When determining a Civ.R. 12(C) motion, the court "is required to construe as true all the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party." *Whaley v. Franklin Cty. Bd. of Commrs.*, 92 Ohio St.3d 574, 581 (2001). A court may grant a Civ.R. 12(C) motion only if the material facts are not disputed and the pleadings demonstrate the movant is entitled to judgment as a matter of law. *Midwest Pride* at 570.

B. *The Allegations of Garb-Ko's Complaint*

{¶ 9} Garb-Ko's complaint alleges Wilson Farms, as lessor, and Niagara, as lessee, entered into all three leases, all of which contain provisions allowing the lessee to renew the lease for two additional terms of ten years each. Niagara assigned each lease to Tops Markets, who, in turn, assigned all three leases on June 1, 1989 to Garb-Ko, as assignee. The assignment included a "'complete and full assignment of all rights, entitlements and obligations of the Assignor under the original term of the Lease, but shall not include the assignment of any rights of Lessee to exercise options to renew and extend the term of the Lease." (Verified Complaint, ¶ 16, quoting Lease Section 3, exhibits D-F.)

{¶ 10} According to the complaint, Garb-Ko sent defendants an October 18, 2000 letter regarding the properties. The letter stated Garb-Ko was "in the process of setting up a new computer software program, that will take care of our real estate needs. We are sending this letter to you to confirm the information on the properties we lease from you." The letter noted Garb-Ko was "presently leasing six (6) properties from you" with each lease showing "a lease commencement date of December 1, 1986 and have an ending date of December 31, 2011, with two (2) ten (10) year options, making the final termination date as December 31, 2031, if both renewal options are exercised. Each lease has a one (1) year prior notice date to exercise the renewal option(s)." The letter concluded by stating that "[i]f you concur with these dates and renewals, please sign this letter and return it in the enclosed stamped return envelope, so that we may up date our files as soon as possible." (Verified Complaint, exhibit H.) Defendants signed the letter as accepting the above stated information to be correct and returned the letter. (Verified Complaint, exhibit H.)

{¶ 11} On October 6, 2008, Benderson Development sent a letter to Garb-Ko stating that "[o]n a recent inspection of the above referenced location we prepared a Limited Property Condition Report. This is a preliminary courtesy inspection prior to your move-out date of December 31, 2011. Should you not exercise any options, we would require the recommended physical needs at the expiration of the term of the lease to be in as good condition as when received by the Lessee." (Verified Complaint, exhibit I.) Garb-Ko on November 16, 2010 notified Benderson Development of its intent to exercise its

option to extend the lease on all three properties for an additional ten years. (Verified Complaint, exhibit J.) Defendants, through counsel, notified Garb-Ko that as a follow-up to conversations on May 10, and July 21, 2011, the lessor was rejecting Garb-Ko's claim of option terms and expected Garb-Ko to vacate and surrender the premises since it had no options to extend the term. (Verified Complain, exhibit K.)

{¶ 12} Based on those allegations, the complaint asserted the parties agreed Garb-Ko had renewal options via the October 18, 2000 written correspondence modifying the agreement between the parties, and defendants continued to recognize Garb-Ko's renewal options in its October 6, 2008 correspondence. According to the complaint, Garb-Ko reasonably relied upon defendants' promises and assurances that Garb-Ko had renewal options. The common pleas court concluded Garb-Ko's complaint, coupled with the remaining pleadings, did not state a claim for relief for breach of contract, estoppel, negligent misrepresentation, negligence, unjust enrichment or quantum meruit, and likewise did not warrant injunctive or declaratory relief.

1. Breach of Contract Claim

{¶ 13} " 'The essential elements of a cause of action for breach of contract are the existence of a contract, performance by the plaintiff, breach by the defendant and resulting damage to the plaintiff.' " *Winner Bros., L.L.C. v. Seitz Elec., Inc.*, 182 Ohio App.3d 388, 2009-Ohio-2316, ¶ 31 (2d Dist.), quoting *Flaim v. Med. College of Ohio*, 10th Dist. No. 04AP-1131, 2005-Ohio-1515, ¶ 12. To the extent Garb-Ko so alleges, " '[a]n anticipatory breach of contract by a promisor is a repudiation of the promisor's contractual duty before the time fixed for performance has arrived.' " *Banks v. Bob Miller Builders, Inc.*, 10th Dist. No. 01AP-582 (Dec. 18, 2001), quoting *McDonald v. Bedford Datsun*, 59 Ohio App.3d 38, 40 (8th Dist.1989). "The repudiation must be expressed in clear and unequivocal terms." *Id*., citing *McDonald*. "To prevail on a claim of anticipatory breach of contract, a plaintiff must establish that there was a contract containing some duty of performance not yet due and, by word or deed, the defendant refused future performance, causing damage to the plaintiff." *Id*., citing *McDonald*.

{¶ 14} The contract at issue plainly provided that Garb-Ko, as an assignee, did not have the right to renew the leases. Garb-Ko contends its October 18, 2000

correspondence with defendants modified the agreement in writing, per the lease terms. The common pleas court determined that only Tops Markets, not defendants, could modify the agreement because defendants were not a party to the assignments between Tops Markets and Garb-Ko.

{¶ 15} Whether or not the correspondence was between parties who had the authority to modify the agreement, the correspondence does not purport to modify the leases. Defendants' correspondence does nothing more than acknowledge the options in the leases; its does not state that Garb-Ko had an option to renew the leases and does not suggest the correspondence was granting such a right. Similarly, the 2008 correspondence does not specify that Garb-K0 had an option to exercise, but rather refers to any option it may have. As a result of the assignment, it had none. Accordingly, the complaint failed to state a claim for relief for breach of contract or anticipatory repudiation.

2. Estoppel Claim

{¶ 16} The common pleas court observed that Garb-Ko's estoppel claim relies on assertions that defendants falsely or misleadingly represented to Garb-Ko its right to exercise the lease agreements' renewal options, and Garb-Ko reasonably relied on those representations. The common pleas court, however, determined Garb-Ko was seeking not promissory estoppel but equitable estoppel, an affirmative defense and not a cause of action.

{¶ 17} Equitable estoppel arises from a misrepresentation of fact and prevents recovery " 'when one party induces another to believe certain facts exist and the other party changes his position in reasonable reliance on those facts to his detriment.' " *Doe v. Archdiocese of Cincinnati*, 116 Ohio St.3d 538, 2008-Ohio-67, ¶ 7, quoting *State ex rel. Chavis v. Sycamore City School Dist. Bd. of Edn.*, 71 Ohio St.3d 26, 34 (1994). "A prima facie case of equitable estoppel requires proof of (1) a factual representation that, (2) is misleading, (3) induces actual reliance that is reasonable and in good faith, and (4) causes detriment to the relying party." *Hudson v. Petrosurance, Inc.*, 10th Dist. No. 08AP-1030, 2009-Ohio-4307, ¶ 38, citing *Ruch v. Ohio Dept. of Transp.*, 10th Dist. No. 03AP-1070, 2004-Ohio-6714, ¶ 14.

{¶ 18} Garb-Ko argues that its complaint presented not a claim for equitable estoppel but a claim for promissory estoppel. Promissory estoppel arises when a defendant makes " '[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance.' " *Hortman v. Miamisburg*, 110 Ohio St.3d 194, 2006-Ohio-4251, ¶ 23, quoting Restatement of the Law 2d, Contracts, Section 90, at 242 (1981). To prove a claim for promissory estoppel, a plaintiff must prove "(1) a clear, unambiguous promise, (2) that the person to whom the promise was made relied on the promise, (3) that reliance on the promise was reasonable and foreseeable, and (4) that the person claiming reliance was injured as a result of reliance on the promise." *Ford Motor Credit Co. v. Ryan*, 189 Ohio App.3d 560, 2010-Ohio-4601, ¶ 96 (10th Dist.), citing *Pappas v. Ippolito*, 177 Ohio App.3d 625, 2008-Ohio-3976, ¶ 55 (8th Dist.). Equitable estoppel differs from promissory estoppel in that equitable estoppel primarily arises from a misrepresentation of fact, while promissory estoppel arises from a promise. *Hortman* at ¶ 24.

{¶ 19} Garb-Ko's complaint alleged the parties agreed Garb-Ko had renewal options, and Garb-Ko reasonably relied upon the promises and assurances of defendants that Garb-Ko had renewal options. In so alleging, Garb-Ko incorporated the allegations contained in the preceding paragraphs of its complaint, including those paragraphs asserting the promises arose out of the correspondence between the parties.

{¶ 20} Construed as true, the material allegations in the complaint, with all reasonable inferences drawn in favor of the non-moving party, suffer the same deficiency as Garb-Ko's claims for breach of contract: they allege defendants, premised on the correspondence between Garb-Ko and defendants, promised Garb-Ko it had renewal options. The correspondence, as noted, did not set forth a promise that Garb-Ko had an option to renew, much less "a clear, unambiguous promise." Absent the requisite promise, Garb-Ko failed to state a promissory estoppel claim.

3. Negligent Misrepresentation Claim

{¶ 21} Under negligent misrepresentation, " '[o]ne, who in the course of his business, profession or employment, or in any other transaction in which he has a

pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their *justifiable reliance* upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.' " (Emphasis sic.) *Delman v. Cleveland Heights*, 41 Ohio St.3d 1, 4 (1989), quoting 3 Restatement of the Law 2d, Torts, Section 552(1), at 126-27 (1965). The common pleas court determined defendants did not factually misrepresent or supply false information to Garb-Ko.

{¶ 22} As with its claim for promissory estoppel, Garb-Ko's complaint alleged defendants negligently misrepresented to Garb-Ko that it had two ten-year renewal options to extend the expiration of the leases to December 31, 2031, in the event both options were exercised. Garb-Ko asserted defendants' misrepresentations or omissions were material and Garb-Ko reasonably relied upon them to its detriment. In alleging the misrepresentation, Garb-Ko again incorporated by reference the correspondence between the parties as the basis for its allegations. Because the correspondence does not submit false information, Garb-Ko necessarily failed to state a claim for negligent misrepresentation.

4. Negligence Claim

{¶ 23} To state a claim for negligence, Garb-Ko had to allege defendants owed it a duty of care, breached that duty and through the breach proximately caused Garb-Ko's injuries. *Strother v. Hutchinson*, 67 Ohio St.2d 282, 285 (1981).

{¶ 24} Garb-Ko argued in the common pleas court that it asserted its negligence claim in the alternative, in the event the court determined Garb-Ko had no lease renewal options. The common pleas court determined defendant owed Garb-Ko no duties beyond those the lease agreements imposed. On appeal, Garb-Ko does not address specifically its negligence claim. When an appellant fails to support an assignment of error, the appellate court need not address it. App.R. 12(A)(2); *Earl v. Nelson*, 9th Dist. No. 04CA008622, 2006-Ohio-3341, ¶ 47, citing *Hutchins v. Fedex Ground Package Systems, Inc.*, 9th Dist. No. 22852, 2006-Ohio-253, ¶ 7.

5. Unjust Enrichment and Quantum Meruit Claims

{¶ 25} The doctrine of unjust enrichment "applies when a benefit is conferred and it would be inequitable to permit the benefitting party to retain the benefit without compensating the conferring party." *Meyer v. Chieffo*, 10th Dist. No. 10AP-683, 2011-Ohio-1670, ¶ 16. Three elements comprise an unjust enrichment claim: "(1) the plaintiff conferred a benefit on the defendant, (2) the defendant knew of the benefit, and (3) it would be unjust to permit the defendant to retain the benefit without payment." *Meyer* at ¶ 37, citing *Maghie & Savage, Inc. v. P.J. Dick Inc.*, 10th Dist. No. 08AP-487, 2009-Ohio-2164, ¶ 33. Garb-Ko seeks to recover damages based upon its claim that defendants knew Garb-Ko made improvements to the properties in reliance upon the renewal options, and without such renewal options defendants were unjustly enriched.

{¶ 26} Both the doctrines of unjust enrichment and quantum meruit " 'derived from the natural law of equity' and share the same essential elements.' " *Meyer* at ¶ 37, quoting *Maghie* at ¶ 33. The doctrines differ when calculating damages because damages for unjust enrichment are " 'the amount the defendant benefited,' " while damages for quantum meruit are " 'the measure of the value of the plaintiff's services, less any damages suffered by the other party.' " *Meyer* at ¶ 37, quoting *U.S. Health Practices, Inc. v. Byron Blake, M.D., Inc.*, 10th Dist. No. 00AP-1002 (Mar. 22, 2001).

{¶ 27} The common pleas court determined the contract set Garb-Ko's rights with regard to the leased properties and noted the doctrine of unjust enrichment " 'does not apply when a contract actually exists * * * .' " (Feb. 7, 2012 Decision, at 17, quoting *Corbin v. Dailey*, 10th Dist. No. 08AP-802, 2009-Ohio-881, ¶ 10.) Observing that the leases were valid contracts between the parties and specifically addressed the rights of the parties regarding alterations, additions and improvements to the properties, the common pleas court concluded the lease agreements governed Garb-Ko's rights with regard to improvements to the properties. Accordingly, the court decided Garb-Ko could not successfully assert unjust enrichment or quantum meruit claims. Garb-Ko continues to argue that the injuries alleged do not arise from the contract in existence.

{¶ 28} Contrary to Garb-Ko's contentions, the leases expressly address the rights of the parties regarding improvements. (*See* Verified Complaint, exhibit A, B, C, 16-17,

Section 10.) The leases specify that the "Lessee or its sublessee may, at Lessee's option, at any time during the term of this Lease, alter, add to, and improve the premises. * * * Such alterations, additions and improvements shall be at the sole expense of the Lessee or its sublessee." The leases further provide that "[a]ll furniture, appliances, machinery, tools, and equipment for business conducted on the premises, and in addition all other fixtures and improvements which have not been permanently incorporated in the realty so as to be an integral part thereof, which have been or will be installed by T.A. Buscaglio Co., Inc., Lessee, or any permitted sublessee at their expense, shall remain the property of Lessee or such sublessee, as the case may be, and may be removed at any time by Lessee." (Verified Complaint, exhibit A, B, C, 16-17, Section 10.)

{¶ 29} Because the contract specifically governs the rights of the parties regarding improvements, claims of unjust enrichment and quantum meruit are inapplicable. Garb-Ko's argument that the contract does not cover the contract extension derives no support from the lease language; nor does Garb-Ko adequately explain why the noted provisions would not apply to extensions of the leases. Its unjust enrichment and quantum meruit claims failed to state a claim because the lease provisions specifically apply.

{¶ 30} Accordingly, we overrule Garb-Ko's first assignment of error.

IV. Second Assignment of Error - Motion for Temporary Restraining Order, Preliminary Injunction, Permanent Injunction and Declaratory Judgment

{¶ 31} Garb-Ko's second assignment of error contends the common pleas court erred in denying Garb-Ko's motion for temporary restraining order, preliminary injunction, permanent injunction and declaratory judgment. Garb-Ko filed the motion to prevent defendants from removing Garb-Ko from the properties on December 31, 2011. Garb-Ko also sought a declaratory judgment that it had lease renewal options and properly exercised them.

A. *Request for Injunctive Relief*

{¶ 32} A temporary restraining order is a form of relief intended to prevent the applicant from suffering immediate and irreparable harm, injury or damage. Civ.R. 65(A); *Coleman v. Wilkinson*, 147 Ohio App.3d 357, 358 (10th Dist.2002). In

determining whether injunctive relief should be granted, a trial court generally examines four factors: " (1) whether the evidence presents a substantial likelihood that plaintiff will prevail on the merits, (2) whether denying the injunction will cause plaintiff to suffer irreparable injury, (3) whether granting the injunction will cause third parties to suffer unjustifiable harm, and (4) whether the injunction will serve the public interest." *Cuyahoga Re-Entry Agency v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 11AP-740, 2012-Ohio-2034, ¶ 31, citing *Vanguard Transp. Sys., Inc. v. Edwards Transfer & Storage Co., Gen. Commodities Div.*, 109 Ohio App.3d 786, 790 (1oth Dist.1996). A "'party seeking a permanent injunction "must demonstrate by clear and convincing evidence that they are entitled to relief under applicable statutory law, that an injunction is necessary to prevent irreparable harm, and that no adequate remedy at law exists.' " *McDowell v. Gahanna*, 10th Dist. No. 08AP-1041, 2009-Ohio-6768, ¶ 9, quoting *Acacia on the Green Condominium Assoc., Inc. v. Gottlieb*, 8th Dist. No. 92145, 2009-Ohio-4878, ¶ 18, citing *Proctor & Gamble Co. v. Stoneham*, 140 Ohio App.3d 260, 268 (1st Dist.2000). The issue of whether to grant or deny an injunction is a matter within the discretion of the trial court, and a reviewing court will not disturb the judgment of the trial court absent an abuse of discretion. *Garono v. State*, 37 Ohio St.3d 171, 173 (1988).

{¶ 33} Garb-Ko requested injunctive relief to maintain the status quo and prevent defendants from evicting Garb-Ko from the leased properties. The common pleas court determined Garb-Ko was not entitled to injunctive relief because Garb-Ko was not likely to succeed on the merits of the case. The court's assessment of Garb-Ko's probability of success on the merits was not an abuse of discretion.

{¶ 34} In the hearing for injunctive relief, Garb-Ko's vice president of real estate testified that when she first became vice president of real estate in late 1998 or early 1999, she reviewed every lease document for Garb-Ko. She discovered a conflict between the leases in the lease file and Garb-Ko's computer, the computer indicating Garb-Ko had two ten-year renewal options. The conflict prompted her to write to defendants for a clarification of the lease terms. She admitted, however, that the conflict arose from Garb-Ko's internal computer program. In reality, Garb-Ko sought to use defendants' acknowledgment of the lease terms as a modification of the lease.

{¶ 35} Tops Markets' assignment did not grant Garb-Ko renewal options. Although Garb-Ko argues that Garb-Ko and defendants modified the agreement by their correspondence, the common pleas court determined defendants could not do so because Tops Markets was the assignor. Even if the parties could have modified the leases in writing signed by both parties as the leases provided, they did not. Garb-Ko did not have the right to the renewal options, and its correspondence with defendants only requested that defendants acknowledge the terms of the lease, not provide Garb-Ko with greater rights.

{¶ 36} Defendants acknowledged the words in the lease were as Garb-Ko stated, but it acknowledged nothing more. For Garb-Ko to attempt to create rights from such an acknowledgement is baseless, and any reliance on such acknowledgment is not reasonable. The common pleas court thus did not abuse its discretion in denying Garb-Ko's request for injunctive relief, as the evidence presents a substantial likelihood that Garb-Ko would not prevail on the merits.

B. *Request for Declaratory Relief*

{¶ 37} In its request for declaratory relief, Garb-Ko argued it had two ten-year options to renew the leases on the properties. Garb-Ko also asked the court to declare that Garb-Ko properly exercised the first option for the three properties. The common pleas court determined that since the unmodified leases did not assign the renewal options to Garb-Ko, it was not entitled to a declaratory judgment on either point.

{¶ 38} A declaratory judgment action is a civil action that provides a remedy in addition to other legal and equitable remedies available. *Aust v. Ohio State Dental Bd.*, 136 Ohio App.3d 677, 681 (10th Dist.2000). " 'The essential elements for declaratory relief are (1) a real controversy exists between the parties, (2) the controversy is justiciable in character, and (3) speedy relief is necessary to preserve the rights of the parties.' " *Walker v. Ghee*, 10th Dist. No 01AP-960 (Jan. 28, 2002), quoting *Aust* at 681. The decision to grant or deny declaratory relief is a matter within the sound discretion of the trial court. *State v. Brooks*, 133 Ohio App.3d 521, 525 (4th Dist.1999), citing *Arbor Health Care Co. v. Jackson*, 39 Ohio App.3d 183, 185 (10th Dist.1987). "A trial court properly dismisses a declaratory judgment action when no real controversy or justiciable issue exists between

the parties." *Brooks* at 525, citing *Weyandt v. Davis*, 112 Ohio App.3d 717, 721 (9th Dist.1996).

{¶ 39} A real controversy does not require a violation of a statute, contract or other regulation but exists when a controversy exists " 'between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.' " (Emphasis deleted.) *Burger Brewing Co. v. Ohio Liquor Control Comm.*, 34 Ohio St.2d 93, 97 (1973), quoting *Peltz v. South Euclid*, 11 Ohio St.2d 128, 131 (1967.) To determine when a controversy is "justiciable" or ripe for review, courts first must determine whether the issues are appropriate for judicial resolution; then the court is to assess the hardships of the parties if judicial relief is denied. *Toilet Goods Assn., Inc. v. Gardner*, 387 U.S. 158, 162 (1967). *See also* R.C. 2721.03 (specifying that any interested party to a written contract may have the court determine the rights, status or other legal obligations of the parties).

{¶ 40} Garb-Ko was not assigned the ten-year renewal options, and Garb-Ko admitted as much. Garb-Ko attempted to argue that the correspondence between the parties modified the leases, but, as noted, the correspondence did not. Accordingly, the common pleas court did not abuse its discretion in denying Garb-Ko's request for declaratory relief, as no justiciable controversy existed.

{¶ 41} Garb-Ko's second assignment of error is overruled.

V. Third and Fourth Assignments of Error - The Municipal Court Actions

A. *Motion to Dismiss*

{¶ 42} In its third assignment of error, Garb-Ko contends the municipal court erred in denying its motion to dismiss. The trust filed three separate lawsuits in the municipal court against Garb-Ko for possession of the three properties; the three actions were consolidated. Garb-Ko filed a motion to dismiss, arguing the municipal court lacked jurisdiction because the trust's claim for possession was a compulsory counterclaim in the common pleas court litigation that the trust waived when it failed to assert it. The municipal court denied Garb-Ko's motion to dismiss, concluding the argument produced an "absurd" result in relation to the results of the common pleas court litigation, as Garb-

Ko would be entitled to remain in possession of the properties for another 20 years despite the common pleas court's conclusion to the contrary.

{¶ 43} Garb-Ko argues the municipal court erred in not applying Civ.R. 13(A)'s provision that "[a] pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." Civ.R. 1(C), however, states that the Ohio Rules of Civil Procedure "to the extent that they would by their nature be clearly inapplicable, shall not apply to procedure * * * (3) in forcible entry and detainer [actions]."

{¶ 44} Generally speaking, Civ.R. 13 is not " ' clearly inapplicable' to procedure in forcible entry and detainer" cases. *Jemo Assoc., Inc. v. Garman,* 70 Ohio St.2d 267, 270 (1982). Although *Jemo* determined that a counterclaim may be asserted in a forcible entry and detainer action, it did not address whether compulsory counterclaims must be asserted under Civ.R. 13(A).

{¶ 45} In *Carter v. Russo Realtors*, 10th Dist. No. 99AP-585 (Mar. 7, 2000), this court determined that, consistent with *Haney v. Roberts*, 130 Ohio App.3d 293 (4th Dist.1998) and R.C. 1923.03, Civ.R. 13(A) by its nature does not apply to forcible entry and detainer actions because it would contradict R.C. 1923.03. R.C. 1923.03, one of the statutes governing forcible entry and detainer actions, provides that "[j]udgments under this chapter are not a bar to a later action brought by either party." *See also Haney*, at 300 (determining Civ.R. 13(A) inapplicable to forcible entry and detainer actions when the plaintiff seeks only eviction, but if a landlord also "sues for back rent, the tenant has a Civ.R. 13(A) duty to assert any compulsory counterclaims in the action for back rent").

{¶ 46} Although *Carter* addressed a later-filed common pleas court action, the Supreme Court of Ohio concluded a municipal court erroneously stayed a forcible entry and detainer action pending resolution of a common pleas court declaratory action. *State ex rel. Weiss v. Hoover*, 84 Ohio St.3d 530 (1999). *Weiss* cited *State ex rel. Carpenter v. Warren Mun. Court*, 61 Ohio St.2d 208, 210 (1980), in which the court granted a writ of procedendo ordering a municipal court to proceed in a forcible entry and detainer action

that it had stayed pending the outcome of a previously filed common pleas court action involving the same parties and raising an issue concerning title to the property.

{¶ 47} *Weiss* also quoted *Haas v. Gerski*, 175 Ohio St. 327 (1963) where, while an action was pending in the common pleas court to quiet title to property, the landlord filed an action in the municipal court to evict the tenant. The court determined that an action to quiet title pending in the common pleas court did not prevent the municipal court from rendering judgment in the forcible entry and detainer action, since the forcible entry and detainer action is solely a possessory action.

{¶ 48} Finally, *Weiss* cited *Cleveland v. A.J. Rose Mfg. Co.*, 89 Ohio App.3d 267, 275 (8th Dist.1993) where a subtenant filed an action for preliminary and permanent injunctions in the common pleas court, and the landlord followed that request with actions for recovery of the real property in the municipal court. The subtenant argued that estoppel and waiver barred the landlord's ejectment action because it should have been raised as a compulsory counterclaim in the common pleas case, as that complaint was filed before the municipal court action. *A.J. Rose* determined the dispositive issue extrapolated from *Carpenter* and *Haas* was that the injunction action in the common pleas court could not stay the proceedings in the municipal court to obviate the purpose of the eviction statutes. The court specifically concluded that jurisdictional arguments such as "first in time" rule and res judicata fail because they would be inequitable and inappropriate in an action to recover real property.

{¶ 49} Pursuant to the Supreme Court's decisions, the trust was not required to assert as a compulsory counterclaim in the common pleas court the claims it filed in the municipal court. To permit Garb-Ko to avoid the result in the common pleas court action by claiming it was immune from eviction in the municipal court would be contrary to law, as well as inequitable.

{¶ 50} Garb-Ko's third assignment of error is overruled.

B. *Summary Judgment*

{¶ 51} Garb-Ko's fourth assignment of error contends the municipal court erred in determining that the decisions rendered in the common pleas court preclude Garb-Ko's equitable estoppel defense and entitle defendants to judgment as a matter of law. An

appellate court's review of a decision granting a motion for summary judgment is conducted under a de novo standard. *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41 (9th Dist.1995). Summary judgment is proper only when the party moving for summary judgment demonstrates that: (1) no genuine issue of material fact exists, (2) the moving party is 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. The issue presented in a motion for summary judgment is not the weight of the evidence, but whether sufficient evidence of the character and quality set forth in Civ.R. 56 demonstrates the existence or non-existence of genuine issues of fact.

{¶ 52} The moving party has 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 on the essential elements of the non-moving party's claim. *Dresher v. Burt*, 75 Ohio St.3d 280 (1996). Once the moving party satisfies its initial burden, the non-moving party has a reciprocal burden to set forth specific facts demonstrating a genuine issue for trial. Summary judgment is appropriate if the non-moving party does not respond, by affidavit or as otherwise provided in Civ.R. 56, with specific facts showing that a genuine issue exists for trial, and judgment is otherwise appropriate. *Dresher* at 293; *Vahila v. Hall*, 77 Ohio St.3d 421, 430 (1997); Civ.R. 56(E).

{¶ 53} The trust filed a motion for summary judgment in the municipal court cases, and the court granted it. Garb-Ko contends the municipal court failed to permit it to present its equitable estoppel defense premised on res judicata. The municipal court, however, granted the summary judgment motion because Garb-Ko did not produce any evidence in response to the trust's motion, but only a memorandum opposing the motion for summary judgment.

{¶ 54} To prevail in a forcible entry and detainer action, plaintiff must prove: (1) that the plaintiff met the procedural requirements and properly served the tenant with notice of the eviction, (2) the plaintiff has the right to possess the premises, and (3) the

tenant does not have the right to possession. *Admr. of Veterans Affairs v. Jackson*, 41 Ohio App.3d 274, 278 (9th Dist.1987).

{¶ 55} The trust provided evidence that it was the lessor and had the right to possess the properties as of December 31, 2011; that the lease terminated on that date and Garb-Ko had no right to the renewal options pursuant to the limitation in the assignments. Garb-Ko presented no contrary evidence. To the extent Garb-Ko relied on its argument under Civ.R. 13(A), the argument failed on the merits, as noted. Garb-Ko was left to once again contend the correspondence between the parties modified the assignment, granted it a right to the options, and estopped the trust from contending otherwise.

{¶ 56} As noted, the letter from Garb-Ko did not inquire as to Garb-Ko's rights but specifically requested information regarding the lease terms. Defendants acknowledged only that the information was correct, not that Garb-Ko had renewal rights. The municipal court determined that since Garb-Ko possessed the terms of sublease at all times and its corporate hands were unclean in terms of reliance, it could not assert an equitable estoppel defense.

{¶ 57} Given that the terms of the assignment did not extend to Garb-Ko the right to exercise the options in the leases, the trial court correctly concluded Garb-Ko could not reasonably rely upon defendants' acknowledgment of the lease terms, despite Garb-Ko's attempt to parlay that acknowledgement into a written modification of the agreement. See *Trepp, L.L.C. v. Lighthouse Commercial Mtge, Inc.*, 10th Dist. No. 09AP-597, 2010-Ohio-1820, ¶ 21, citing *Lepara v. Fuson*, 83 Ohio App.3d 17, 26 (1st Dist.1992) (noting "[r]eliance 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"). Garb-Ko attempts to distinguish *Trepp* by arguing the agreement in *Trepp* was a simple and direct contract with clear written terms, but the contract in this case involved parties that changed through the years. Despite the change in parties to the agreements, the lease renewal rights were not assigned to Garb-Ko and Garb-Ko was aware of that fact or should have been by reading the contract. Garb-Ko failed as a matter of law to demonstrate reasonable reliance.

{¶ 58} Garb-Ko's fourth assignment of error is overruled.

VI. Disposition

{¶ 59} For the reasons stated, Garb-Ko's four assignments of error are overruled and the judgments of the Franklin County Court of Common Pleas and the Franklin County Municipal Court are affirmed.

Judgments affirmed.

KLATT, P.J., and CONNOR, J., concur.