

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Mohamed Bashir Ahmmad,	:	
Plaintiff-Appellee,	:	
v.	:	
Mohammed Younus Ahmed and	:	No. 14AP-736
Mohammed F. Rahaman,	:	(C.P.C. No. 13CVH-3458)
Defendants-Appellants,	:	(REGULAR CALENDAR)
Curry & Kabab, Inc.,	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on June 25, 2015

Bhatt Law Office, Inc., and Sanjay K. Bhatt, for appellee Mohamed Bashir Ahmmad.

George A. Lyons Attorney At Law LLC, and George A. Lyons, for appellant Mohammad Younus Ahmed.

Strip, Hoppers, Leithart, McGrath & Terlecky Co., L.P.A., and Kristie A. Campbell, for appellant Mohammed F. Rahaman.

APPEAL from the Franklin County Court of Common Pleas

SADLER, J.

{¶ 1} Defendants-appellants, Mohammed Younus Ahmed ("Younus") and Mohammed F. Rahaman ("Rahaman"), appeal from a judgment of the Franklin County

Court of Common Pleas in favor of plaintiff-appellee, Mohamed Bashir Ahmmad ("Bashir").¹ For the reasons that follow, we affirm.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} In 2006, appellants Younus and Rahaman, along with their friend and associate, Sanjive Dey Kumar ("Sanjive"), decided to open a restaurant. All three men hailed from the country of Bangladesh, and they knew each other from their ties to the local Bangladeshi community. To facilitate the restaurant venture, they formed a corporation known as Curry & Kabab, Inc. ("Curry & Kabab"). The restaurant was conceived as a carry-out establishment serving regional cuisine.

{¶ 3} In 2006, Rahaman worked at a Wendy's restaurant in the morning and at a Taco Bell restaurant in the evening. Rahaman had no other restaurant experience. In order to get the restaurant business started, Rahaman invested \$13,000 in return for a 25 percent ownership interest in Curry & Kabab. Younus had prior experience as a cook at several restaurants, but he did not have any start-up capital. In return for a 20 percent ownership interest in Curry & Kabab and a salary, Younus agreed to serve as a full-time chef at the restaurant. Sanjive obtained a 25 percent ownership interest in Curry & Kabab.²

{¶ 4} The three owners of Curry & Kabab identified a suitable location for the restaurant just north of The Ohio State University campus. The corporation entered into a lease agreement for premises located at 2412 North High Street in Columbus, Ohio and began preparations to open the restaurant. By summer 2006, Younus, Rahaman, and Sanjive realized that they needed an infusion of capital in order to open the restaurant. Because none of them was willing to invest additional personal funds, Younus approached Bashir seeking either a personal loan or an investment in Curry & Kabab.

{¶ 5} Bashir was a fellow member of the Bangladeshi community in the Columbus area. Bashir had known Younus for 20 years and Rahaman for 15 years. Bashir worked full-time as a chemist for Roxane Labs, and he was part owner of a Holiday Inn Hotel in Cambridge, Ohio. According to Bashir, Younus approached him in July 2006 seeking a

¹ In the text of this decision, the names of the parties shall appear as they do in the complaint, even though they may be spelled differently in other quoted sources.

² Sanjive is not a party to this action and was not called as a witness in the proceedings.

personal loan and offering him an opportunity to invest in Curry & Kabab. Bashir was willing to loan Younus some money, but he was not interested in an investment in Curry & Kabab.

{¶ 6} Months later, after some discussion and deliberation, Bashir agreed to purchase an ownership interest in Curry & Kabab. Although there is disagreement regarding the size of Bashir's initial investment, Bashir claims that in April 2007, he invested \$10,000 to \$15,000 in Curry & Kabab. Bashir testified that he obtained the funds by using a credit card. Bashir does not remember the exact cost per share or the total number of shares he purchased, but there is no dispute that Bashir acquired a 30 percent ownership interest in Curry & Kabab. Bashir was also given the title of president.

{¶ 7} With the infusion of additional capital, the restaurant opened its doors for business in July 2007. The restaurant operated primarily as a carry-out restaurant serving regional cuisine. As the head chef and only full-time employee, Younus worked long hours at the restaurant, six days a week. The restaurant also employed an assistant chef and a cashier. Younus, Bashir, and Sanjive worked at the restaurant as servers and cashiers on a part-time basis.

{¶ 8} The owners met approximately once a month to discuss business operations. According to Bashir, the restaurant was taking in approximately \$18,000 to \$20,000 per month but monthly expenses far exceeded that number. According to Bashir, Younus and Sanjive were of the opinion that, in order to increase restaurant revenues, Curry & Kabab needed to acquire a liquor license. Bashir claims that Younus informed him a liquor license could be purchased immediately from a third-party at a cost of \$45,000, but it would cost approximately \$20,000 to acquire a license by filing an application and obtaining approval from the Liquor Control Commission.

{¶ 9} The testimony establishes that, while each of the owners believed that acquiring a liquor license would benefit the restaurant, the corporation did not have funds available to pay the fees required to obtain a liquor license. Bashir was the only owner who was willing and able to expend his own personal funds in order to acquire a liquor license for Curry & Kabab. However, Bashir wanted the other owners to agree to reimburse him for the costs associated with obtaining the liquor license. The other

owners agreed that Bashir should be compensated for the costs associated with acquiring the liquor license for Curry & Kabab.

{¶ 10} Additionally, at one of the monthly shareholder meetings, the owners discussed an opportunity to increase sales to students who used the Buck-ID system of payment rather than cash or credit cards. In order to accept the Buck-ID cards as payment, Curry & Kabab needed to purchase a card reading system at a cost of \$3,300. When the other owners refused to contribute their own personal funds to purchase the card reader, Bashir agreed to pay for the purchase with his own personal funds. The other owners agreed that Bashir should be compensated for the purchase of the Buck-ID card reader for Curry & Kabab.

{¶ 11} In summer 2007, Bashir paid the required fees, on behalf of Curry & Kabab, and applied to the Department of Commerce, Liquor Control Division, for a permit to sell beer, wine, and spirits. Bashir also took the steps necessary to qualify Curry & Kabab for the Buck-ID program, and he purchased a Buck-ID card reading machine for the corporation. According to Younus and Rahaman, over the next several weeks, Bashir pressured them to sign a written agreement memorializing their promise to reimburse him for the costs associated with acquiring the liquor license and obtaining the Buck-ID card reader. The parties subsequently executed a letter of agreement, which provides as follows:

This Letter of Agreement made and entered into effective as of this 26th day of August 2007, by and between Mo Younus Ahmed, Mohammed F. Rahaman, Sanjive Dey Kumar and Mohammed Bashir Ahmmad.

This letter states that the above owners of the restaurant, CURRY AND KABAB INC. 2412 North High Street, Columbus, Ohio 43202 (EIN # 86-1174081), each owners agrees Mohammed Bashir Ahmmad will applied for Liquor License for Curry and kabab inc with his money what ever the cost, if Mohammed Bashir Ahmmad get the license Curry and Kabab Inc above owner will pay Mohammed Bashir Ahmmad total twenty thousand dollars (20000.00) next two years after get the permit

Also Mohammed Bashir Ahmmad will applied Buckeye ID and will pay his own money, after Buckeye Id's approved

Curry and Kabab Inc. owners will be paying him \$ 150.00 dollars every month until total paid of \$ 3300.00.

All above parties are in agreement of this letter and have signed this.

(Sic passim.)

{¶ 12} The signature of each of the four owners of Curry & Kabab appears below the text of the agreement. Each owner signed the agreement as "Owner of Curry and Kabab Inc."

{¶ 13} In March 2008, Bashir purchased Sanjive's 25 percent interest in Curry & Kabab for approximately \$13,000. As a result of the purchase, Bashir owned 55 percent of the outstanding shares in the corporation. Later in 2008, Bashir filed a civil action against Younus alleging that Younus had stolen from Curry & Kabab. According to Bashir, he filed the civil action for the sole purpose of enjoining Younus from entering the business premises. The witnesses agreed that a court order was subsequently issued enjoining Younus from entering the business premises. Although Bashir terminated Younus's employment at the restaurant, Younus remained a 20 percent shareholder in Curry & Kabab. After Bashir fired Younus, Rahaman decided not to return to the restaurant, but he did retain his 25 percent ownership interest in Curry & Kabab.

{¶ 14} In January or February 2009, the Department of Commerce, Division of Liquor Control, issued Curry & Kabab a class C1 and C2 permit to sell beer and wine from the premises. (Exhibit A.³) On July 20, 2009, Bashir and his wife filed a Chapter 7 bankruptcy petition in the United States Bankruptcy Court, Southern District of Ohio, Eastern Division. On March 10, 2010, the United States bankruptcy judge issued an order scheduling the sale of Bashir's 55 percent share in Curry & Kabab. The testimony establishes that Rahaman and Younus submitted a joint bid of \$23,000 for the shares and that they were the best and highest bidders. The bankruptcy court subsequently issued a "Settlement Agreement" and "Stock Transfer Agreement" evidencing the sale. (Exhibits H and J.) The settlement agreement at section I, paragraph 13, authorizes the bankruptcy

³ Exhibit A is a copy of a class C1 and C2 liquor permit for Curry & Kabab for the period of February 1, 2009 to February 1, 2010.

trustee to "[s]ell the Stock Free and Clear of Liens, Claims, Interests and Encumbrances." Younus testified that he relinquished his ownership interest to Rahaman and that Rahaman paid the bankruptcy trustee for the shares in Curry & Kabab.

{¶ 15} Bashir testified that, on August 26, 2011, the bankruptcy trustee issued a separate "Settlement Agreement" assigning Bashir the claim that is the subject of this case. Exhibit 3 is a single page of a document entitled "Settlement Agreement." The exhibit provides, in relevant part, as follows:

[T]he Trustee assigns to the Debtors all claims that the bankruptcy estate may have against Mohammad Rahaman and Younis Ahmed. The Trustee makes no warranties or representations to the Debtors either that any claims exist against Mohammad Rahaman or Younis Ahmed or regarding the value or collectability of any claims against Mohammad Rahaman or Younis Ahmed.

{¶ 16} On March 27, 2013, Bashir filed a complaint against Younus and Rahaman alleging a breach of the 2007 letter of agreement, unjust enrichment, and promissory estoppel. The case was tried to the court on April 21 and 23, 2014. On August 18, 2014, the trial court entered judgment in favor of Bashir and against Younus and Rahaman "jointly and severally, in the amount of \$23,300, together with interest thereon, commencing February 2, 2011." (Aug. 18, 2014 Judgment Entry, 9.)

II. ASSIGNMENTS OF ERROR

{¶ 17} Appellant Younus assigns the following as error:

1. The Trial Court erred in entering judgment against Mohammed Younus Ahmed and Mohammad Rahaman on a document which was unconscionable and overreaching to the non-drafting parties.
2. The Trial Court erred in entering judgment against Mohammed Younus Ahmed and Mohammad Rahaman on an ambiguous document, containing clauses subject to multiple interpretations the majority of which are in opposition to the judgment of the trial Court.
3. The Trial Court erred in finding a "Contract" when the drafter of the document testified that he did not have a clear understanding of what the exact terms were, which at law

precludes an agreement in which there is a meeting of the minds among the parties at the time of signing.

{¶ 18} Appellant Rahaman assigns the following as error:

1. The trial court erred in failing to dismiss the complaint against Appellants on the basis of Judicial Estoppel and/or Res Judicata wherein Appellee admitted that all claims brought before the trial court were previously resolved through bankruptcy proceedings with the same parties.

2. The trial court erred in entering judgment against Mohammed Younus Ahmed and Mohammad Rahaman individually contrary to a finding that the Corporation had a valid liquor permit and Buck-ID processing machine as part of the Corporation's assets at the time Appellants purchased the stock of the Corporation free and clear of all liens, claims, interests, and encumbrances.

3. The trial court erred in awarding judgment in favor of Appellee Mohamed Bashir Ahmmad Against Appellants Mohammad Younus Ahmed and Mohammed Rahaman even though all the parties were obligated under the Letter of Agreement.

4. The trial court erred in assigning a prejudgment interest award in this matter with a date certain of February 2, 2011 with interest thereon without a separate evidentiary finding or authority pursuant to O.R.C. §1343.03(C).

III. LEGAL ANALYSIS

A. Younus's Second and Third Assignments of Error

{¶ 19} For ease of discussion, we will address Younus's assignments of error out of order. Because Younus's second and third assignments of error each challenge the trial court's interpretation of the letter of agreement, we will consider those assignments of error together.

{¶ 20} "For a breach of contract claim, several elements must be present: the existence of a contract, performance by the plaintiff, breach by the defendant, and damage or loss to the plaintiff." *State of Ohio Dept. of Dev. v. Matrix Centennial, L.L.C.*, 10th Dist. No. 14AP-47, 2014-Ohio-3251, ¶ 16. In his second assignment of error, Younus argues that the trial court erred by rendering judgment in Bashir's favor on the breach of

contract claim where the terms of the letter of agreement are unclear and ambiguous. More particularly, Younus argues that the trial court erred when it interpreted the contract in a manner consistent with Bashir's testimony rather than his own and Rahaman's. We disagree.

{¶ 21} In finding the letter of agreement to be clear and unambiguous, the trial court made the following findings:

17. On August 26, 2007, the parties, Defendants, Rahaman and Younus, Sanjive and Bashir, executed a "Letter of Agreement", which memorialized the parties' agreement, that Bashir would apply for and pay from his own funds all of the cost and expenses for the liquor license and the Buck-Id program.

18. Pursuant to the Letter of Agreement, Defendants, Rahaman and Younus, and Sanjive agreed that if Bashir was successful in securing a liquor permit at his sole cost and expense, they would "pay Mohammed Bashir Ahmmad total twenty thousand dollars (20000.00) next two years after [he] get the permit".

19. Pursuant to the Letter of Agreement, Defendants, Rahaman and Younus, and Sanjive agreed that if Bashir would apply for Buck-Id program, which included purchasing a card processing machine, at his sole cost and expense, they would pay Bashir "\$ 150.00 dollars every month until total paid of **\$ 3300.00**".

(Emphasis sic.) (Aug. 18, 2014 Judgment Entry, 3-4.)

{¶ 22} "[T]he intent of the parties to a contract resides in the language they chose to employ in the agreement." *Shifrin v. Forest City Ents., Inc.*, 64 Ohio St.3d 635, 638 (1992), citing *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130 (1987), paragraph one of the syllabus. When contract terms are clear and unambiguous, courts will not create a new contract by finding an intent which is not expressed in the clear language utilized by parties. *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241 (1978), paragraph one of the syllabus. "Whether a contract's terms are clear or ambiguous is a question of law for the court." *KeyBank Natl. Assn. v. Columbus Campus, LLC*, 10th Dist. No. 11AP-920, 2013-Ohio-1243, ¶ 27, citing *Nationwide Life Ins. Co. v. Canton*, 10th Dist. No. 09AP-

939, 2010-Ohio-4088, ¶ 20. Because the construction of written contracts involves issues of law, our review is de novo. *Alexander* at paragraph one of the syllabus.

{¶ 23} A contract is ambiguous where it cannot be given a "definite legal meaning." *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216 (2003). "Ambiguity exists only when a provision at issue is susceptible of more than one reasonable interpretation." *Lager v. Miller-Gonzalez*, 120 Ohio St.3d 47, 2008-Ohio-4838, ¶ 16; *see also* 11 Williston on Contracts § 30:5 (4th ed.). However, as the Supreme Court of Ohio has cautioned, "[o]nly when a definitive meaning proves elusive should rules for construing ambiguous language be employed. Otherwise, allegations of ambiguity become self-fulfilling." *State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, ¶ 11.

{¶ 24} "When parties to a contract dispute the meaning of the contract language, courts must first look to the four corners of the document to determine whether an ambiguity exists." *KeyBank* at ¶ 27, citing *B.C.I. v. DeRycke*, 9th Dist. No. 21459, 2003-Ohio-6321, ¶ 16. Both Younus and Rahaman testified that the letter of agreement, as written, imposes no personal liability on either of them. Rather, they claim that the obligation to pay Bashir created by the letter of agreement is a corporate liability of Curry & Kabab. The trial court, however, found that "[t]he Letter of Agreement clearly states that the 'owners' of the Corporation agree to pay Bashir, and at all times relevant to the complaint, Younus and Rahaman were the 'owners' of the Corporation." (Aug. 18, 2014 Judgment Entry, 5.) After review of the four corners of the letter of agreement, we agree with the trial court's interpretation.

{¶ 25} The agreement expressly refers to the four individual owners by name in the first paragraph and mentions the "above owners of the restaurant" in the second paragraph. The document also includes a signature line for each of the four individual owners, but there is no designated space for an individual owner to sign on behalf of the corporation. Accordingly, we find that the language of the letter of agreement clearly and unambiguously expresses the intent and agreement of the parties that each of the other three owners of Curry & Kabab shall pay Bashir the total sum of \$23,300 if and when he obtains both a liquor license and a Buck-ID card reader for Curry & Kabab.

{¶ 26} In Younus's third assignment of error, he offers support for his argument that the trial court erred in finding that the letter of agreement is clear and unambiguous.

Younus argues that Bashir admitted at trial that the letter of agreement is unclear. Even if we agree with Younus's characterization of Bashir's testimony, Bashir's admission is not dispositive of the issue.⁴ As stated above, contract interpretation is ordinarily an issue of law for the court, not an issue of fact. *KeyBank; Nationwide Life Ins. See also Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio, Inc.*, 15 Ohio St.3d 321, 322 (1984) (when terms of a contract are clear and unambiguous, the contract's "interpretation is a matter of law and there is no issue of fact to be determined"). The trial court determined the meaning of the letter of agreement, as a matter of law, and we agree with the trial court's interpretation.

{¶ 27} In the alternative, Younus argues that the letter of agreement does not accurately reflect the prior oral agreement of the parties. Younus claims that the parties orally agreed that the obligation to repay Bashir was on Curry & Kabab, not the individual owners of Curry & Kabab. Younus argues that the trial court should not have enforced the signed letter of agreement in light of the parties' prior oral agreement. We disagree.

{¶ 28} The parol evidence rule prohibits parties to a contract from later contradicting the express terms of the contract with evidence of other alleged or actual agreements. *Katz, Teller, Brant & Hild, LPA v. Farra*, 2d Dist. No. 24093, 2011-Ohio-1985, ¶ 23, quoting *Evilsizor v. Becraft & Sons Gen. Contrs., Ltd.*, 156 Ohio App.3d 474, 2004-Ohio-1306, ¶ 12 (2d Dist.). Absent claims of fraud, mistake, or some other invalidating cause, the parties' written agreement may therefore not be varied, contradicted, or supplemented by or on account of evidence of prior or contemporaneous oral agreements. *Natl./RS, Inc. v. Huff*, 10th Dist. No. 10AP-306, 2010-Ohio-6530, ¶ 24. *See also Galmish v. Cicchini*, 90 Ohio St.3d 22, 27 (2000). "[A]n oral agreement cannot be enforced in preference to a signed writing which pertains to exactly the same subject matter, yet has different terms." *Marion Prod. Credit Assn. v. Cochran*, 40 Ohio St.3d 265 (1988), paragraph three of the syllabus.

⁴ The transcript establishes that English is not the first language of any of the parties in this case. The witnesses struggled, at times, to understand the question posed and they struggled, at other times, to articulate an understandable response. Consequently, we do not read the cited testimony as an admission that the letter of agreement is unclear and ambiguous.

{¶ 29} In this case, the oral promise Younus and Rahaman asked the trial court to consider directly contradicts the clearly expressed terms in the letter of agreement. Although Younus and Rahaman testified that the parties orally agreed that he and Rahaman would not be personally liable to Bashir, the clear language of the letter of agreement states otherwise. Even if we were to accept Younus's claim that there was a prior oral agreement between the parties that he and Rahaman would not be personally liable to Bashir, absent fraud, mistake, or some other invalidating cause, the parol evidence rule bars enforcement of the prior oral agreement. There is no claim of fraud, mistake, or other invalidating cause raised in this case. Accordingly, the trial court did not err when it enforced the signed letter of agreement rather than the parties' prior oral agreement. *Natl./RS, Inc.; Marion Prod. Credit Assn.*

{¶ 30} Younus and Rahaman acknowledged that Bashir obtained a liquor license by his own efforts and at his own expense and that the restaurant and, therefore, its owners benefited from his effort by serving beer and wine to its customers. They also acknowledged that Bashir obtained a Buck-ID card reader by his own efforts and at his own expense and that customers used the Buck-ID cards to make purchases at the restaurant. The testimony shows that Younus and Rahaman initially paid Bashir \$300 of the \$3,300 owed to him for the Buck-ID card reader but made no further payments. Nor has Younus or Rahaman made any payments to Bashir for the liquor license.

{¶ 31} For the above stated reasons, we hold that the trial court did not err in its interpretation of the terms of the letter of agreement or in its finding that Younus and Rahaman violated the terms of that agreement by failing to pay Bashir the sums due and owing thereunder. Accordingly, Younus's second and third assignments of error are overruled.

B. Younus's First Assignment of Error

{¶ 32} In his first assignment of error, Younus argues that the letter of agreement is unenforceable due to the unconscionable terms and Bashir's overreaching. We disagree.

{¶ 33} The Supreme Court has observed that " '[u]nconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other

party.' " *Lake Ridge Academy v. Carney*, 66 Ohio St.3d 376, 383 (1993), quoting *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C.Cir.1965). In other words, unconscionability "embodies two separate concepts: (1) unfair and unreasonable contract terms, i.e., 'substantive unconscionability,' and (2) individualized circumstances surrounding each of the parties to a contract such that no voluntary meeting of the minds was possible, i.e., 'procedural unconscionability.' " *Collins v. Click Camera & Video, Inc.*, 86 Ohio App.3d 826, 834 (2d Dist.1993). "The party asserting unconscionability of a contract bears the burden of proving that the agreement is both procedurally and substantively unconscionable." *Hayes v. Oakridge Home*, 122 Ohio St.3d 63, 2009-Ohio-2054, ¶ 20. See also *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, ¶ 33. "Whether a contract is unconscionable is a question of law to be determined by the court." *Vistein v. Am. Registry of Radiologic Technologists*, 342 Fed.Appx. 113, 122 (6th Cir.2009), citing *Ins. Co. of N. Am. v. Automatic Sprinkler Corp.*, 67 Ohio St.2d 91, 98 (1981). "The test of unconscionability poses a very great burden." *Highway Equip. Co. v. Caterpillar, Inc.*, 908 F.2d 60, 65 (6th Cir.1990).

{¶ 34} The related concept of overreaching is defined as the act or an instance of taking unfair commercial advantage of another. *Buckeye Check Cashing of Arizona, Inc. v. Lang*, S.D. Ohio No. 2:06-CV-792 (Feb. 23, 2007). "The unequal bargaining power of the parties or lack of ability to negotiate over the clause cannot, in itself, support a finding of overreaching." *Id.*, citing *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593 (1991). "However, overreaching may be found if the disparity in bargaining power was used to take unfair advantage." *Id.*, citing *United Rentals, Inc. v. Pruett*, 296 F.Supp.2d 220, 227 (D.Conn.2003).

{¶ 35} When we examine the terms of the letter of agreement, the evidence presented at trial, and the trial court's findings of fact, we conclude that Younus did not meet his burden of proof on the issues of unconscionability and overreaching. The trial court expressly found as follows: "Defendants Younus and Rahaman testified that they felt coerced into signing the Letter of Agreement because Bashir was a majority owner of the shares of the Corporation. However, that testimony lacks merit as the Letter of Agreement was executed in August, 2007, whereas, Bashir did not become the majority shareholder [until] March, 2008." (Aug. 18, 2014 Judgment Entry, 5.) The trial court

also noted that Younus and Rahaman "continued to maintain their respective ownership interest in the Corporation even after they were not able to directly participate in the restaurant business." (Aug. 18, 2014 Judgment Entry, 5.) The testimony supports the trial court's findings.

{¶ 36} Younus claims that he signed the letter of agreement only after Bashir threatened to take away his shares. He maintains that Bashir was "nasty with everybody." (Tr. 240.) According to Younus, as president of Curry & Kabab, Bashir controlled every aspect of the business, and he made all the business decisions. Younus testified that Bashir was the only experienced businessman among the owners of Curry & Kabab and that he and Rahaman were essentially ignorant of the financial and operational aspects of the business.

{¶ 37} There is no dispute that Younus, Rahaman, and Sanjive conceived of the idea for a restaurant serving regional cuisine, created Curry & Kabab in order to facilitate their venture, located a suitable space for the business, negotiated the terms of a lease agreement, and were nearly ready to open the business before running out of money. They accomplished all of these things before Bashir became involved in the business. The primary reason Younus contacted Bashir was the restaurant's lack of capital, not the perceived lack of business acumen among the current owners. Moreover, Bashir was a full-time chemist by vocation. He testified that a hotel employee managed the day-to-day operations of that business. Among the owners of Curry & Kabab, Younus had more experience in the restaurant business. Accordingly, there is insufficient evidence in the record to support a finding that there existed an inequality in bargaining power such that a voluntary meeting of the minds was not possible. *See MidAm Bank v. Dolin*, 6th Dist. No. L-04-1033, 2005-Ohio-3353, ¶ 85, citing *McGuffey v. LensCrafters, Inc.*, 141 Ohio App.3d 44 (12th Dist.2001) (a mere assertion of inequality of bargaining power is insufficient to establish procedural unconscionability).

{¶ 38} Nor does the evidence support a finding that Younus and Rahaman lacked the ability to negotiate the terms of the letter of agreement. When the letter of agreement was executed in August 2007, Bashir did not own a majority interest in Curry & Kabab. Rather, Younus, Rahaman, and Sanjive together owned 70 percent of the shares in Curry & Kabab. The witnesses agreed that all four of the owners participated in the monthly

shareholder meetings where business operations were discussed. Though Younus claims that Bashir threatened to take away his shares if he did not sign the agreement, the trial court found that Younus and Rahaman "failed to offer any credible arguments or evidence in support of their claim of threat or duress." (Aug. 18, 2014 Judgment Entry, 7.) As the trier of fact, the trial court was in the best position to determine witness credibility and make factual findings since it has had the opportunity to observe the witnesses' demeanor, gestures, and voice inflections which cannot be conveyed on appeal through the written record. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 79-80 (1984). *See also Miller v. Miller*, 37 Ohio St.3d 71 (1988). In this case, the lack of credible evidence of threats, coercion, and duress on the part of Bashir forecloses a finding that the letter of agreement was the product of procedural unconscionability or overreaching. *Riggs v. Patriot Energy Partners, LLC*, 7th Dist. No. 11 CA 877, 2014-Ohio-558, ¶ 56-57 (absence of evidence of duress or coercion weighs against a finding of procedural unconscionability). *See also Buckeye Check Cashing*.

{¶ 39} Based on the foregoing, we conclude that Younus failed to meet his burden of proving that the letter of agreement was either procedurally unconscionable or the product of overreaching by Bashir. Because we have found that the letter of agreement is not procedurally unconscionable or the product of overreaching, we conclude that Younus did not meet his burden of proving that the letter of agreement is unconscionable, and we need not separately address Younus's assertion that the terms of the letter of agreement are also unfair and unreasonable. *See Hayes* at ¶ 20 ("The party asserting unconscionability of a contract bears the burden of proving that the agreement is *both* procedurally and substantively unconscionable."). (Emphasis added.) Accordingly, Younus's first assignment of error is overruled.

{¶ 40} For the foregoing reasons, each of Younus's three assignments of error are overruled.

C. Rahaman's First Assignment of Error

{¶ 41} In Rahaman's first assignment of error, Rahaman alleges the trial court erred in failing to dismiss Bashir's claims pursuant to the doctrines of res judicata and judicial estoppel. We disagree.

{¶ 42} Under the doctrine of res judicata, a valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action. *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 381 (1995). Res judicata bars litigation of all claims that were or could have been litigated in a prior action. *Id.* at 382, citing *Natl. Amusements, Inc. v. Springdale*, 53 Ohio St.3d 60, 62 (1990). Res judicata is an affirmative defense and the party asserting it must show that all the elements are met. *Id.* at 381-82. The applicability of res judicata "presents a question of law we consider de novo." *Daniel v. Williams*, 10th Dist. No. 13AP-155, 2014-Ohio-273, ¶ 18.

{¶ 43} Rahaman argues that res judicata bars Bashir's claim against him and Younus under the letter of agreement because that claim was or could have been litigated by Bashir in the case he previously brought against them in the court of common pleas in 2008. Bashir testified that he commenced the civil litigation in 2008 for the sole purpose of barring Younus from the business premises due to the allegations of theft. Although there is testimony that the existence of the letter of agreement was alleged in an amended pleading filed in the 2008 case, a copy of the amended pleading was not admitted as evidence in this case, and there is no claim by Rahaman that a judgment was previously rendered on the letter of agreement. Moreover, given the repayment terms set out in the letter of agreement and the testimony regarding the date when a liquor license was issued to Curry & Kabab, it is unlikely that Bashir's claim could have been litigated at that time. As the trial court expressly noted, payment to Bashir under the letter of agreement did not become due and payable until February 2, 2011, two years after the liquor license was issued. Thus, the trial court correctly determined that res judicata did not bar Bashir's claims in this case.

{¶ 44} Appellant next contends that judicial estoppel bars Bashir from asserting a claim in this action based on the letter of agreement because Bashir failed to list that claim on the schedule of assets he filed in the 2010 bankruptcy case and subsequently failed to inform the bankruptcy trustee of its existence until after the trustee sold his shares in Curry & Kabab. We disagree.

{¶ 45} "The judicial estoppel doctrine 'precludes a party from assuming a position in a legal proceeding inconsistent with a position taken in a prior action.' " *Saha v.*

Research Inst. at Nationwide Children's Hosp., 10th Dist. No. 12AP-590, 2013-Ohio-4203, ¶ 14, quoting *Advanced Analytics Laboratories, Inc. v. Kegler, Brown, Hill & Ritter, L.P.A.*, 148 Ohio App.3d 440, 2002-Ohio-3328, ¶ 37 (10th Dist.). "It is an equitable doctrine intended to prevent abuse of the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposing to suit an exigency of the moment." (Internal quotes omitted.) *Id.* "This court has cautioned that judicial estoppel 'should be applied with caution in order to avoid impinging on the truth-seeking function of the courts.' " *Id.*, quoting *Scioto Mem. Hosp. Assn., Inc. v. Price Waterhouse & Co.*, 10th Dist. No. 90AP-1124 (Dec. 21, 1993), *aff'd in part and rev'd in part on other grounds*, 74 Ohio St.3d 474 (1996). "The doctrine applies only when a party shows that his opponent: (1) took a contrary position; (2) under oath in a prior proceeding; and (3) the prior position was accepted by the court." *Greer-Burger v. Temesi*, 116 Ohio St.3d 324, 2007-Ohio-6442, ¶ 25, quoting *Griffith v. Wal-Mart Stores, Inc.*, 135 F.3d 376, 380 (6th Cir.1998).

{¶ 46} The trial court made the following finding with regard to the bankruptcy proceeding:

Sometime in 2009, Bashir filed for Chapter 7 Bankruptcy as a result of his failing hotel business. In July/August of 2011, the Bankruptcy Trustee assigned to Bashir all claims his bankruptcy estate may have had against Younus and Rahaman. It is with that assignment of rights that Bashir filed the subject action.

(Aug. 18, 2014 Judgment Entry, 5-6.)

{¶ 47} There is no dispute that Bashir filed for Chapter 7 bankruptcy protection in 2010 and that Bashir did not list his cause of action under the letter of agreement on the schedule of assets filed in the bankruptcy case. On March 8, 2010, the trustee sold Bashir's shares to Rahaman. Bashir testified that he informed the trustee of his claim against Rahaman and Younus under the letter of agreement sometime after the sale but before final discharge in the bankruptcy case. The trustee elected not to pursue the claim on behalf of the creditors and assigned the claim to Bashir on August 26, 2011. (Exhibit 3, Tr. 125, 175.) The settlement agreement evidencing the assignment provides, in relevant part, as follows:

Mohammed B. Ahmmad and Parul Akter (the "Debtors") and David M. Whittaker, Trustee (the "Trustee") agree as follows:

* * *

3. The Debtors filed an Application for Allowance of Administrative Expense (Doc. No. 71) and the Trustee filed an Objection to this Application (Doc. No. 72).
4. The Trustee and the Debtors negotiated a settlement of the disputes regarding the Application for Allowance of Administrative Expense and the Trustee's Objection.
5. Pursuant to the provisions of Federal Rule of Bankruptcy Procedure 9019, the Trustee filed a Motion for Authority to Compromise the Debtors' Application for Allowance of Administrative Expense Claim on June 24, 2011 (Doc. No. 75; the "Motion to Compromise").
6. The Motion to Compromise was served by the Trustee on all creditors and parties in interest in the Chapter 7 Case.
7. The Bankruptcy Court entered an Order in the Chapter 7 Case on July 20, 2011 authorizing the Trustee to compromise the application for allowance of administrative claim (the "Order Authorizing the Compromise"; Doc. No. 80).
8. Based upon the authority provided by the Order Authorizing the Compromise, the Trustee and the Debtors agree to compromise the issues regarding the Application for Administrative Claim upon the following terms and conditions:
 - A. *The Debtors are allowed an administrative expense claim pursuant to 11 U.S.C. § 503(b)(1) in the amount of Seven Thousand Five Hundred Dollars (\$7,500).*
 - B. *In addition, the Trustee assigns to the Debtors all claims that the bankruptcy estate may have against Mohammad Rahaman and Younis Ahmed. The Trustee makes no warranties or representations to the Debtors either that any claims exist against Mohammad Rahaman or Younis Ahmed or regarding the value or collectability of any claims against Mohammad Rahaman and Younis Ahmed.*

C. *In consideration of the allowance of the \$7,500 administrative claim and the transfer of the claims against Mohammad Rahaman and Younis Ahmed, the Debtors waive any and all other claims that they may have against the bankruptcy estate.*

(Emphasis added.)

{¶ 48} The settlement agreement establishes that Bashir's cause of action against Rahaman and Younus under the letter of agreement was brought to the attention of the bankruptcy trustee, that the cause of action became the subject of an administrative claim filed pursuant to 11 U.S.C. § 503(b)(1), that Bashir and the trustee negotiated the disputed administrative claim, that the trustee filed and served a motion to compromise the administrative claim pursuant to Federal Rule of Bankruptcy Procedure 9019, and that the trustee assigned the cause to Bashir for certain consideration. Rahaman does not allege that the bankruptcy court disapproved the administrative expense claim identified in the settlement agreement. Thus, while Rahaman has demonstrated that Bashir initially took a position in the bankruptcy court that was inconsistent with his pursuit of his cause of action in this case, there is no proof that the bankruptcy court accepted Bashir's initial representation that the cause did not exist. To the contrary, the settlement agreement establishes that the trustee was notified of the potential cause of action against Rahaman and Younus, that the trustee elected to compromise the claim, and that the bankruptcy court approved an administrative expense claim assigning the cause of action, if any, to Bashir.⁵

{¶ 49} In order to apply the doctrine of judicial estoppel, the proponent must show that the bankruptcy court accepted the opponent's prior inconsistent position. *Greer-Burger* at ¶ 25. Given the existence of an unchallenged assignment by the bankruptcy trustee, there is no proof that the bankruptcy court ultimately accepted Bashir's initial position that the cause of action against Rahaman and Younus did not exist. Thus,

⁵ We note that "[i]n deciding whether to approve a proposed compromise of a cause of action, the [federal bankruptcy] court should consider such factors as the probability of success in litigation; difficulties in collection; complexity, expense, inconvenience, and delay of litigation; and the interest and views of creditors." C.J.S., Bankruptcy § 145. Review of bankruptcy court decision to approve an administrative claim is subject to an abuse of discretion standard. *In re Wolverine, Proctor & Schwartz, LLC*, 436 B.R. 253 (D.Mass.2010).

Rahaman has failed to prove that all of the elements of judicial estoppel are satisfied. *See Sports Page, Inc. v. First Union Mgt., Inc.*, 438 N.W.2d 428 (Minn.Ct.App.1989) (judicial estoppel did not prevent athletic store/debtor from pursuing a claim against a mall landlord in state court even though the store failed to disclose its cause of action as an asset of the bankruptcy estate, where the bankruptcy trustee had notice of the store's cause of action and ultimately abandoned the claim by assigning it to the store for \$500).

{¶ 50} For the foregoing reasons, Rahaman's first assignment of error is overruled.

D. Rahaman's Second Assignment of Error

{¶ 51} In Rahaman's second assignment of error, he alleges that Bashir relinquished all claims against Curry & Kabab, including his claim under the letter of agreement, when the trustee sold Bashir's shares to Younus and Rahaman. In making his argument, Rahaman relies on the fact that the liquor license and Buck-ID card reader were assets of Curry & Kabab, and the language of section I, paragraph 13 of the settlement agreement authorizing the bankruptcy trustee to "[s]ell the Stock Free and Clear of Liens, Claims, Interests and Encumbrances."

{¶ 52} As we have determined in connection with Younus's second and third assignments of error, the trial court did not err when it interpreted the letter of agreement. Under the clear and unambiguous terms of the letter of agreement, Younus and Rahaman are jointly obligated to pay Bashir. Bashir's shares in Curry & Kabab are not an obligee under the letter of agreement. Consequently, Rahaman and Younus did not purchase Bashir's right to payment under the letter of agreement when they purchased his shares in Curry & Kabab. In other words, the sale of Bashir's shares in Curry & Kabab did not extinguish Bashir's claim against Rahaman and Younus under the letter of agreement.

{¶ 53} For this reason, Rahaman's second assignment of error is overruled.

E. Rahaman's Third Assignment of Error

{¶ 54} In his third assignment of error, Rahaman argues alternatively that even if he and Younus are found personally liable to Bashir in damages for violating the letter of agreement, the trial court erred by failing to apportion the liability among all owners, including Bashir. We disagree.

{¶ 55} As we have previously determined in connection with Younus's second and third assignments of error and Rahaman's second assignment of error, under the clear and unambiguous terms of the letter of agreement, Rahaman and Younus are jointly obligated to pay Bashir. Bashir is not an obligor under the letter of agreement. To interpret the letter of agreement otherwise would be to impose an obligation on Bashir to pay himself for his own effort and personal expenditures associated with acquiring the liquor license and the Buck-ID card reader for Curry & Kabab. Accordingly, Rahaman's alternative argument is without merit, and we overrule his third assignment of error.

F. Rahaman's Fourth Assignment of Error

{¶ 56} In Rahaman's fourth assignment of error, he contends the trial court erred when it awarded prejudgment interest. In making this argument, Rahaman relies on the language of R.C. 1343.03(C)(1), pertaining to the determination of postjudgment interest on judgments "based on tortious conduct." The provisions of R.C. 1343.03(C)(1) do not apply to this action as this is a contract action and not an action based on tortious conduct.

{¶ 57} R.C. 1343.03(A) pertains to interest on obligations in contracts and provides, in relevant part, as follows:

In cases other than those provided for in sections 1343.01 and 1343.02 of the Revised Code, *when money becomes due and payable upon any * * * judgments, decrees, and orders of any judicial tribunal for the payment of money arising out of * * * a contract * * **, the creditor is entitled to interest at the rate per annum determined pursuant to section 5703.47 of the Revised Code, unless a written contract provides a different rate of interest in relation to the money that becomes due and payable, in which case the creditor is entitled to interest at the rate provided in that contract. Notification of the interest rate per annum shall be provided pursuant to sections 319.19, 1901.313, 1907.202, 2303.25, and 5703.47 of the Revised Code.

(Emphasis added.)

{¶ 58} The trial court found that the sum of \$23,000 became due and payable to Bashir under the terms of the letter of agreement on February 2, 2011, two years after Bashir obtained a liquor license for Curry & Kabab. Because payment was not timely, the

trial court properly awarded prejudgment interest to Bashir. The language of the letter of agreement and the evidence in the record support the trial court's determination. Therefore, Rahaman's fourth assignment of error is overruled.

IV. CONCLUSION

{¶ 59} Having overruled each of appellants' assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK and LUPER SCHUSTER, JJ., concur.
