

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Open Container, Ltd.,	:	
Plaintiff-Appellant,	:	
v.	:	No. 14AP-133
CB Richard Ellis, Inc. et al.,	:	(C.P.C. No. 11CVH-05-6683)
Defendants-Appellees.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on March 12, 2015

Law Offices of Marcell Rose Anthony, LLC, and Marcell Rose Anthony, Golden & Meizlish Co., LPA, Adam H. Karl and Keith E. Golden, for appellant.

BakerHostetler, John H. Burtch and Robert J. Tucker, for appellee CB Richard Ellis, Inc.

Carpenter Lipps & Leland LLP, and Andrew W. Owen, for appellee Greater Ohio Leasing Corporation.

ON MOTIONS

TYACK, J.

{¶ 1} Appellant, Open Container, Ltd., has filed an application for reconsideration en banc pursuant to App.R. 26(A)(2)(a) requesting that this court reconsider our January 13, 2015 decision in *Open Container, Ltd. v. CB Richard Ellis, Inc.*, 10th Dist. No. 14AP-133, 2015-Ohio-85. Open Container has also moved for an order to certify a conflict between our decision and the decisions of other state appellate courts. For the following reasons, appellant's motions are denied.

{¶ 2} When analyzing an application for reconsideration, we must determine whether an App.R. 26(A) application "calls to the attention of the court an obvious error

in its decision or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been." *Matthews v. Matthews*, 5 Ohio App.3d 140, 143 (10th Dist.1981). An appellate court will not grant an application for reconsideration merely because a party disagrees with the logic or conclusions of the underlying decision. *Callander v. Callander*, 10th Dist. No. 07AP-746, 2008-Ohio-3128, ¶ 2.

{¶ 3} The purpose of an en banc proceeding "is to resolve conflicts of law that arise within a district." *State v. Forrest*, 136 Ohio St.3d 134, 2013-Ohio-2409, ¶ 7. App.R. 26(A)(2)(a) states in part:

Upon a determination that two or more decisions of the court on which they sit are in conflict, a majority of the en banc court may order that an appeal or other proceeding be considered en banc. * * * Consideration en banc is not favored and will not be ordered unless necessary to secure or maintain uniformity of decisions within the district on an issue that is dispositive in the case in which the application is filed.

Intradistrict conflicts develop when different panels of judges hear the same issue, but reach different results. *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, ¶ 15. Resolution of intradistrict conflicts promotes uniformity and predictability in the law, and a larger appellate panel provides the best possible means of resolution. *Id.* at ¶ 15-16

{¶ 4} Appellant, Open Container, in its motion for reconsideration, brings arguments inappropriate for such a motion seeking to address issues that were either never properly before this court or that have been fully resolved by our previous decisions. *See State ex rel. Zollner v. Indus. Comm.*, 66 Ohio St.3d 276, 278 (1993). Such arguments are not well taken. A party cannot raise new issues or legal theories for the first time on appeal. *Hudson v. P.I.E. Mut. Ins. Co.*, 10th Dist. No. 10AP-480, 2011-Ohio-908, ¶ 12. An appellate court must, therefore, limit its review of the case to the arguments contained in the record before the trial court. *Litva v. Richmond*, 172 Ohio App.3d 349, 2007-Ohio-3499, ¶ 18 (7th Dist.).

{¶ 5} In seeking en banc consideration, Open Container contends that our decision is in conflict with: *Andrew v. Power Marketing Direct, Inc.*, 10th Dist. No. 11AP-

603, 2012-Ohio-4371; *Crossley v. Esler*, 10th Dist. No. 94APE04-497 (Nov. 17, 1994); *Buren v. Karrington Health*, 10th Dist. No. 00AP-1414 (Jan. 17, 2002); *Banks v. Bob Miller Builders, Inc.* 10th Dist. No. 01AP-582 (Dec. 18, 2001); *O'Brien v. Product Design Ctr., Inc.*, 10th Dist. No. 99AP-584 (Mar. 31, 2000). Open Container cites these cases and argues that this court firmly holds that ambiguous contract questions are not appropriate for summary judgment.

{¶ 6} Our decision in the case at bar is not in conflict with these cases. We agree with the trial court that the contract in question was clear and not ambiguous as to the question of what was being offered to be sold. "[B]ased on the submitted depositions, affidavits, the plan language of the listing agreement, and the price of \$1,500,000, the trial court concluded that Open Container intended to sell the land, buildings, and all the amenities of the restaurant within." *Open Container, Ltd.* at ¶ 14.

{¶ 7} Open Container is arguing that the trial court's interpretation of the contract is incorrect, not that our holding creates a conflict of law within this court. We did not hold in the case at bar that ambiguous contracts are appropriate for summary judgment. There is no conflict of law, only Open Container arguing a question of fact.

{¶ 8} Open Container cites *Killilea v. Sears, Roebuck & Co.*, 27 Ohio App.3d 163 (10th Dist.1985), arguing that credibility issues must be resolved at trial, and *Havely v. Franklin Cty.*, 10th Dist. No. 07AP-1077, 2008-Ohio-4889, arguing that a trial court may not improperly consider hearsay evidence. Here, Open Container is not arguing that there is conflict of law but only arguing again about the factual issues of the case.

{¶ 9} Open Container argues that summary judgment was inappropriate because other claims remained viable. As we stated in our decision, the trial court did not address each claim individually; instead, we found that the remaining claims required some showing of loss or damages. Open Container does not argue that this is a conflict in law within the district. Open Container ends its memorandum arguing that the statute of frauds was misapplied but fails to cite any case that could be a conflict.

{¶ 10} Open Container's motion for reconsideration en banc pursuant to App.R. 26(A)(2)(a) is denied as Open Container essentially argues issues of fact rather than conflicts of law within this district.

{¶ 11} Open Container also moves to certify a conflict between *Open Container, Ltd.* and a number of cited cases.

{¶ 12} A motion to certify a conflict "shall specify the issue proposed for certification and shall cite the judgment or judgments alleged to be in conflict with the judgment of the court in which the motion is filed." App.R. 25(A). In *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 596 (1993), the Supreme Court of Ohio noted the following conditions which must be met before and during certification of a case to that court pursuant to Section 3(B)(4), Article IV of the Ohio Constitution:

First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict must be "upon the same question." Second, the alleged conflict must be on a rule of law—not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals.

Id. at 596. Further, factual distinctions between cases are not a basis upon which to certify a conflict. *Semenchuk v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 10AP-19, 2010-Ohio-6394, ¶ 4, citing *Whitelock* at 599.

{¶ 13} Open Container, in its motion to certify a conflict, again brings inappropriate arguments seeking to address issues that were either never properly before this court or that have been fully resolved by our previous decisions. *See Zollner*. A party cannot raise new issues or legal theories for the first time on appeal. *Hudson* at ¶ 12.

{¶ 14} Open Container also contends that the contract in question is ambiguous and therefore *Open Container, Ltd.* is in conflict with *Central Ohio Joint Vocational School Dist. Bd. of Edn. v. Peterson Constr. Co.*, 129 Ohio App.3d 58 (12th Dist.1998) as well as other cases. We emphasize again that the contract was not found to be ambiguous. Open Container also cites *Houston v. Liberty Mut. Fire Ins. Co.*, 6th Dist. No. L-04-1161, 2005-Ohio-4177 (the issue was whether an employee was within the course of employment when injured); *Lannigan v. Pioneer Sav. & Loan Co.*, 4th Dist. No. 92 CA 14 (Aug. 13, 1993) (a case that focused on punitive damages); *Bd. of Edn. v. Hayes, Donaldson, Wittenmyer & Partners*, 4th Dist. No. 1734 (June 17, 1985) (a deposition was cited by a brief but not included in the record which the fourth district choose to

disregard); *Millersport Hardware, Ltd. v. Weaver Hardware Co.*, 5th Dist. No. 08-CA-86, 2009-Ohio-6556 (a parol evidence case that focuses on misrepresentation). Any conflict Open Container is alleging would not be upon the same question; nor does Open Container clearly specify the issue that is in conflict with the exception of *Bd. of Edn. v. Hayes, Donaldson, Wittenmyer & Partners*. We do not see a conflict since evidence may be considered on summary judgment other than those specified in Civ.R. 56(C) if there is no objection. *State ex rel. Gilmour Realty, Inc. v. Mayfield Hts.*, 122 Ohio St.3d 260, 2009-Ohio-2871, ¶ 17. Open Container's motion to certify a conflict to the Supreme Court of Ohio is denied.

{¶ 15} We find that the cases cited to be distinguishable from our decision. The judgment of this court is not in conflict with any of the cases relied upon by Open Container. Based upon the forgoing, we deny Open Container's motion for en banc consideration and motion to certify a conflict.

*Motions for en banc consideration and
to certify conflict denied.*

KLATT and SADLER, JJ., concur.
