[Cite as *Grimmer v. Shirilla*, 2016-Ohio-4572.]

[Vacated opinion. Please see 2016-Ohio-5423.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103921

DAVID GRIMMER, ET AL.

PLAINTIFFS-APPELLEES

vs.

ROBERT G. SHIRILLA

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-836463

BEFORE: E.T. Gallagher, J., Keough, P.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: June 23, 2016

ATTORNEY FOR APPELLANT

Mitchell L. Alperin
29325 Chagrin Blvd., Suite 305
Pepper Pike, Ohio 44122

ATTORNEYS FOR APPELLEES

Robert B. Weltman
David S. Brown
Weltman Weinberg & Reis Co., L.P.A.
Lakeside Place, Suite 200
323 W. Lakeside Avenue
Cleveland, Ohio 44113

EILEEN T. GALLAGHER, J.:

{¶1} This cause came to be heard on the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1. Defendant-appellant, Robert G. Shirilla ("Shirilla"), appeals an order granting summary judgment in favor of plaintiffs-appellees, David Grimmer ("Grimmer") and Toris Realty Company ("Toris Realty") (collectively "appellees"). Shirilla raises the following three assignments of error:

> 1. The lower court failed to apply and/or incorrectly applied the standard and rule of law relating to summary judgment.
>
> 2. The failure of these parties to sign the lease and promissory note "at the same time" voided their entire business transactions.
>
> 3. Other disputed legal and factual claims relate to issues of material fact.

{¶2} We find some merit to the appeal, affirm the trial court's judgment in part, reverse in part, and remand the case to the trial court to enter judgment in the amount of $109,002.39.

I. Facts and Procedural History

{¶3} Shirilla's friend, Steve Gilleland ("Steve"), lost his job and wanted to purchase a retail business known as Dean's Discount, located at 124 Madison Street, Port Clinton, Ohio. Dean's Discount was owned by Grimmer and Toris Realty. Shirilla agreed to help Steve and his wife, Lisa Gilleland (collectively "the Gillelands"), by pledging to be an investor in the business. Shirilla and the Gillelands agreed to sign a lease and purchase agreement that provided (1) the terms for leasing space for the store, and (2) the price for the purchase of the store's inventory. The agreement also provided that the Gillelands and Shirilla would sign a cognovit promissory

note for the value of the inventory once the inventory was valued by a third-party valuation service.

{¶4} Regis Inventory Services completed a valuation of the inventory on October 14, 2011, and valued the inventory at $99,919.99. On October 15, 2011, Shirilla and the Gilleland's signed the lease and purchase agreement as well as a security agreement that provided appellees a security interest in the inventory. The Gillelands also signed a cognovit promissory note for the purchase of the inventory at the time they signed the parties' agreements.

{¶5} Although Shirilla signed the lease and purchase agreement and the security agreement on October 15, 2011, he refused to sign the cognovit note because he disputed the valuation of the inventory. After discounting for several stale items, the parties eventually agreed on the price of $56,000 for the inventory, and on March 28, 2012, Shirilla signed the promissory cognovit note in that amount.

{¶6} Both the lease and purchase agreement and the security agreement refer to the execution of the promissory cognovit for the purchase of the inventory. The lease purchase agreement provides, in relevant part, that "[s]eller agrees to accept a deferred payment of the cost of the inventory and equipment to be represented by a cognovit promissory note individually signed by each of the buyers." The security agreement provides, in relevant part:

> WHEREAS, the Debtors are in the business of selling at retail various items of inventory * * * , and the Secured Party has sold the inventory of Dean's Discount store, 124 Madison Avenue, Port Clinton, Ohio the sale of which is evidenced by the cognovit promissory note (Exhibit A).
>
> * * *
>
> 21. ENTIRE AGREEMENT This Agreement and the documents to be delivered hereunder constitute the entire understanding and agreement between the Secured Party and the Debtor hereto concerning the subject matter hereof. All negotiations between the parties hereto are merged into this Agreement, and

> there are no representations, warranties, covenants, understandings or agreements, oral or otherwise, in relation thereto between the parties other than those incorporated herein or to be delivered hereunder.

{¶7} Unfortunately, the business was not a success, and the Gillelands and Shirilla defaulted on the lease and purchase agreement and the cognovit promissory notes. Grimmer agreed to accept partial and late payments, but the payments were never made on time, and their checks were often refused due to insufficient funds. Consequently, appellees filed a complaint against Shirilla, alleging breach of contract for failure to make payments required under the cognovit promissory note dated March 28, 2012, and the lease and purchase agreement dated October 15, 2011.

{¶8} Shirilla answered the complaint and asserted a counterclaim for fraud in the inducement, claiming that Grimmer "orally represented grossly inaccurate sales figures but would only disclose such information orally to Defendant." (Counterclaim ¶ 6.) Shirilla further alleged that Grimmer's promise that Shirilla would receive written confirmation of the store's gross sales and income after Shirilla signed the cognovit promissory note, security agreement, and the lease and purchase agreement were separate components of a "package deal." (Counterclaim ¶ 7.) Thus, Shirilla claimed that the "package deal" also included disclosure of the store's gross sales and income and that "if sales figures and product were not as represented[,] the entire transaction would be voided unless the parties all agreed to adjusted figures." (Counterclaim ¶ 8.)

{¶9} In July 2012, three months after Shirilla signed the cognovit promissory note, Grimmer provided copies of the store's income tax returns. Although the income for the years 2009 and 2010 exceeded $500,000, Shirilla contends he later learned the figures represented sales from two store locations, not just the store he was leasing. (Counterclaim ¶ 12.)

{¶10} Both parties filed motions for summary judgment. Appellees submitted Shirilla's deposition transcript in support of their motion. In the deposition, Shirilla admitted that he paid a total of $12,500 toward lease payments and the purchase of inventory, even though the inventory was valued at $56,000, and the monthly lease payments for the 36-month term totaled $90,000. Shirilla claimed the parties' contract was void because Grimmer falsely misrepresented the gross sales and income of the store. The court disagreed, denied Shirilla's motion for summary judgment, and granted summary judgment in favor of appellees. The court's journal entry awarded damages to appellees as follows:

> [J]udgment is entered in favor of plaintiffs and against defendant Robert G. Shirilla, in the amount of $56,000 plus 6% pre- and post-judgment interest and court costs pursuant to the cognovit promissory note dated March 28, 2012; [and] in the amount of $109,002.39 plus post-judgment interest at the statutory rate per annum and court costs pursuant to the lease dated October 15, 2011.

{¶11} Shirilla now appeals the trial court's judgment.

II. Law and Argument

{¶12} Shirilla raises three assignments of error all of which challenge the propriety of the court's order granting summary judgment in favor of appellees. In the first assignment of error, he contends the court failed to correctly apply the standard for awarding summary judgment. In the second assignment of error, Shirilla argues the court erred in granting summary judgment to appellees on their breach of contract claim because the parties' contract was void. We discuss the first and second assignments of error together because they are interrelated.

A. Summary Judgment Standard

{¶13} We review an appeal from summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). The party moving for summary judgment bears the burden of demonstrating the absence of a genuine issue of material fact as to the

essential elements of the case with evidence of the type listed in Civ.R. 56(C). *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). Once the moving party demonstrates entitlement to summary judgment, the burden shifts to the nonmoving party to produce evidence related to any issue on which the party bears the burden of production at trial. Civ.R. 56(E). Summary judgment is appropriate when, after construing the evidence in a light most favorable to the party against whom the motion is made, reasonable minds can only reach a conclusion that is adverse to the nonmoving party. *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201 (1998).

B. Simultaneous Execution of Documents

{¶14} Shirilla argues the parties' contract is void because the cognovit note and the lease and purchase agreement were not signed at the same time as required by the terms of the lease and purchase agreement.

{¶15} Page 1 of the parties' lease and purchase agreement provides terms for leasing the space for the store, and page 2 provides terms for purchasing the store's inventory. The second page of the agreement provides that appellees agreed to accept deferred payment for the cost of the inventory pursuant to a cognovit promissory note signed by the buyers. The lease and purchase agreement also states that the payments to be made on the cognovit note were to be made monthly "1/36 each month for thirty-six months of the lease." A heading on the top of page 2 of the agreement states, in all capital letters: "PROMISSORY NOTE TO BE EXECUTED AT THE SAME TIME AS THE LEASE." Shirilla contends that, based on this language, the parties' agreement is void because he did not sign the cognovit note at the same time as the lease. The parties signed the lease and purchase agreement on October 15, 2011, and Shirilla did not execute the cognovit note until March 28, 2012.

{¶16} Paragraph 2 on the first page of the lease and purchase agreement states that the lease term was to commence on "the date the inventory valued by inventory service [a]nd turned over to Buyer for their sole possession, control, and liability." In other words, the parties could not execute a contract without an agreement on the price of the inventory. Although Regis Inventory Services completed a valuation of the inventory the day before the parties signed the lease and purchase agreement, Shirilla did not agree on the valuation and continued to negotiate the price of the inventory for several months.

{¶17} To be enforceable, a contract must have an offer, acceptance, consideration, and a manifestation of mutual assent. *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58, ¶ 16. Price is another essential term of a contract, without which there cannot be an enforceable contract. *Alligood v. Proctor & Gamble, Co.*, 72 Ohio App.3d 309, 311, 594 N.E.2d 668 (1st Dist.1991). Thus, the parties' contract was not effective until all the parties agreed on a price for the inventory.

{¶18} The promissory note executed by Shirilla on March 28, 2012, was a manifestation of the parties' agreement on the price of the inventory. The language "PROMISSORY NOTE TO BE EXECUTED AT THE SAME TIME AS THE LEASE" expressed the parties' intent that the lease and purchase agreement and security agreement were not effective until the parties' reached an agreement on all material terms of the agreement, including price as manifested in the promissory note. Indeed, the security agreement specifically provides that the lease and purchase agreement, the security agreement, and promissory notes merged into a single agreement. (Security Agreement ¶ 21.) The agreement was not executed until all the contract documents were signed. Therefore, the documents were simultaneously executed when Shirilla

signed the promissory cognovit note, which was last document to be signed in the parties' global agreement.

C. The Parole Evidence Rule

{¶19} Shirilla contends the lease and purchase agreement, the security agreement, and the promissory cognovit note are not a complete representation of the parties' agreement. He contends Grimmer's oral representation that the gross sales of Dean's Discount Store for the previous two years exceeded $500,000 was a material term of the parties' agreement that voided the contract because of its falsity. Shirilla relies on an alleged oral agreement, which was not memorialized in the parties' written contract, as a defense for nonpayment under the terms of the contract.

{¶20} "The parol evidence rule is a rule of substantive law that prohibits a party who has entered into a written contract from contradicting the terms of the contract with evidence of alleged or actual agreements." *Ed Schory & Sons, Inc. v. Francis*, 75 Ohio St.3d 433, 440, 662 N.E.2d 1074 (1996). Thus,

> "[w]hen two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing."

Id., quoting 3 Corbin, *Corbin on Contracts*, Section 573 at 357 (1960).

{¶21} The purpose of the parol evidence rule is to protect the integrity of written contracts. *Galmish v. Cicchini*, 90 Ohio St.3d 22, 27, 734 N.E.2d 782 (2000); *Ed Schory & Sons* at 440. By prohibiting evidence of parol agreements, the rule seeks to ensure the stability, predictability, and enforceability of finalized written instruments. *Id.*

{¶22} However, the parol evidence rule does not prohibit a party from introducing extrinsic evidence for the purpose of proving fraudulent inducement. *Id*., citing *Drew v. Christopher Constr. Co., Inc.*, 140 Ohio St. 1, 41 N.E.2d 1018 (1942), paragraph two of the syllabus. "'[I]t was never intended that the parol evidence rule could be used as a shield to prevent the proof of fraud * * *.'" *Galmish* at 28, quoting 37 American Jurisprudence 2d, Fraud and Deceit, Section 451, at 621-622 (1968).

{¶23} However, establishing a fraud claim for purposes of overcoming the parol evidence rule is not easy. The *Galmish* court explained:

> "[A] fraudulent inducement case is not made out simply by alleging that a statement or agreement made prior to the contract is different from that which now appears in the written contract. Quite to the contrary, attempts to prove such contradictory assertions is exactly what the Parol Evidence Rule was designed to prohibit."

Id. at 29-30, quoting Shanker, *Judicial Misuses of the Word Fraud to Defeat the Parol Evidence Rule and the Statute of Frauds (With Some Cheers and Jeers for the Ohio Supreme Court)* (1989), 23 Akron L.Rev. 1, 7.

{¶24} "Parties may not * * * prove fraud by claiming that the inducement to enter into an agreement was a promise that was within the scope of the integrated agreement but was ultimately not included in it." *Busler v. D & H Mfg., Inc.*, 81 Ohio App.3d 385, 390, 611 N.E.2d 352 (10th Dist.1992). The parol evidence rule also excludes evidence offered to show a promise that contradicts an integrated written agreement. *Ed Schory & Sons,* 75 Ohio St.3d at 440, 662 N.E.2d 1074. Unless the false promise is either independent of or consistent with the written instrument, evidence thereof is inadmissible. *Galmish,* 90 Ohio St.3d at 28, 734 N.E.2d 782.

{¶25} Shirilla argues Grimmer orally represented that the store was grossing $500,000 per year, and that the parties' agreement was contingent on the truth of that fact. He further

contends that because the disclosure of the gross sales established that Grimmer's oral representations were false, the parties never reached a "meeting of the minds" on all the material terms of the agreement and, therefore, never entered into an enforceable contract.

{¶26} However, other than bald conclusory allegations in Shirilla's briefs, he has failed to present any authenticated evidence of the type required by Civ.R. 56(C) to show that Grimmer made any false misrepresentations. Under Civ.R. 56, the nonmoving party cannot rest upon conclusory statements to create a genuine issue of material fact. *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 115, 526 N.E.2d 798, 801 (1988). The nonmoving party must point to specific facts to demonstrate a genuine issue of material fact for trial. *Id*. Moreover, "[d]ocuments which are not sworn, certified, or authenticated by way of affidavit have no evidentiary value and shall not be considered by the trial court." *Mitchell v. Ross*, 14 Ohio App.3d 75, 75, 470 N.E.2d 245 (8th Dist.1984).

{¶27} Grimmer produced Dean's Discount's IRS tax returns for the years 2009, 2010, and 2011 in response to Shirilla's request for production of documents. The 2009 and 2010 tax returns indicate that Dean's Discount's gross sales were well above $500,000. Because the Gillelands and Shirilla took over the business in 2011, appellees' 2011 tax returns do not represent the entire year. Although Shirilla maintains the tax returns represent sales and income from two stores as opposed to the store that is the subject of the parties' lease and purchase agreement, there is no evidence to support this claim. There simply is no evidence of fraud in the record.

{¶28} Therefore, all the material terms of the parties' agreement were exclusively contained in the parties's written contract documents.

D. Other Asserted Issues of Fact

{¶29} In the third assigned error, Shirilla argues there were other genuine issues of material fact that precluded summary judgment in appellees' favor besides his fraud claim. He contends that (1) appellee Toris Realty Company could not maintain its action against him after its corporate status was canceled by the Ohio Secretary of State, and (2) appellees were not entitled to judgment on the cognovit promissory note because they lacked possession of the original note.

1. Canceled Corporation

{¶30} Shirilla argues that because Ohio Secretary of State canceled Toris Realty Company's corporate status, it had no right to sue him.

{¶31} "A corporation may sue and be sued," but the legal capacity to sue is dependent upon the legal existence of the corporation. R.C. 1701.13(A). The corporation exists from the time the articles of incorporation are filed with the secretary of state until the corporation is wound up, or for a period of five years, which is later. R.C. 1701.04(D), 1701.88(A). Thus, R.C. 1701.88(B) provides:

> The * * * cancellation of the articles of a corporation, expiration of the period of existence of a corporation, * * * or other action to dissolve a corporation under this chapter shall not eliminate or impair any remedy available to * * * the corporation * * * for any right or claim existing, * * * prior to the dissolution, if [the corporation] brings such an action * * * within the time limits otherwise permitted by law.

{¶32} It is undisputed that Toris Realty Company has not been in good standing with the Ohio Secretary of State since January 2, 2013. The statute of limitations for written contracts is eight years after the cause of action has accrued. R.C. 2305.06. A corporation may legally exist for five years after dissolution. R.C. 1701.88. In this case, appellees filed the complaint commencing this action in November 2014, less than two years after the corporation started to

wind up, and more than three years before the corporation would lose its capacity to sue. Therefore, there is no genuine issue of material fact affecting Toris Realty Company's capacity to bring this action.

2. Original Promissory Note

{¶33} Finally, Shirilla argues the trial court erred in granting summary judgment in favor of appellees on the cognovit promissory note he executed in the amount of $56,000. He contends appellees were not entitled to judgment on the cognovit promissory note because they lacked possession of the original note and therefore could not enforce it.

{¶34} Grimmer admitted in an affidavit and in his answer to Shirilla's counterclaim that appellees do not have possession of the original promissory cognovit note signed by Shirilla. (Plaintiff's Reply to Counterclaim ¶ 20.)

{¶35} R.C. 1303.38, which governs the enforcement of a lost, destroyed, or stolen instruments, provides:

> (A) A person not in possession of an instrument is entitled to enforce the instrument if all of the following apply:
>
> (1) The person was in possession of the instrument and entitled to enforce it when loss of possession occurred.
>
> (2) The loss of possession was not the result of a transfer by the person or a lawful seizure.
>
> (3) The person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

{¶36} Shirilla testified at deposition that the Gillelands retained the original note and were not to give it to Grimmer until after Grimmer provided documentation regarding Dean's Discount's sales figures. (Shirilla Depo. p. 14.) Although Shirilla conceded at deposition that

Grimmer eventually provided the sales figures, there is no evidence regarding the note's whereabouts. There is no evidence that appellees ever actually possessed the original note. It is possible the Gillelands or Shirilla gave Grimmer a photo copy of the original note. A lender does not have standing to enforce a note unless it can establish an interest in the note at the time the complaint is filed. *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶ 28. Therefore, because appellees were not entitled to enforce the note, the trial court entered judgment in appellee's favor on the note in error.

{¶37} Accordingly, the third assignment of error is sustained insofar as it relates to the judgment in favor of appellees on the cognovit promissory note.

III. Conclusion

{¶38} The trial court's judgment is affirmed in part and reversed in part. The trial court's judgment that appellees are entitled to damages for unpaid rent is affirmed, but its judgment that appellees are entitled to damages on the cognovit promissory note is reversed. The parol evidence rule excluded evidence of an oral agreement that was not included in the parties' written agreement and there was no evidence that Grimmer fraudulently induced Shirilla to be bound by the parties' agreement.

{¶39} Although Shirilla and the Gilleland's rent obligation was only $90,000, the trial court awarded damages in the amount of $109,002.39. The difference reflects Shirilla and the Gillelands' obligation under the parties' agreement to pay half the real estate taxes and costs for maintenance. Shirilla did not dispute the amount of these additional damages.

{¶40} Therefore, the trial court's judgment is affirmed in part, reversed in part, and remanded to the trial court to enter judgment in favor of Grimmer in the amount of $109,002.39 only.

It is ordered that appellees and appellant share costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

EILEEN T. GALLAGHER, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
ANITA LASTER MAYS, J., CONCUR