

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Mark Ebner,	:	
Plaintiff-Appellee,	:	
v.	:	No. 25AP-843
Sylvia Ebner et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees,	:	
[Lisa Rosen,	:	
Appellant].	:	
Mark Ebner,	:	
Plaintiff-Appellee,	:	
v.	:	No. 25AP-846
Sylvia Ebner et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees,	:	
[Cynthia Ebner,	:	
Appellant].	:	

D E C I S I O N

Rendered on October 20, 2026

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APPEAL from the Franklin County Court of Common Pleas

TUCKER, J.

{¶ 1} Cynthia Ebner and Lisa Rosen appeal from the trial court’s entry of final judgment following two partial summary judgment rulings in favor of Mark Ebner on his breach of contract claim against them. They contend the trial court erred in finding, as a matter of law, that Mark had purchased and was the sole owner of two family-operated real estate businesses, Ebner Properties Limited, LLC, and Ebner Development, LLC.¹ They also claim the trial court erred in finding, as a matter of law, that another entity, Tuttle Partners, Ltd., was included in Mark’s purchase.

{¶ 2} On cross-appeal, Mark challenges the trial court’s sua sponte dismissal of other claims he brought against Cynthia and Lisa. He also disputes the trial court’s finding that an appealable order resulted from his settlement and voluntary dismissal of all claims against his mother, Sylvia Ebner, and other parties and from the trial court’s dismissal, on mootness grounds, of his remaining claims against Cynthia and Lisa.

{¶ 3} For the reasons set forth below, we conclude that the trial court erred in entering summary judgment for Mark on his breach of contract claim against Cynthia and Lisa. The trial court also erred in entering summary judgment for Mark on a motion for declaratory judgment regarding the inclusion of Tuttle Partners in his purchase. The trial court further erred in finding Mark’s other claims against Cynthia and Lisa to be moot after resolving his breach of contract claim. Finally, we reject Mark’s argument that the judgment entry from which the parties have appealed is not an appealable order. The trial court’s judgment is reversed, and the case is remanded for further proceedings.

I. Background

{¶ 4} The present appeal and cross-appeal stem from a dispute over ownership of the two Ebner companies mentioned above, Ebner Properties and Ebner Development. Prior to the events at issue, the companies were owned by two trusts, with Sylvia serving as the sole trustee. Over the years, Sylvia’s children—Cynthia, Lisa, and Mark—worked for the two companies in different capacities. In early 2020, Sylvia and the children

1. For clarity, we refer to the parties by their first names.

negotiated a transaction involving her disposition of the companies. Their discussions culminated in signed agreements in March and April 2020.

{¶ 5} The written agreements, which included “Membership Interest Purchase Agreements,” “Assignments of Membership Interest,” and ancillary documents, were made effective retroactively to January 1, 2020. Under their terms, Sylvia gave Cynthia and Lisa each 25 percent of Ebner Properties and Ebner Development. Sylvia retained the remaining 50 percent of the two companies. Mark agreed to purchase Sylvia’s 50 percent interest for \$5,500,000 and to purchase Cynthia’s and Lisa’s respective 25 percent interests for \$2,750,000 each, resulting in Mark wholly owning the two companies. The three children signed the documents on March 24, 2020. The following day, Cynthia called Sylvia’s attorney for the two trusts, Doug Sladoje, and advised him that she, her sister, and her mother did not want to go forward with the transaction. Despite this representation, Mark presented the documents to Sylvia, who signed them on April 3, 2020.

{¶ 6} After signing the contract documents, the parties continued to discuss various proposals for Mark to purchase Ebner Properties and Ebner Development. Later in 2020, he negotiated to purchase the companies directly from Sylvia without involving Cynthia or Lisa. At one point, he tendered a \$25,000 payment, but the record is unclear whether it was in contemplation of a proposed direct purchase from Sylvia or in connection with the parties’ earlier signed agreements. In any event, the proposed direct purchase from Sylvia never occurred. Mark made no other payments for the companies, and Cynthia and Lisa never received any money for Mark’s purchase of their respective 25 percent interests.

{¶ 7} Following the signing of the documents by Sylvia and her children in March and April 2020, Sylvia continued to act as owner of the Ebner companies through the trusts. At one point, she paid delinquent taxes of more than \$400,000 for the companies. Mark and Cynthia continued managing operation of the companies, and business largely went on as it had before the document signings. In September 2022, Sylvia removed Mark from his management position based on allegations from Cynthia that he had engaged in improper self-dealing involving the companies’ assets. In September 2023, Sylvia terminated Mark’s employment entirely.

{¶ 8} In October 2023, Mark commenced the present lawsuit against Sylvia, Cynthia, Lisa, and Sylvia's two trusts. He amended his complaint twice, asserting breach of contract and other claims related to the Ebner companies. Among other things, he sought specific performance of the purchase agreements signed in March and April 2020. Sylvia, Cynthia, and Lisa responded with counterclaims and third-party complaints. In August 2024, Mark moved for summary judgment on his breach of contract claim. In her capacity as trustee of the two trusts, Sylvia filed a competing summary judgment motion on the breach of contract claim. In October 2024, the trial court entered summary judgment for Mark on that claim, finding him to be the sole owner of the Ebner companies based on the agreements signed in March and April 2020. It also found Mark entitled to specific performance of the parties' contract. The trial court later amended its decision and dismissed counterclaims against Mark involving the validity of the signed agreements.

{¶ 9} The trial court also resolved a dispute over whether Tuttle Partners had been included in Mark's purchase. Cynthia sought judgment on the pleadings on the issue, and Mark moved for summary judgment. The trial court sustained Mark's motion in June 2025. It held that Tuttle Partners was an asset of Ebner Development, which was one of the two companies Mark had purchased from Sylvia, Cynthia, and Lisa.

{¶ 10} In September 2025, Mark filed a notice of settlement resolving all causes of action between himself, Sylvia personally and as trustee of the two trusts, and all third-party defendants. Mark, Sylvia personally and as trustee, and the third-party defendants also filed a voluntary stipulation and joint dismissal with prejudice of all claims against one another. On September 19, 2025, the trial court approved the settlement and dismissal. It also struck as a nullity an indemnification claim brought by Mark against Cynthia and Lisa. Finally, it sua sponte found that its summary judgment decision enforcing the Membership Interest Purchase Agreements had rendered moot Mark's other claims against Cynthia and Lisa. Finding that all causes of action had been adjudicated, the trial court declared its September 19, 2025, judgment entry to be an appealable order.

{¶ 11} Cynthia and Lisa appealed from the trial court's September 19, 2025, judgment entry, advancing three assignments of error. Mark cross-appealed, also advancing three assignments of error. After the appeals were consolidated, Mark sought

dismissal based on the lack of an appealable order. On March 2, 2026, we overruled his motion, finding that the trial court's September 19, 2025, judgment entry had resolved all remaining claims. As a result, both appeals are now before us for disposition.

II. Analysis of Appeal by Cynthia and Lisa

{¶ 12} Cynthia's and Lisa's first assignment of error states:

The Trial Court Erred as a Matter of Law in Granting Appellee's MSJ.

{¶ 13} Cynthia and Lisa contend the trial court erred in entering summary judgment for Mark on his breach of contract claim for several reasons. First, they claim there was an unmet condition precedent to the existence of an enforceable contract. Second, they argue that Sylvia is legally blind, did not review the documents she signed, and lacked the capacity to contract. They also question whether she signed the documents purporting to bear her signature. Third, they maintain that Mark failed to perform under the written agreements because he never paid on a promissory note. Fourth, they allege mutual abandonment even if an enforceable contract existed. Fifth, they assert that laches barred Mark's breach of contract claim.

{¶ 14} Under Civ.R. 56(C), a movant is entitled to summary judgment upon demonstrating (1) that there is no genuine issue as to any material fact, (2) that the moving party is entitled to judgment as a matter of law, and (3) that reasonable minds can come to only one conclusion, and that conclusion is adverse to the non-moving party. *Garnett v. ViaQuest Residential Servs., LLC*, 2026-Ohio-3742, ¶ 11 (10th Dist.). "The burden of showing that no genuine issue exists as to any material fact falls upon the moving party in requesting a summary judgment." *Harless v. Willis Day Warehousing Co., Inc.*, 54 Ohio St.2d 64, 66 (1978). Once the moving party has satisfied its burden of showing that there is no genuine issue of material fact, the burden shifts to the non-moving party to set forth specific facts showing a genuine issue for trial. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). We review a summary judgment decision de novo. *Garnett* at ¶ 11. We apply "the same standard that the trial court should have used, and we examine all the Civ.R. 56 evidence, without deference to the trial court, to determine whether, as a matter of law, no genuine issues exist for trial." *McAlpine v. McCloud*, 2021-Ohio-2430, ¶ 13 (2d Dist.).

{¶ 15} With the foregoing standards in mind, we turn to Cynthia’s and Lisa’s first argument, which concerns an alleged condition precedent to the existence of an enforceable contract. Specifically, Cynthia and Lisa contend the parties had signed the written documents in March and April 2020 in reliance on a contemporaneous oral agreement that no enforceable contract would exist until a family meeting occurred where everyone reaffirmed satisfaction with the transaction and expressed a desire to go forward. In the proceedings below, Cynthia and Lisa supported this assertion with their own affidavits. They also relied on testimony and correspondence from attorney Sladoje about the signed documents not taking effect until after Sylvia personally met with Cynthia, Lisa, and Mark, which never occurred.

{¶ 16} In awarding Mark summary judgment on his breach of contract claim, the trial court found that the signed documents were legally enforceable contracts. Regarding the claimed oral condition precedent, the trial court noted that no such condition was found in the agreements. It held that the extrinsic evidence upon which Cynthia and Lisa relied was inadmissible under the parol evidence rule. It reasoned that they could not create a genuine issue of material fact by relying on extrinsic evidence of an oral agreement that contradicted the signed documents.

{¶ 17} Mark takes the same position on appeal, arguing that the documents signed in March and April 2020 were enforceable contracts. He notes that the signed Membership Interest Purchase Agreements contained an integration clause providing in part: “This document constitutes the entire agreement between the parties and supersedes all prior or contemporaneous discussions, representations or agreements relating to the subject matter.” Mark argues that evidence about a post-execution family meeting to “re-agree” was immaterial and inadmissible. He claims the integration clause embodied the parol evidence rule and precluded reliance on a contemporaneous oral agreement to hold the signed documents in abeyance until Sylvia and the children met and reaffirmed their desire to proceed.

{¶ 18} Cynthia and Lisa counter that they could rely on parol evidence to establish an oral condition precedent to the agreement’s existence and effectiveness. They assert that extrinsic evidence generally is admissible to prove an oral condition precedent to the existence of a contract. This is so, they argue, because an oral condition precedent to a

contract's existence does not modify the writing. Instead, it determines whether any contract ever came into effect.

{¶ 19} Under the circumstances here, we conclude that the trial court properly refused to consider extrinsic evidence of an oral agreement to hold a post-signature meeting before the executed documents became effective. This court addressed the use of extrinsic evidence to prove a condition precedent to a contract in *Beatley v. Knisley*, 2009-Ohio-2229 (10th Dist.). We recognized that “[c]ourts admit extrinsic evidence of a condition precedent because satisfaction of such a condition must occur before a contract comes into existence.” *Id.* at ¶ 16. “[P]arol evidence establishing a condition precedent does not modify the terms of a written contract but instead determines whether the contract ever became effective.” *Id.* Thus, the parol evidence rule does not bar extrinsic evidence negating “the very existence or validity of an alleged contract.” *Id.*

{¶ 20} Notably, however, using parol evidence to establish a condition precedent to the existence or effectiveness of a contract comes with a caveat. “Although the parol evidence rule does not preclude extrinsic evidence of a condition precedent, courts do not completely abandon the principles behind that rule when dealing with alleged oral conditions precedent.” *Beatley* at ¶ 19. “To preserve the integrity of the written contract, a party may not introduce extrinsic evidence of an oral condition precedent when the written contract addresses the subject matter of the condition precedent and the contractual terms are inconsistent with the condition precedent.” *Id.* “When the subject matter of a condition precedent is dealt with in the written instrument, in any form, the condition may not be shown by parol evidence to be different from the manner in which it is expressed in the writing.” *Id.*, quoting *Villa Realty Co. v. Allied Invest. Credit Co.*, 1977 WL 201215, *5 (8th Dist. July 14, 1977); see also 11 *Williston on Contracts*, § 33:20 (4th Ed. 2026) (“[P]roof that the parties agreed by parol that the writing would not become effective until some future day or the happening of some contingency is admissible if it is not inconsistent with the express terms of the writing.”).

{¶ 21} “A certain disparity is inevitable, of course, whenever a written promise is, by oral agreement of the parties, made conditional upon an event not expressed in the writing. Quite obviously, though, the parol evidence [rule] does not bar proof of every orally established condition precedent, but only of those which in a real sense contradict the terms of the written agreement.” *Morgan Stanley High Yield Securities, Inc. v. Seven*

Circle Gaming Corp., 269 F.Supp.2d 206, 217 (S.D.N.Y. 2003), quoting *Hicks v. Bush*, 180 N.E.2d 425, 427 (N.Y. 1962).

{¶ 22} Here the parties' signed documents directly addressed the subject matter of the alleged oral condition precedent. The first paragraph of the Membership Interest Purchase Agreement that each party signed stated: "This purchase agreement is made effective January 1, 2020." Elsewhere, the agreement stated that it "constitutes the legal, valid and binding obligation" of the parties "enforceable in accordance with its terms." Those terms, of course, included the introductory paragraph making the agreement effective January 1, 2020. Finally, the last paragraph of each Membership Interest Purchase Agreement stated: "In witness whereof, Seller and Buyer have executed this Agreement to be effective on the date set forth above." A companion document, the Assignment of Membership Interest, likewise stated: "In witness whereof, Assignor and Assignee have executed this instrument to be effective on January 1, 2020."

{¶ 23} On appeal, Cynthia and Lisa seek to invoke a contemporaneous oral agreement that the signed documents in fact "would not be effective or enforceable" until a later family meeting where everyone agreed to "move forward." Although no such meeting occurred, the executed documents were "binding," "enforceable," and "effective" on their face as of January 1, 2020. The claimed oral condition precedent undeniably conflicted with the written agreements. Therefore, the trial court correctly found that Cynthia and Lisa could not rely on it to avoid summary judgment on Mark's breach of contract claim.

{¶ 24} Cynthia and Lisa next dispute Sylvia's capacity to sign and understand the documents at issue. They stress that elderly Sylvia signed the documents without the assistance of counsel. They contend that she could not review and did not understand them. In response, Mark asserts that Sylvia read the documents using a magnifying glass. He notes that the record contains a video of her signing the documents. He also points out that she proclaimed "mazel tov" upon signing, suggesting that she knew what she was doing.

{¶ 25} Upon review, we conclude that the trial court properly rejected the challenge to Sylvia's capacity to contract and her understanding of the documents. Under R.C. 3109.01, adults "who are under no legal disability" can contract. The record contains

no evidence that Sylvia was under a legal disability, that she had been appointed a guardian, or that she had been declared incompetent.

{¶ 26} Perhaps more significantly, the settlement agreement and joint stipulation of dismissal filed by Mark and Sylvia effectively foreclosed Cynthia's and Lisa's current challenge to Sylvia's capacity and understanding. The trial court accepted the settlement and dismissal in which Sylvia acknowledged that her signed Membership Interest Purchase Agreement and the companion documents were "valid and enforceable." Given that Sylvia is not challenging her capacity to contract or claiming that she did not understand the agreements, Cynthia and Lisa cannot prevail on those arguments.

{¶ 27} Absent any evidence that Sylvia was under a legal disability or that she had been declared incompetent, the person best positioned to know whether Sylvia understood what she was doing was Sylvia. We note too that disaffirming or challenging a contract based on a lack of capacity is a personal right that typically may not be asserted by a third party other than a legal guardian. *See, e.g., 5 Williston on Contracts*, § 10:5; *Lemon v. Beeman*, 45 Ohio St. 505, 512 (1888). For the foregoing reasons, we see no genuine issue of material fact.

{¶ 28} Cynthia and Lisa also claim laches barred Mark's breach of contract claim. Laches involves "an omission to assert a right for an unreasonable and unexplained length of time under circumstances prejudicial to the adverse party." *State ex rel. Allied Sys. Holdings, Inc., v. Indus. Comm.*, 2012-Ohio-5855, ¶ 13 (10th Dist.). "To succeed in asserting the doctrine of laches, the proponent must establish: (1) an unreasonable delay or lapse of time in asserting a right; (2) the absence of an excuse for such delay; (3) knowledge, actual or constructive, of the injury or wrong; and (4) prejudice to the party asserting laches." *Id.* Without more, delay in asserting a right is insufficient. "Instead, the proponent must demonstrate that it has been materially prejudiced by the unreasonable and unexplained delay of the entity asserting the claim." *Id.*

{¶ 29} Material prejudice in the context of laches typically involves some detrimental change of position or disadvantage causally related to the delay. *See, e.g., Jacobs v. Hawbaker*, 1986 WL 7487, at *6 (10th Dist. June 30, 1986) (noting that "[d]elay which results in a material disadvantage to the adverse party . . . is the essence of laches" and finding the doctrine inapplicable absent evidence that "appellant changed his position to his detriment and prejudice as a result of the conduct of appellee over the lapse

of time”); *State ex rel. Pennington v. Bivens*, 2021-Ohio-3134, ¶ 29 (finding laches inapplicable where respondents provided no “concrete details as to how their preparation and defense of this case [had] been materially affected”). The inconvenience of having to meet an existing obligation later does not constitute material prejudice. *Smith v. Smith*, 168 Ohio St. 447, 457 (1959), *superseded by statute on other grounds*.

{¶ 30} Here Cynthia and Lisa contend they were prejudiced in two ways due to unreasonable delay by Mark in claiming a breach of contract. First, they incurred additional legal expenses while negotiating alternative transactions with him between April 2020 and the end of that year. Second, he failed to pay them as required under his promissory note. In our view, neither argument demonstrates a genuine issue of material fact regarding laches.

{¶ 31} Immediately after executing the Membership Interest Purchase Agreements and related documents in March and April 2020, Cynthia and Lisa orally repudiated them. During a hearing, Cynthia testified as follows about what occurred after she and Lisa signed the documents:

Q. Did you—what happened the day after you signed the documents?

A. The day after I got a phone call from my sister Lisa and she said, you know, this was—we shouldn’t have done this and she doesn’t want to do this, go forward with this. I’m, like, okay. And so I called mother, I said, is this something that you would like? And she goes, I have no interest in selling, Mark’s driving me crazy. I said, Mark’s driving me crazy, Mark’s driving Lisa crazy. And she goes, just forget the whole thing, I’m not doing it. I go, okay. So she goes, call Doug [Sladoje]. So I called Doug and I said, listen, we’re done, we’re not doing any of this, any kind of deal is off. And that was it.

{¶ 32} The record also contains affidavits from Cynthia and Lisa in which they recalled characterizing the signed “deal” as “dead” almost immediately after executing it. They recalled telling attorney Sladoje that “the deal was off.” In his own affidavit, Sladoje recalled being “notified that Cynthia did not approve the transaction and withdrew her consent.” In his own deposition, Mark testified that he was made aware of Cynthia’s rejection of the transaction. He stated that he nevertheless made a \$25,000 payment as a deposit on his obligation under the promissory note. When asked why he did not make any additional payments, he cited Cynthia’s and Lisa’s lack of “cooperation” and their

acknowledged statements about “not wanting to follow through with what they signed.” Mark explained that he kept talking to them informally, attempting to keep “lines of communication open.” When he realized they were having what he characterized as “buyer’s remorse,” he began “trading ideas” with them. Mark stated that he did not file a breach of contract lawsuit shortly after the agreements were signed because he wanted to “work this out” and keep “peace in the family.”

{¶ 33} For purposes of laches, Mark’s initial delay in failing to sue for breach of contract was reasonable as a matter of law. In our analysis above, we determined that the parties had executed valid Membership Interest Purchase Agreements, along with ancillary documents, in March and April 2020. Immediately thereafter, Cynthia and Lisa admittedly repudiated those agreements, declaring the deal “dead” and refusing to follow through. Regardless of his subjective motivation for briefly delaying, no rational trier of fact could find that Mark acted unreasonably in trying to discuss the issue with his sisters for several months rather than immediately filing a lawsuit. In reaching this conclusion, we note that the general statute of limitations for breach of a written contract was eight years when Cynthia and Lisa repudiated their agreements. *See* former R.C. 2305.06 (providing an eight-year statute of limitations before a 2021 amendment reduced it to six years). A laches defense may be raised before expiration of the statute of limitations, of course, but a delay of mere months after Mark’s cause of action accrued was reasonable as a matter of law. Therefore, Cynthia and Lisa cannot establish material prejudice for purposes of laches based on incurring additional expenses while negotiating with him between April 2020 and the end of that year. Material prejudice in the context of laches requires some detriment causally related to the other party’s *unreasonable* delay in asserting a right.

{¶ 34} The only other material prejudice alleged by Cynthia and Lisa involves Mark’s failure to pay them for their interest in the Ebner companies as required by his promissory note. We are unpersuaded, however, that mere non-payment under the terms of the note resulted in material prejudice for purposes of a laches defense. We see no detrimental change of position or material disadvantage to Cynthia and Lisa resulting from Mark’s non-payment. In a sense, of course, they have been harmed by not having any of the money that was owed to them. But if Mark ultimately proves a breach of contract claim and obtains specific performance, the terms of the promissory note

obligate him to pay Cynthia and Lisa the full amount owed with interest. The mere inconvenience of the parties consummating their transaction later than they otherwise might have does not support a laches defense. *Compare Thirty-Four Corp. v. Sixty-Seven Corp.*, 15 Ohio St. 3d 350, 353 (1984). (“We do not believe that the accumulation of interest and the absence of a timely demand for payment constitute material prejudice. The terms of the debt were established at the time of execution, and any delay in commencing a foreclosure action on the mortgage would not affect those terms.”).

{¶ 35} Cynthia and Lisa also argue that Mark was not entitled to summary judgment on his breach of contract claim because he failed to perform his own obligations. Specifically, they cite his failure to pay them as required under the promissory notes accompanying the Membership Interest Purchase Agreements. They additionally contend summary judgment was improper because the parties mutually abandoned their agreements after signing, as evidenced by Mark’s failure to pay and numerous other actions over the next few years.

{¶ 36} Upon review, we are unpersuaded that Mark’s failure to pay, alone, precluded summary judgment for breach of contract. It is true that a plaintiff seeking summary judgment generally must prove the existence and terms of a contract, the plaintiff’s performance, the defendant’s breach, and damages. *Lewis & Michael Moving & Storage, Inc. v. Stofcheck Ambulance Serv., Inc.*, 2006-Ohio-3810, ¶ 15 (10th Dist.). A defendant’s material breach of a contract, however, may suspend a plaintiff’s obligation to perform. *Id.* at ¶ 22, quoting Farnsworth, *Contracts*, § 8.18, at 525 (3rd Ed. 2004).

{¶ 37} Anticipatory repudiation of a contract can constitute a material breach. *Haman Ents., Inc. v. Sharper Impressions Painting Co.*, 2015-Ohio-4967, ¶ 24 (10th Dist.). “An anticipatory breach of contract by a promisor is a repudiation of the promisor’s contractual duty before the time fixed for performance has arrived.” *Metz v. Am. Elec. Power Co., Inc.*, 2007-Ohio-3520, ¶ 35 (10th Dist.), quoting *McDonald v. Bedford Datsun*, 59 Ohio App.3d 38, 40 (8th Dist. 1989). “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.” *Haman Ents.* at ¶ 23. “Anticipatory breach requires ‘an overt communication of an intention or an action which renders performance impossible or demonstrates a clear determination not to continue

with performance.” *JDS So Cal, Ltd. v. Ohio Dept. of Natural Resources*, 2018-Ohio-1159, ¶ 50 (10th Dist.), quoting *Willson v. Bd. of Trustees*, 1991 WL 274862, *15 (10th Dist. Dec. 24, 1991).

{¶ 38} “Under the doctrine of anticipatory repudiation, ‘if one party to a contract repudiates his duties thereunder prior to the time designated for performance and before he has received all of the consideration due him thereunder, such repudiation entitles the nonrepudiating party to claim damages for total breach.’” *Gatling Ohio, LLC v. Allegheny Energy Supply Co., LLC*, 2018-Ohio-3636, ¶ 42 (10th Dist.), quoting *Long Island RR. Co. v. Northville Industries Corp.*, 41 N.Y.2d 455, 463 (1977). Moreover, if “one party to a contract repudiates it or notifies the other party before a default that it will not perform, the nonrepudiating party may enforce the contract without first performing or offering to perform those provisions of the contract requiring performance in favor of the repudiating party. The repudiating party, on the other hand, cannot demand performance from the nonrepudiating party” 13 *Williston on Contracts*, § 39:37. “The rationale behind this rule, that a repudiation by one party excuses the other party from its duty to perform, has been said to be the prevention of economic waste; following a clear repudiation, the other party should not be required to perform the formal, economically wasteful, useless act of performing further. . . . To further comply with the contract requirements, when the other party has repudiated, would be a useless act, and the law does not require the doing of a useless act.” *Id.*; see also *Daniel E. Terreri & Sons, Inc. v. Mahoning Cty. Bd. of Commrs.*, 2003-Ohio-1227, ¶ 48 (7th Dist.) (quoting *Williston on Contracts* for the proposition that anticipatory repudiation suspends the other party’s obligation to perform).

{¶ 39} Having determined that Cynthia and Lisa cannot avoid enforcement of their written agreements by relying on an oral condition precedent, it follows that their post-signing rejection of the deal by declaring it “dead,” calling it “off,” and withdrawing their consent constituted an anticipatory repudiation as a matter of law. We see no other possible characterization. Therefore, before suing for breach, Mark had no obligation to pay on the promissory notes, which were incorporated by reference into the signed Membership Interest Purchase Agreements that Cynthia and Lisa had repudiated.

{¶ 40} Finally, we turn to Cynthia’s and Lisa’s abandonment argument. They contend the parties’ conduct between March and April 2020, when they signed the

contract documents, and October 2023, when Mark filed his lawsuit, demonstrated mutual abandonment and dissolution of the agreement. In support, they cite Mark's ongoing negotiation of new contract terms, his October 2020 written proposal to purchase the Ebner companies directly from Sylvia, his lack of payments on the promissory notes, his failure to hold himself out as owner of the Ebner companies, and Sylvia's continuing to act as the sole owner of the companies.

{¶ 41} In response, Mark asserts that the parties' unsuccessful additional negotiations did not constitute abandonment of their written agreements. He notes that abandonment, or rescission, must be mutual rather than unilateral. For its part, the trial court rejected the mutual abandonment argument by finding that the parol evidence rule "remove[d] from consideration" whether the parties' post-signing negotiations "were tantamount to cancellation of the contract." It also reasoned that efforts to renegotiate the transaction "did not ipso facto result in the prior agreements becoming void."

{¶ 42} Upon review, we find genuine issues of material fact as to whether the parties mutually abandoned their written agreements as evidenced by their post-signing words and actions. Mutual abandonment is also known as an agreement for rescission. *See* Restatement of the Law 2d, Contracts, § 283 (1981); *Fornshell v. Tiller*, 1994 WL 12301, *2 (12th Dist. Jan. 18, 1994) (recognizing that "[r]escission includes abandonment or other change by mutual consent"). "The primary purpose of rescission is to restore the status quo and return the parties to their respective positions had the contract not been formed." *Haman Ents.*, 2015-Ohio-4967, at ¶ 19 (10th Dist.). "Rescission may occur 'even though one or both parties have partly performed their duties or one or both have a claim for damages for partial breach,' and a party's assent to rescission may be implied from the party's conduct." *Id.*, quoting Restatement, § 283; *see also Coburn v. Auto-Owners Ins. Co.*, 2010-Ohio-3327, ¶ 22 (10th Dist.) ("A contract will be treated as abandoned when one party acquiesces in the acts of the other party that are inconsistent with the existence of the contract. Mutual abandonment thus can be inferred from the conduct of the parties and the surrounding circumstances; it need not be express."). "A contract may be terminated by the mutual consent and consideration of the parties at any time." *Reiter Dairy, Inc. v. Ohio Dept. of Health*, 2002-Ohio-2402, ¶ 15 (10th Dist.). A mutual oral agreement to rescind a written contract and relieve all parties from their obligations may constitute sufficient consideration. *Id.* When mutual abandonment is established,

“neither party may sue for breach of the contract, nor compel specific performance.” *Hunter v. BPS Guard Servs., Inc.*, 100 Ohio App. 3d 532, 541 (10th Dist. 1995). Mutual abandonment involves a question of fact for the trier of fact to resolve. *Haman Ents.* at ¶ 19.

{¶ 43} The Restatement (Second) of Contracts provides a pertinent explanation of mutual abandonment or rescission by agreement:

Sometimes the parties to a contract that is at least partly executory on each side make an agreement under which each party agrees to discharge all of the other party's duties of performance. Such an agreement is called an “agreement of rescission” in this Restatement. Consideration is provided by each party's discharge of the duties of the other. This is so even though one or both parties have partly performed their duties or one or both have a claim for damages for partial breach. . . . The agreement need not be expressed in words. Other conduct may show an intent by both parties to abandon their contract. If one party, even wrongfully, expresses a wish or an intention to cease performance and the other party fails to object, circumstances may justify the inference that there has been an agreement of rescission. Sometimes mere inaction on both sides, such as the failure to take any steps looking toward performance or enforcement, may indicate an intent to abandon the contract.

Restatement, § 283.

{¶ 44} When construed most strongly in favor of Cynthia and Lisa, the record contains ample evidence from which a trier of fact reasonably might conclude that the parties mutually abandoned their Membership Interest Purchase Agreements and related documents. Even if Cynthia and Lisa wrongfully expressed an intention not to perform, thereby providing Mark with a breach of contract claim, the parties' failure to take any steps toward performance or enforcement supports an inference that they mutually agreed to rescind their agreement. In fact, their mutual conduct for more than three years after signing the Membership Interest Purchase Agreements was at odds with the continued existence of a binding agreement.

{¶ 45} After Cynthia and Lisa repudiated their agreements, the parties immediately continued negotiating the sale of the Ebner companies. In October 2020, Mark proposed purchasing the companies directly from Sylvia. He executed documents to carry out that transaction and proffered a \$25,000 down payment. Although Mark

claims this payment was made in connection with his earlier deal involving Sylvia, Cynthia, and Lisa, the Membership Interest Purchase Agreements and related documents did not require an upfront \$25,000 payment, whereas a promissory note drafted as part of Mark's proposed October 2020 transaction with his mother did reference an initial \$25,000 payment. A trier of fact reasonably might question why Mark was trying to buy the Ebner companies directly from Sylvia if he already had purchased them from Sylvia, Cynthia, and Lisa collectively. *Compare Honda v. Reed*, 156 Cal.App.2d 536, 539 (1958) ("Abandonment of a contract may be implied from the acts of the parties in negotiating for a new and different contract concerning the same property or subject matter.").

{¶ 46} In the months and years that followed, Sylvia, Cynthia, and Lisa did not refer to Mark as owner, and he did not hold himself out as owner. To the contrary, Sylvia continued to act as owner for years, paying taxes on behalf of the companies, providing personal guarantees, and taking other actions. In 2022, Sylvia removed Mark from his position as co-manager of the companies and made Cynthia the sole manager. In September 2023, Sylvia terminated Mark as an employee and removed him from any involvement with the company. Not until October 2023 did Mark file his lawsuit claiming ownership of the companies.

{¶ 47} In our view, the record supports a reasonable inference that the parties mutually abandoned their executed Membership Interest Agreements and the ancillary documents prior to Mark's lawsuit. Construing the evidence in favor of Cynthia and Lisa, a trier of fact easily could conclude that the parties mutually rescinded their agreement after Cynthia and Lisa repudiated it by expressing an intention not to perform.

{¶ 48} Contrary to the trial court's ruling, the parole evidence rule does not preclude a finding of abandonment. The rule generally prohibits contradicting or altering a written agreement with evidence of prior or contemporaneous oral agreements. *Wooden v. Marysville Animal Care Ctr.*, 2026-Ohio-1570, ¶ 36 (10th Dist.). It does not apply to subsequent oral discussions or agreements involving a written contract. Nor does it preclude consideration of whether a written agreement has been altered by subsequent conduct. *Tri State Asphalt Corp. v. Ohio Dept. of Transp.*, 1995 WL 222160, *11 (10th Dist. Apr. 11, 1995); *Pingue v. Durante*, 1996 WL 239642, at *3 (10th Dist. May 9, 1996).

{¶ 49} Although the parties' Membership Interest Purchase Agreements contained an integration clause purporting to prohibit oral "amendments, modifications or additions," the clause said nothing about subsequent mutual abandonment. *Compare Harris v. IES Assocs., Inc.*, 69 P.3d 297, 309, fn. 14 (Utah.App. 2003) ("IES claims that because the contract required modifications to be written and to be executed by the parties, the parties could not abandon the contract orally and by their actions. We disagree. The contract required only modifications to be written."); *Honda*, 156 Cal.App.2d at 539-540 ("Abandonment is not an 'alteration' or modification of a contract. Abandonment of a contract terminates it and entirely abrogates so much of it as is unperformed.").

{¶ 50} We note too that even no-oral-modification clauses in written contracts at times may be waived by subsequent words or deeds. "[P]arties to a contract possess, and never cease to possess, the freedom to contract even after the contract has been executed and what the parties have consented to do, they can later consent to abandon." *Fields Excavating, Inc. v. McWane, Inc.*, 2009-Ohio-5925, ¶ 16 (12th Dist.). "If strictly enforced, a no-oral-modification clause would deny effect to every oral modification—even those that are fully voluntary, freely entered, and entirely consensual—simply because there was no writing." *Id.* "[I]n their agreement, parties can say they want the modifications in writing, but by the same rationale they can also, after the signing, decide to change how they deal with each other." *Id.* "Regardless of the clause, it is the parties' subsequent agreement that has legal effect, and if the parties go on to make an oral modification after they agreed on a no-oral-modification clause, then their subsequent agreement must be taken as itself modifying, or at least waiving, the no-oral-modification clause." *Id.* at ¶ 17. "A no-oral-modification clause suggests that parties can, through the right words, invoke a power beyond their own: if such clauses are rigidly enforced, then a party could simply insert the clause into an agreement and would be magically protected in the future no matter what that party said or did." *Id.*; see also *Ohio Valley Mall Co. v. Dreamz Come True, LLC*, 2025-Ohio-888, ¶ 24-25 (11th Dist.) (recognizing that a no-oral-modification clause in a written contract itself may be waived orally if the opposing party treats the waiver as operative). Finally, as noted above, the doctrine of mutual abandonment or rescission recognizes that a written contract may be dissolved by the parties' subsequent words or actions.

{¶ 51} Having found genuine issues of material fact as to whether the parties mutually abandoned the Membership Interest Purchase Agreements and related documents, we conclude that the trial court erred in entering summary judgment for Mark on his breach of contract claim against Cynthia and Lisa. Accordingly, the first assignment of error is sustained.

{¶ 52} Cynthia's and Lisa's second and third assignments of error challenge the trial court's determination that Mark's purchase of the two Ebner companies included ownership of Tuttle Partners. They state:

The Trial Court Erred as a Matter of Law in Denying Appellant's Motion for Judgment on the Pleadings Because it Lacked Jurisdiction to Decide Matters Related to Tuttle Partners, Ltd., Whose Inclusion in the Lawsuit Was Mandated Pursuant to R.C. 2721.12.

The Trial Court Lacked Jurisdiction to Decide Matters Related to Tuttle Partners, Ltd. because a Motion for Declaratory Judgment is a Procedural Nullity Insufficient for the Court to Exercise Jurisdiction.

{¶ 53} Cynthia and Lisa contend the trial court lacked jurisdiction to determine whether Tuttle Partners was included in Mark's purchase for two reasons: (1) Tuttle Partners was not a party to the lawsuit and (2) Mark's motion for declaratory judgment addressing the partnership's inclusion was a nullity.

{¶ 54} After the trial court's partial summary judgment finding Mark to be sole owner of the two Ebner companies, a dispute arose over whether Tuttle Partners was included in the transaction. Mark responded by filing a "motion for declaratory judgment" to resolve the issue. He then sought summary judgment on his declaratory judgment motion, and Cynthia, acting alone, moved for judgment on the pleadings. The trial court sustained Mark's motion, finding no genuine issue of material fact as to whether Tuttle Partners had been included in the Membership Interest Purchase Agreement transactions. The trial court concluded, as a matter of law, that Tuttle Partners "was included in the assets of Ebner Development, LLC," which Mark had purchased.

{¶ 55} On appeal, Cynthia and Lisa contend the trial court lacked jurisdiction over Tuttle Partners, a non-party to the lawsuit. They also assert that Mark's motion for declaratory judgment was a nullity. In response, Mark argues that Tuttle Partners was not required to be a party to the lawsuit to determine whether it was included in his purchase.

He does not directly address Cynthia's and Lisa's alternative argument about his motion for declaratory judgment being a nullity.

{¶ 56} Turning first to the third assignment of error, which addresses the viability of Mark's motion for declaratory judgment, this court has recognized that a request for "declaratory judgment can only be brought as a claim, not as a motion." *Turner v. Univ. of Cincinnati*, 2020-Ohio-248, ¶ 13 (10th Dist.). A trial court cannot adjudicate a motion for declaratory judgment because it is a nullity. *In re J.D.F.*, 2008-Ohio-2793, ¶ 9 (10th Dist.). Such a motion "is procedurally incorrect and inadequate to invoke the jurisdiction of the court pursuant to R.C. Chapter 2721." *Id.* "The declaratory judgment statutes contemplate a distinct proceeding that a party generally initiates by filing a complaint, not by including the declaratory judgment request in a motion filed in the middle of already existing litigation." *Id.* "Because neither the Civil Rules nor R.C. Chapter 2721 provide for it," a trial court's decision sustaining a motion for declaratory judgment is reversible error. *Id.*; see also *State ex rel. Evans v. Mohr*, 2018-Ohio-935, ¶ 1 (10th Dist.) (recognizing "that declaratory judgment is a remedy sought by pleading it as a cause of action" and that "[i]t is not inherently subject to relief by motion").

{¶ 57} Here Mark's second amended complaint contained no cause of action seeking declaratory judgment regarding the inclusion of Tuttle Partners in his purchase. The only request for declaratory judgment in the second amended complaint was count eight, which sought a declaration regarding the validity and enforceability of the Membership Interest Purchase Agreements and Assignments of Membership Interest. Therefore, we are compelled to conclude that Mark's motion for declaratory judgment regarding ownership of Tuttle Partners was a nullity that failed to invoke the trial court's jurisdiction to resolve the issue. As a result, we sustain Cynthia's and Lisa's third assignment of error.

{¶ 58} Finally, we see no error in the trial court's failure to sustain Cynthia's separate motion for judgment on the pleadings regarding Mark's ownership of Tuttle Partners. Considering that the relevant pleading, Mark's second amended complaint, lacked a claim for declaratory judgment addressing his ownership of Tuttle Partners, there simply was no relevant pleading on which to enter judgment in Cynthia's favor. Without a proper claim by Mark involving Tuttle Partners, we have no occasion to decide whether Cynthia might have been entitled to judgment on the pleadings in the

partnership's absence if Mark had filed a claim against it. Accordingly, the second assignment of error is overruled.

III. Analysis of Mark's Cross-Appeal

{¶ 59} Mark advances three assignments of error in his cross-appeal. The first two state:

The trial court erred as a matter of law in failing to set a hearing on, and dismissing Appellee/Cross-Appellant's damages claims as set forth in his Second Amended Complaint filed with the court on March 18, 2024.

The trial court erred as a matter of law in declaring additional claims to be moot based upon the discrete ruling on summary judgment.

{¶ 60} In his first two assignments of error, Mark challenges the trial court's sua sponte dismissal of all other causes of action in his second amended complaint after entering summary judgment for him on the breach of contract claim in count one.

{¶ 61} Mark's first assignment of error asserts that the trial court erroneously failed to set a damages hearing for, and improperly dismissed, the other claims. Regarding the need for a damages hearing, he cites an October 23, 2024, motion he filed in the trial court. He also cites his follow-up July 1, 2025, request for a status conference to set a date for the damages hearing. Mark's motion sought "an oral or non-oral hearing" to establish damages related to the breach of contract claim on which the trial court had awarded him summary judgment. The motion cited an indemnification clause in the Membership Interest Purchase Agreements. The motion provided no basis for a damages hearing related to Mark's other causes of action, which then remained adjudicated. Therefore, the trial court did not err in failing to set a damages hearing on those other causes of action.

{¶ 62} The remainder of Mark's first assignment of error challenges the trial court's sua sponte dismissal of those other claims, which primarily alleged intentional torts. He reasons that the trial court's entry of summary judgment on his breach of contract claim did not "nullify" his other causes of action seeking damages for unrelated wrongful acts following the breach of contract. Likewise, Mark's second assignment of error challenges the trial court's sua sponte dismissal of those additional claims based on mootness.

{¶ 63} Upon review, we agree that the trial court erred in dismissing Mark's other causes of action after entering summary judgment on his breach of contract claim. The trial court reasoned that its summary judgment decision necessarily resolved all of his other claims. Given our determination above that Mark was not entitled to summary judgment on his breach of contract claim, it follows that the trial court's sole rationale for finding mootness no longer exists. Accordingly, we sustain Mark's first and second assignments of error insofar as they challenge the trial court's dismissal of his other causes of action.

{¶ 64} Mark's third assignment of error states:

The trial court erred as a matter of law in holding that a decision amounting to a final appealable order had been rendered when multiple claims of Appellee/Cross-Appellant were pending and not adjudicated, including damages on all claims.

{¶ 65} Mark argues that the trial court's September 19, 2025, judgment entry from which both parties have appealed was not a final, appealable order. Although the judgment purported to dispose of all remaining claims in the case, Mark asserts that the trial court's dismissal of his non-breach of contract claims was erroneous. He notes too that the trial court's judgment lacked Civ.R. 54(B) certification. Under these circumstances, he challenges the existence of an appealable order.

{¶ 66} Upon review, we find Mark's argument to be unpersuasive. He previously moved to dismiss the consolidated appeals for lack of an appealable order. In a March 2, 2026, judgment entry, we overruled the motion. We noted that the trial court's judgment had adjudicated all pending claims and left nothing to be decided. We also specifically addressed Mark's mootness argument, reasoning: "Although Mark complains that the trial court should have recognized his 'moot' claims as factually distinct from the breach of contract claim and capable of further adjudication, the fact that the trial court did not agree does not create a jurisdictional issue for this court. Mark may assign the trial court's dismissal of his claims as error on appeal."

{¶ 67} Even if erroneous, the trial court's September 19, 2025, judgment entry disposed of the entire case, leaving nothing to be decided. Therefore, it was an appealable order. The third assignment of error is overruled.

IV. Conclusion

{¶ 68} Having sustained Cynthia Ebner's and Lisa Rosen's first and third assignments of error, we reverse the trial court's entry of summary judgment for Mark Ebner on his breach of contract claim and on his motion for declaratory judgment regarding the inclusion of Tuttle Partners, Ltd., in his purchase.

{¶ 69} Having sustained the first and second assignments of error presented by Mark Ebner on cross-appeal, we reverse the trial court's dismissal, on mootness grounds, of his other causes of action.

{¶ 70} The case is remanded to the trial court for further proceedings.

*Affirmed in part, reversed in part;
cause remanded.*

EPLEY and HUFFMAN, JJ., concur.

TUCKER, J. EPLEY, J. and HUFFMAN, J., of the Second Appellate District, sitting by
assignment in the Tenth Appellate District.