

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STOP 65, LLC

C.A. No. 25CA012256

Appellee

v.

BEACH PARK RAILWAY, LLC

APPEAL FROM JUDGMENT
ENTERED IN THE
AVON LAKE MUNICIPAL COURT
COUNTY OF LORAIN, OHIO
CASE No. 2400273

Appellant

DECISION AND JOURNAL ENTRY

Dated: October 5, 2026

ROBB CAROL ANN, Judge.

{¶1} Defendant-Appellant Beach Park Railway, LLC appeals the decision of the Avon Lake Municipal Court in a forcible entry and detainer action filed by Plaintiff-Appellee Stop 65, LLC, which ended with a summary judgment for Appellee upon finding a breach of lease for subleasing without written consent. Setting forth six assignments, Appellant first alleges the court’s summary judgment was erroneous because the person who granted access to the premises was a mere licensee. Alternatively, Appellant contends the consent requirement was waived and Appellee was estopped from enforcing it. Appellant also claims entitlement to summary judgment because Appellee served a 30-day notice of default with a request to cure and the 3-day statutory notice but did not serve an additional 30-day termination notice.

{¶2} Regarding an earlier judgment, Appellant argues the court erred in dismissing the breach of lease claims in the fifth and sixth counts in the counterclaim (on quiet enjoyment and repairs). From this, Appellant concludes the municipal court should have certified the case to the common pleas court due to the prayer for damages exceeding the monetary jurisdiction of the municipal court. For the following reasons, the trial court’s judgment is affirmed.

STATEMENT OF THE CASE

{¶3} On May 3, 2024, Appellee filed a complaint in forcible entry and detainer against Appellant regarding the premises at 33501 (Suite A) Lake Rd. Avon Lake, Ohio, which was subject

to a lease (the Facility Lease). The Ohio Facilities Commission was originally named as a party in case they claimed a possessory interest in the premises due to a 2019 “Non-Disturbance and Estoppel Agreement” (NDE) between the Commission, Appellant, and a former property owner (including successors) due to grant money Appellant received to operate a museum.

{¶4} The complaint stated a contractual 30-day notice of default was served on Appellant on March 22, 2024, providing time to cure the breaches of unauthorized subleasing and storing items beyond the premises leased. Notice was also served on the Commission as required by the NDE. A letter attached to the complaint showed Appellant responded to the notice by claiming the default was cured due to the termination of any subleases with two named entities and the removal of various items from the premises. The complaint, however, alleged additional subtenants and improperly stored items remained, which prompted the service of a statutory 3-day notice to vacate on April 29, 2024.

{¶5} In response, Appellant’s answer with counterclaim (amended) contained six counts with the following allegations: (1) retaliatory eviction; (2) failure to maintain the premises in violation of R.C. 5321.04 and in breach of the Facility Lease with a request for rent abatement; (3) tortious interference with a contract (the Commission’s NDE); (4) tortious interference with a business relationship (the museum Appellant operated); (5) preventing quiet enjoyment in breach of the lease; and (6) breach of lease for failing to maintain the premises.

{¶6} Upon the trial court’s order, briefing was conducted on the issue of whether the municipal court lacked jurisdiction due to the monetary demand in the counterclaim. (6/24/24 J.E.). Appellee opposed certification of the case to the common pleas court. Relatedly, Appellee filed a motion to dismiss the counterclaim for failure to state a claim upon which relief can be granted under Civ.R. 12(B)(6), with arguments on each count. After Appellant’s response, the municipal court dismissed Appellant’s counterclaim. As a result, the court said Appellee’s opposition to certification (and a bifurcation motion) was moot and thus denied. (7/29/24 J.E.).

{¶7} Appellant filed an immediate appeal, which was dismissed on Appellee’s motion for lack of jurisdiction, as the municipal court’s judgment did not resolve all claims against all parties and lacked Civ.R. 54(B) no just reason for delay language. *Stop 65, LLC v. Beach Park Railway, LLC*, 9th Dist. No. 24 CA 12157 (10/2/24 J.E.). Subsequently, the municipal court denied Appellant’s request to add Civ.R. 54(B) language. (10/30/24 J.E.).

{¶8} On January 15, 2025, the Commission was dismissed as a party by stipulation between Appellant and the Commission. After depositions were taken and discovery was concluded, the parties filed trial briefs and proposed jury instructions.

{¶9} Joint stipulations of fact reviewed the following items: the contractual notice of default; Appellant's response claiming cure; the statutory 3-day eviction notice; the history of property ownership and leases; and Appellee's prior action evicting TBP. *See Stop 65 v. TBP Avon Lake, LLC*, Lorain C.P. No. 22 CV 206454 (Mar. 14, 2024). According to the parties, Appellee did not become Appellant's direct lessor until TBP's tenancy was terminated, before which Appellant was a subtenant obligated to pay \$583 a month in rent to TBP. *See* Pl. Mot. (6/26/24); *accord* Def. Trial Br. (2/14/25) (when TBP sold the property to Appellee's predecessor, TSH Commercial Holdings, LLC, TBP leased the premises back from TSH for \$100 a month, allowing TBP to continue to collect rent from Appellant).

{¶10} Just prior to the scheduled jury trial on Appellee's claim, the municipal court continued the trial and granted a joint request to move for summary judgment. (3/13/25 J.E.). The parties then filed opposing summary judgment motions. In pertinent part, Appellee's motion for summary judgment said Appellant breached the lease by subleasing to John Bryan. In response, Appellant argued Bryan was a mere licensee and the clause on consent was waived. In addition, Appellant's summary judgment motion posited that after the contractual 30-day notice of default, a specific notice of termination was required rather than a mere statutory 3-day notice to vacate.

{¶11} The court granted summary judgment in favor of Appellee. The court rejected the arguments about a dedicated notice of termination and found no genuine issue of material fact that Appellant created a subtenancy with Bryan without proper consent, which remained uncured after proper notice. Finding this breach entitled Appellee to lease termination, the court specifically declined to address Appellee's additional allegations of breach (regarding Pace Foundation as an additional unauthorized subtenant and items stored outside the leased premises). (4/7/25 J.E.).¹ A writ of restitution of the premises was issued. (4/10/25 J.E.); (4/10/25 Writ); (4/11/25 J.E.).

{¶12} Appellant filed a timely notice of appeal. The municipal court issued a stay pending appeal on the posting of bond. (4/17/25 J.E.). Appellant sets forth six assignments of errors with

¹ As Appellant points out, Appellee's additional allegations of breach that were unaddressed by the trial court are not before this court on appeal. *Lopez v. Hulburt*, 2018-Ohio-2499, ¶ 10 (9th Dist.) (it is established that alternative summary judgment grounds not passed upon by the trial court will not be decided on appeal as we are a court of review).

the first three challenging the summary judgment and the last three challenging the dismissal of two counts in the counterclaim and the effect thereof.

SUMMARY JUDGMENT STANDARD

{¶13} Summary judgment can be granted when no genuine issue of material fact remains and reasonable minds construing the evidence in the light most favorable to the non-movant can only conclude the movant is entitled to judgment as a matter of law. Civ.R. 56(C) (with the evidence being pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact). A summary judgment movant has the initial burden of stating why the movant is entitled to judgment as a matter of law and showing the absence of a genuine issue of material fact. *Byrd v. Smith*, 2006-Ohio-3455, ¶ 10, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 294 (1996).

{¶14} As explained by the Supreme Court, the non-moving party then has a reciprocal burden. *Id.* The non-movant's response, by affidavit or as otherwise provided in Civ.R. 56, must set forth specific facts showing there is a genuine issue for trial. Civ.R. 56(E). The non-movant may not rest upon mere allegations or denials in the pleadings. *Id.*

{¶15} Although the court is to consider the evidence in the light most favorable to the non-movant, summary judgment is not to be discouraged where the non-movant fails to respond with evidence supporting the essentials of his argument. *Leibreich v. A.J. Refrigeration, Inc.*, 67 Ohio St.3d 266, 269 (1993). Moreover, the material issues of each case depend on the substantive law, and only outcome-determinative and properly disputed facts will preclude summary judgment. *Byrd* at ¶ 12.

{¶16} We consider the propriety of granting summary judgment de novo. *Comer v. Risko*, 2005-Ohio-4559, ¶ 8 (where the Ohio Supreme Court reversed the appellate court and reinstated the trial court's grant of summary judgment). The construction of a written contract is also a matter of law reviewed de novo. *Long Beach Assn., Inc. v. Jones*, 82 Ohio St.3d 574, 576 (1998). Plain and unambiguous contract terms are applied as written. *Id.* at 577.

SUBTENANT OR LICENSEE

{¶17} In the first assignment of error, Appellant alleges:

“The Trial Court Erred in Granting Stop 65 Summary Judgment on its Complaint for Forcible Entry and Detainer.”

{¶18} Appellant contractually “agreed this lease shall not be assigned, transferred, or the premises or any part thereof, sublet or under-leased or under-rented in its entirety or in part without the prior written consent of Lessor . . .” Facility Lease, Sec. IX (any attempt at this prohibited conduct without written consent “shall be wholly null and void”). Written notification of a desire to sublet must be served by certified mail, after which the lessor shall have 10 days to make a decision. Consent shall not be unreasonably withheld; however, the requested subletting usage must meet acceptable community standards and restrictions in other leases in the shopping center with the lessor able to impose conditions on the use. *Id.*

{¶19} In finding Appellant breached this clause, the trial court concluded John Bryan was Appellant’s subtenant. Urging a limitation clause against subletting should be strictly construed against the lessor, Appellant says the clause does not prohibit use by a licensee. We note Appellee has not attempted to argue the additional words under-rent or under-lease cover more than a typical anti-subletting clause or otherwise argue that the anti-sublease clause would prohibit a license arrangement. Appellant quotes, “The rule is well settled that an agreement by a lessee with a third person for the permissive use by the latter of the leased premises does not constitute a violation of covenants in a lease against assigning or subletting, but merely amounts to a license to use the property.” *Fairbanks v. Power Oil Co. of Ohio*, 81 Ohio App. 116, 123 (3d Dist. 1945) (lessee’s oral agreement with a third party allowing “trial” operation of the facilities on part of land was not a violation of a clause against sublease or assignment). Appellant concludes there was a genuine issue of material fact as to whether Bryan was a subtenant or a mere licensee.

{¶20} In setting forth the law distinguishing a sublease from a license, the parties agree the following definition is applicable:

A license to do an act upon land involves the exclusive occupation of the land by the licensee so far as is necessary to do the act and no further, whereas a lease gives the right of possession of the land and the exclusive occupation of it for all purposes not prohibited by its terms.

DiRenzo v. Cavalier, 165 Ohio St. 386 (1956), paragraph one of the syllabus.

{¶21} In *DiRenzo*, the Court addressed a written agreement wherein a long-time lessee rented out a ballroom (plus the lessee’s guard and attendants) to a host of a wedding reception for under 5 hours. *Id.* When a guest sued the lessee for personal injury after a piece of ceiling fell on him, the trial court directed verdict for the lessee upon finding the agreement with the host was a

sublease rather than a license. After noting the entire contents of the writing are used to evaluate intent, the Supreme Court concluded, “there is a presumption of law that the ballroom is being used under a license and not a lease.” *Id.* at paragraphs two and three of the syllabus.

{¶22} Appellee points out the facts and type of case are quite different from the present case. *Id.* at 389 (in the personal injury suit, the Court found the reception host had no knowledge of or reasonable opportunity to guard against any hazard). Moreover, in finding the circumstances consistent with a license, the Court emphasized the extremely short duration and pointed out “occupation was exclusive only so far as necessary to hold a wedding reception and went no further.” *Id.* Additionally, the *DiRenzo* Court maintained prior law defining a tenant as one who occupies someone else’s premises with assent and thus has an interest in the land and estate no matter how small (including a tenancy at will). *Id.* at 385; *see also Schloss v. Sachs*, 63 Ohio Misc.2d 457, 462-463 (1993) (in finding a kiosk agreement was a lease as a matter of law rather than a license, the court described the essential aspects of a lease as “(1) a defined space or place, however small, which the lessor occupies, (2) to the exclusion of others, and (3) that the use of the space or place is not merely incidental to the performance of the contract”).

{¶23} Appellant says Bryan was a lessee, insisting no evidence showed he had rights to occupy the premises to the exclusion of others. *See Jefferson Med. Assoc., L.L.C. v. Unemp. Comp. Rev. Comm.*, 2006-Ohio-2310, ¶ 19 (10th Dist.) (stating a lease of an interest in land must give the right to exclusive *possession* of a certain quantity of land for a term, which involves the right to physical control at the exclusion of others). We point out the cited Supreme Court case holds that both a license and a lease have the feature of exclusive occupation. *DiRenzo*, 165 Ohio St. at 389 (“A license to do an act upon land involves the exclusive occupation of the land by the licensee so far as is necessary to do the act and no further, whereas a lease gives the right of possession of the land and the exclusive occupation of it for all purposes not prohibited by its terms.”).

{¶24} Appellee says the trial court correctly ruled a reasonable person could only conclude Bryan had the right to exclude others from the portion of the leased premises he was possessing and occupying and Bryan was using the premises for all purposes not for only limited necessary purposes. Appellee notes Bryan would qualify as Appellant’s “tenant” under the forcible entry and detainer statute. *See* R.C. 1923.01(C)(1) (“a person who is entitled under a rental agreement to the use or occupancy of premises”); (C)(2) (including a sublessor in the definition of landlord), (C)(5) (defining rental agreement as “any agreement or lease, written or

oral, that establishes or modifies the terms, conditions, rules, or other provisions concerning the use or occupancy of premises by one of the parties to the agreement or lease”).

{¶25} We review the summary judgment evidence. In his deposition testimony, Appellee’s representative described the museum as never truly active after its establishment with state funds. He originally believed Appellant would be transferring the museum to the local historical society. After the TBP case ended in March 2024, he inspected the premises. He was concerned Appellant was using only a quarter of the space for the museum with the remainder being occupied by other people or entities.

{¶26} Appellee’s representative testified to personally observing evidence that Bryan was running his motorcycle repair shop (Northcoast Motorcycles) out of the warehouse and storing a mass amount of parts and items, including flammable items. Appellant’s representative told him the motorcycle repair business had no relation to the museum. Photographs assisted in visualizing the extent of Bryan’s possession and occupation, including the dedicated storage for his parts inventory and a workshop with a motorcycle on a drive-up ramp.

{¶27} Appellee’s representative also saw evidence Bryan was living in the space, pointing to his viewing of a bed, washer, dryer, oven, cat (with litter box), and refrigerator stocked with food including produce. And, Bryan received his personal mail at the premises. (N.G. Depo. 13, 36-39, 47-48, 56-59, 63, 103-105, 112-113); (N.G. Aff.) (incorporating photographs). After receiving complaints about people and vehicles being present at the shopping center all night, Appellee obtained testimony that Bryan himself declared in the summer of 2024 that he was living at the premises. (S.B. Aff.) (after the supervisor at the neighboring post office asked him about a car parked overnight in the lot).

{¶28} According to the January 2025 deposition of Appellant’s board member, Bryan’s arrangement began around September 2023. In the spring of 2024, Bryan’s belongings, workspace, and living space were viewed and photographed by Appellee’s representative while inspecting the premises. According to Bryan’s March 2025 affidavit prepared at the time of the summary judgment proceedings, he had not completed removing his property from the premises. The evidence of a living arrangement was not specifically disputed by Appellant.

{¶29} It is also not disputed a sublease can include a portion of a leased premises. *See also* Facility Lease, Sec. IX (agreeing “the premises or any part thereof” shall not be “sublet . . . in its entirety or in part”). Moreover, Appellant’s board member admitted Bryan was permitted to

use a portion of the premises to store personal items, tools, and business equipment (including motorcycles under repair and parts); Bryan installed shelving to facilitate this storage. A package addressed to the motorcycle business at the premises was discussed. The board member admitted Bryan was permitted to perform work for his business out of the leased premises. He said the arrangement was agreed upon after Bryan's facility was destroyed by a storm.

{¶30} In return, Bryan was expected to organize a community workshop, give tours, and perform repairs (including on a historical fire truck that he volunteered on prior to the arrangement). It was also acknowledged Bryan began "donating" to help pay utilities, totaling at least \$1,100. An email was discussed wherein the board member expressed concern to Bryan in January 2024 about whether he was going to be able to make the next payment, which his testimony explained referred to the \$300 Bryan paid "every whenever" to help with utilities. The board member described this as "the deal [Bryan] came up with" and noted Bryan "wasn't living up to" it. (Patton Depo. 62-63, 70-76, 83-90) (with exhibits).

{¶31} While criticizing the trial court's statement that rent need not be monetary and the quid pro quo relationship plus the donations constituted consideration, Appellant points out a licensee can also provide consideration. *See BeWigged by Suzzi, Inc. v. Atlantic Dept. Stores, Inc.*, 49 Ohio App.2d 65, 70 (8th Dist. 1976) (finding a license after observing the agreement designated an amount of space in the store to be used by the person but did not set aside a dedicated portion of the store or permit use of the premises other than for the sale of wigs). Part of the reason for the trial court's statement was due to Appellant's motion for summary judgment alleging Bryan was allowed to store his belongings "free of charge" while arguing the parties did not believe the relationship was a sublease. In any case, the terms of the oral agreement were relevant in determining the legal issue of whether the arrangement was a lease or license.

{¶32} Appellant continues to emphasize Bryan's opinion that the arrangement was not a sublease or he did not believe it was a sublease. On this topic, Appellant argues the trial court improperly discounted Bryan's affidavit as self-serving (and notes Bryan was not a party to the action in any event). Appellant points out an affidavit is not invalid merely because the affiant attests to a fact benefitting himself. *See Stone v. Cazeau*, 2007-Ohio-6213, ¶ 14, 16 (9th Dist.) (a self-serving affidavit is "not to be discounted out of hand" as a factual affidavit can carry the non-movant's burden, abrogating any prior decisions suggesting otherwise).

{¶33} However, the trial court considered the facts in Bryan’s affidavit, including his discussion of donations. In a case cited by the court, the debtor-affiant’s statement that a creditor “accepted” a note as “payment in full” for the obligation because the note he mailed was essentially labeled self-serving because it was a conclusion of law supported by no evidence of acts by the creditor that legally constituted acceptance as payment in full. *Natl. Collegiate Student Loan v. Dunlap*, 2018-Ohio-2701, ¶ 37 (4th Dist.). Contrary to Appellant’s suggestion, it does not appear the trial court was declaring an affiant is unable to swear that he knows specific facts if those facts could be considered self-serving to the declarant. In any event, our review is de novo.

{¶34} A factual affiant’s statement that is essentially an opinion on a legal conclusion is not dispositive to defeat summary judgment. In other words, while taking Bryan’s *belief* that he was not a subtenant as true, any legal declaration that he was never a subtenant is not taken as true. *See* Civ.R. 56(E) (“Affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit”); *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 186 (1997) (compliance with the rule requires the summary judgment evidence “setting forth specific facts”). Although the belief of a party to an agreement may become a factual issue where proper and relevant, it would not override the law on evaluating a sublease versus a license.

{¶35} On the topic of Bryan’s denial of the sublease label, even in the case of a written “license,” the name the parties give the agreement does not govern. *Waterman v. Mackenzie*, 138 U.S. 252, 256 (1891) (“a license does not depend upon the name by which it calls itself, but upon the legal effect of its provisions”). In other words, the label attached by the parties does not control, as courts look to the substance of the arrangement when determining whether the agreement resulted in a sublease. *See Tillimon v. Hasan*, 2004-Ohio-687, ¶ 17 (6th Dist.) (a “management agreement” was in actuality a sublease, to which the landlord did not consent); *Fairbanks* at 120 (evaluating whether “the nature of the arrangement was such as in law would constitute an assignment of the lease or a subletting of the premises”).

{¶36} It is not the facts that are disputed but the application of the law to the facts and the ultimate legal conclusion that “the premises or any part thereof [were] sublet or under-leased or under-rented in its entirety or in part” (the language of the Facility Lease). Bryan may have used various areas of the 15,000-foot building while assisting with Appellant’s museum agenda;

however, he was also provided one or more dedicated spaces. Bryan's occupancy of the premises to volunteer or work for Appellant was not limited to that "necessary to do the act and no further" but was instead essentially "for all purposes not prohibited" by the oral agreement. *DiRenzo*, 165 Ohio St. at paragraph one of the syllabus.

{¶37} Storing certain tools may have been incidental to his working on items relevant to the leased premises, but his occupation extended beyond this. A reasonable person could only find Bryan had exclusive possession of a discrete space in the premises that was more than incidental to the service arrangement with the lessee. Bryan was permitted to store unrelated collections of parts and operate his private motorcycle repair business from the premises, which was unrelated to the lessee's agenda. In addition, the evidence of his establishment of a residence (unrelated to any function of the alleged license) assisted in further pushing the arrangement past that of a mere license, as a matter of law. No reasonable person could find Bryan's possession of the defined areas where he kept his belongings was intended to be open for simultaneous possession by Appellant or others. The actual use and occupancy was only consistent with a functional transfer of exclusive possession of a dedicated portion of the floor space premises, however small, to a tenant for a substantial time that continued month after month; the occupation was not merely incidental or only as necessary to the performance of the oral agreement but was for all purposes a tenant would enjoy. On such basis, this assignment of error is overruled.

ALLEGED WAIVER OF SUBTENANCY BREACH

{¶38} Alternatively, Appellant's second assignment of error contends:

"The Trial Court Erred in Denying Beach Park Summary Judgment on its Estoppel/Waiver Arguments and in Granting Stop 65 Summary Judgment."

{¶39} Appellant emphasizes a clause against subletting without written consent can be waived by the lessor where instead of electing to declare the lease forfeited due to the breach, the lessor waives the forfeiture by accepting rent accruing after the breach. *See, e.g., Brokamp v. Linneman*, 20 Ohio App. 199, 200-202 (1st Dist. 1923). Appellant then makes two arguments.

{¶40} First, Appellant says any subtenancy of John Bryan was approved by the lessor prior to Appellee's acquisition of the shopping center. In support, Appellant cites a singular paragraph in three affidavits from three members of the board stating they "never authorized any subleases to any person that were not in existence at the time that Stop 65 bought the Shopping Center." However, this statement was non-specific and did not refer to approval, written or

otherwise, by the prior lessor. Furthermore, in referring to an arrangement existing before Appellant purchased the premises, the cited statement was clearly not related to Bryan. As reviewed in the prior assignment of error, Appellant's own evidence established Bryan was not occupying the premises when Appellee purchased the premises in 2021 (or when Appellee initiated the eviction process against TBP in 2022). We also note Appellant does not reference community standards (or compliance with standards imposed by other leases) in an attempt to argue written consent would have been unreasonably withheld.

{¶41} Second, Appellant argues Appellee waived any sublease arrangement with Bryan. Appellant claims Appellee knew of the existence of subtenants and thereafter accepted rent that was essentially from Appellant. In support, Appellant points to a combination of occurrences in the eviction action Appellee filed against TBP (on April 8, 2022). For instance, at a hearing in that case, Appellee's counsel noted the action was against TBP not TBP's subtenants, who Appellee was not seeking to evict (in that action). He referred to "subtenants in the property, including Beach Park, and I believe there's one or two others who are paying rent." He asked TBP to deposit its \$100 rent along with rent it was receiving from subtenants pending final disposition. TBP's ability to remain in possession pending the eviction while collecting rent from subtenants was described as unjust, at which point the \$583 TBP was receiving from Appellant was offered to be deposited with the court and the court so ordered. *See* Def. S.J. Mot. (citing 4/28/22 and 6/6/22 transcripts in *TBP* eviction action). After the March 14, 2024 summary judgment was granted against TBP, Appellee moved to release the escrowed rent, which the court granted on April 22, 2024.

{¶42} Contrary to Appellant's contention, these occurrences did not constitute "an act of waiver/estoppel" of the John Bryan subtenancy breach claim. As Appellee points out, the bond was to be posted by TBP, and Appellee received it after succeeding in the TBP eviction action, before which *Appellant* was not obligated to pay Appellee. (As admitted by Appellant's brief, Appellant was a subtenant under a sublease with TBP, a direct tenant of TSH from whom Appellee bought the premises). That the party subject to the court's order had its subtenant send rent to the court instead of collecting it before sending it to the court would not transform the payments into a situation of Appellee accepting rent from the subtenant. Moreover, the issue being discussed in the cited portion of the action against TBP was the existence of *TBP's* subtenants who paid rent to TBP, including Appellant (who was not a party to that action, as emphasized by TBP and the court

in setting the rent escrow amount). And again, Bryan was admittedly not present at the premises in 2022 when the cited reference to subtenants was made.

{¶43} Appellant criticizes the trial court’s holding on this topic as unrelated to Appellant’s waiver of the subtenancy argument. The court found Appellant’s waiver arguments based on Appellee’s prior litigation against TBP failed while pointing out the prior forcible entry and detainer action was not barred to a later action if the issue was not litigated. *See Hamdan v. Traish*, 2015-Ohio-4561, ¶ 40 (7th Dist.), citing R.C. 1923.03. However, it appears the trial court was making the point that Appellee’s prior action was between the lessor and its tenant, not between the lessor and the tenant’s subtenants, which is a point we also make in our de novo review.

{¶44} Lastly, we note after Appellee finally obtained a judgment evicting TBP, Appellee provided Appellant notice of default with time to cure alleging Appellant was in breach of the Facility Lease by allowing subtenants (including TBP, Total Restore, and any unknown subtenants). Appellee also served notice on the Commission as required by the NDE. Appellant replied with a notice of cure, saying it terminated any subleases related to TBP and Total Restore. Upon viewing the extent of the occupation of the premises by other subtenants, Appellee filed the within action, and Appellant immediately filed a motion to escrow its rent with the court. (5/14/24 Mot.). Before a ruling could be made, the judge recused, requiring a substitute assignment by the Supreme Court. (5/23/24 J.E.); (5/24/24 Assign.). According to Appellant’s notice of clarification of rental payments, one rent check was delivered on May 31, 2024 (for the July rent). (6/18/24 Not.). Appellant does not raise this as waiver. After a pretrial, the court memorialized the following: “the parties agreed that all rental payments are current through July 2024, and that acceptance will not be deemed prejudicial against the plaintiff.” (6/24/24 J.E.). This assignment of error is overruled.

LACK OF ADDITIONAL 30-DAY TERMINATION NOTICE

{¶45} Appellant’s third assignment of error provides:

“The Trial Court Erred in Denying Beach Park’s Summary Judgment based on Stop 65’s Failure to Provide a Thirty-Day Notice of Termination and in Granting Stop 65 Summary Judgment over the Argument.”

{¶46} As required by the Facility Lease, Appellee served Appellant with a contractual 30-day notice of default with time to cure (on subtenants and items beyond the premises covered by the lease). This notice specified, “Failure to do so will result in the termination of the Lease.” As

required by the NDE, notice was also served on the Commission. Appellant cured some issues and gave notice the cure was complete. Upon discovering the alleged breaches remained, Appellee provided the statutory 3-day notice to vacate the premises. *See* R.C. 1923.01(A) (forcible entry and detainer action); R.C. 1923.02(A)(9) (“[a]gainst tenants who have breached an obligation imposed upon them by a written rental agreement”). R.C. 1923.04(A) (“party desiring to commence an action under this chapter shall notify the adverse party to leave the premises, for the possession of which the action is about to be brought, three or more days before beginning the action”).

{¶47} Appellant argues Appellee was contractually required to provide a second 30-day notice constituting a notice of termination before serving the statutory 3-day notice to vacate the premises. Before reaching the contractual argument, we address Appellant’s complaint that the municipal court “got distracted” by a non-contractual analysis. We point out the reason the trial court undertook said analysis was because Appellant’s summary judgment motion on this topic began by claiming Appellee did not complete the process of termination under Ohio law.

{¶48} Appellant first observed a forcible entry and detainer action determines only the right to immediate possession of the property. *Farla LLC v. Pretlow*, 2021-Ohio-4468, ¶ 4 (9th Dist.) (while stating the forcible entry and detainer action would become moot if the tenant moved out), citing *Seventh Urban, Inc. v. Univ. Circle Prop. Dev., Inc.*, 67 Ohio St.2d 19, 25, fn. 11 (1981), citing R.C. 1923.03 (the action is not a bar to a later action brought by either party). Appellant then suggested the law required, in all cases, a notice to terminate prior to the 3-day notice to vacate as part of a set of steps ending with the eviction action. In support, Appellant cited excerpts of cases discussing a residential lease statute. *Stop 65*, Lorain C.P. No. 22 CV 206454 at 12, 14 (finding TBP’s tenancy was month-to-month due to a lease defect and noting residential tenant law set forth a series of steps including a termination notice), citing *Siegler v. Batdorff*, 63 Ohio App.2d 76, 83 (8th Dist. 1979), citing R.C. 5321.17(B) (30-day notice to terminate month-to-month tenancy). Appellant’s motion failed to recognize the Lorain court *then* found the statute irrelevant to the commercial lease. *Id.*

{¶49} Accordingly, the municipal court in the present case was forced to point out that R.C. 5321.17 does not apply to commercial leases. *Maggiore v. Kovach*, 2004-Ohio-722, ¶ 20 (where the Supreme Court held, “Given that the terms ‘tenant’ and ‘landlord’ as used in R.C. 5321.17(B) do not apply to commercial leases, landlords are not required to provide tenants with

at least 30 days' notice to terminate a commercial tenancy.”). This holding is not contested on appeal.

{¶50} We turn to Appellant’s contractual argument under the “Default by Lessee” clause, which provides in pertinent part:

If default be made . . . in the observance or performance of any of the terms, condition or agreements herein contained, Lessor shall have the following remedies, provided that he has first given Lessee written notice specifying such default and Lessee has failed to cure such default within thirty (30) days after receiving said notice.

- a. Lessor may sue to collect all sums . . . and/or for all damage . . .
- b. Lessor may sue to restrain by injunction any violation or threatened violation of the covenants, conditions, or provisions. Lessor may, within thirty (30) days notice to Lessee and without demand for rent due or for the observance or performance of any of said terms, conditions or agreement, terminate this lease, re-enter said premises and removal of all persons and property therefrom, using force as may be necessary. If this lease shall terminate before its expiration by reason of Lessee’s default, the same may be re-rented by Lessor (but Lessor shall not be obligated to do so) . . .

Facility Lease, Sec. XI (plus no obligation to re-rent if terminated early).

{¶51} Appellant relies on part of the second sentence in subsection b. Appellant concludes an additional 30-day notice was an express precondition to terminate the lease and this must occur before commencement of the process in Chapter 1923 (3-day notice to vacate followed by the eviction action). This argument was not clearly specified in the motion for summary judgment, which seemed to generally argue a notice of termination was required (without mentioning an additional 30 days) while claiming a notice to terminate and a notice to vacate were separate steps mandated by Ohio law.

{¶52} In response to the argument in Appellant’s brief, Appellee asserts the cited sentence is not related to an action under Chapter 1923 but merely establishes a condition granting the landlord the right to exercise self-help. *Compare* Facility Lease, Sec. XI, subsec. b *to* R.C. 1923.02(A)(9) (action against tenant breaching written rental agreement) and R.C. 1923.04(A) (3-day notice to vacate before commencing action for possession). Appellee points out it chose to

utilize the safer statutory remedy and litigated the entire matter in court instead of attempting to exercise its contractual right to a self-help forcible removal of Appellant without a court decision, order, or assistance. Besides avoiding a later claim that the termination for self-help was improper, it avoided a potential unpeaceable confrontation by adding the assistance of an officer of the law in effecting the removal. *See* R.C. 1923.13(A); 1923.14(A).

{¶53} It is not disputed that the ability to file a forcible entry and detainer action exists even in the absence of contract language specifying the statutory right. In contrast, the alternative common law self-help process has been considered unavailable without a re-entry and removal clause, such as existed in the commercial lease at issue here. *See Craig Wrecking Co. v. S.G. Loewendick & Sons, Inc.*, 38 Ohio App.3d 79, 83 (10th Dist. 1987) (“Chapter 1923 is not the exclusive remedy available to commercial lessors who seek to repossess their property upon default of the tenant . . . Absent a breach of the peace and pursuant to a valid lease provision, a commercial lessor may resort to self-help repossession as a remedy for a lessee's breach of the lease agreement.”); *Northfield Park Assocs. v. Northeast Ohio Harness*, 36 Ohio App.3d 14, 20 (8th Dist. 1987) (commercial lease validly contains self-help provisions allowing the landlord to peacefully retake possession from a defaulting tenant in the absence of judicial process; after the enactment of Chapter 5321, a residential lease may no longer contain such provision), citing R.C. 5321.15(A) (barring self-help for residential lease).

{¶54} Where a commercial “Lessor may” exercise self-help under the contract but does not wish to utilize self-help and instead wishes to use the statutory action so as to obtain a court order and writ of restitution, then the lessor need not satisfy conditions of a self-help clause. Appellant’s arguments do not dispute this principle.

{¶55} Rather, in the *reply* brief, Appellant specifies an argument that the phrase “terminate this lease” is a discrete requirement unconnected to the self-help remedy in the same sequence, essentially acknowledging the language after that phrase is the self-help remedy. In effect, Appellant asks for a full stop after the phrase “terminate this lease” (while ignoring the introductory “Lessor may” phrase). That is, in the sequence, “terminate this lease, re-enter said premises and removal of all persons and property therefrom, using force as may be necessary,” Appellant says the use of a comma after “terminate this lease” instead of the word “and” shows termination must occur (before eviction proceedings) and such termination must be preceded by a separate notice. However, the comma is clearly a substitute for “and” in the context of this

sentence. It would be grammatically awkward to repeat “and” every time a comma can be used in a series of events (unless used as an emphazier). This argument is without merit.

{¶56} In sum, the contractual condition of a notice of default with time to cure was met resulting in the arisal of a breach, which in turn gave rise to the statutory right to provide a notice to vacate before filing an eviction action. *See* R.C. 1923.02(A)(9); R.C. 1923.04(A). After the 30-day notice of default with time to cure was provided, the Facility Lease did not require a 30-day notice of termination prior to serving the statutory 3-day notice to vacate (nor did the NDE). The commercial lease clearly gave Appellee the self-help *option* “within 30-days notice” to terminate the lease, reenter the premises, and remove the people and property from the premises using force as necessary. We cannot rewrite the clause to stop the reader mid-sentence. *Long Beach*, 82 Ohio St.3d at 577. Appellee did not seek to exercise this contractual self-help option and instead instituted the statutory action in order to obtain a writ of restitution after proving Appellant’s breach to a court. In accordance, Appellee was not required to satisfy the conditions of the self-help clause. This assignment of error is overruled.

DISMISSAL STANDARDS

{¶57} Appellant’s next assignments of error address the Civ.R. 12(B)(6) dismissal of the counterclaim entered eight months prior to the summary judgment.

{¶58} Pursuant to Civ.R. 8(A), a “counterclaim . . . shall contain (1) a short and plain statement of the claim showing that the party is entitled to relief, and (2) a demand for judgment for the relief to which the party claims to be entitled.” Even under notice-pleading standards, the counterclaim must assert more than bare legal conclusions and is expected to contain facts as to when and where the allegations took place in order to provide fair notice as anticipated by the Civil Rules. *Petty v. Lorain*, 2024-Ohio-2110, ¶ 20 (9th Dist.) (upholding dismissal); *see also E.F. v. Oberlin City School Dist.*, 2010-Ohio-1370, ¶ 13 (9th Dist.) (“Simply including the word ‘hazing’ in a sequence of allegations does not equate to alleging facts which established a hazing claim.”); *Randall v. JM Smucker Co.*, 2024-Ohio-4725, ¶ 15 (6th Dist.) (although operative facts need not be pled with particularity, fair notice still requires sufficient underlying facts relating to the alleged claim and merely stating legal conclusions is insufficient). “In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred.” Civ.R. 9(C).

{¶59} In response to a counterclaim, the other party may file a motion to dismiss for a failure to state a claim upon which relief can be granted. Civ.R. 12(B)(6). “In reviewing whether a motion to dismiss should be granted, we accept as true all factual allegations in the complaint.” *Perrysburg Twp. v. Rossford*, 2004-Ohio-4362, ¶ 5. We review such dismissal de novo. *Id.*

{¶60} The motion is judged on the face of the pleading rather than attachments to a dismissal motion. *State ex rel. Findlay Publishing Co. v. Schroeder*, 76 Ohio St.3d 580, 581 (1996). However, “Material incorporated in a complaint may be considered part of the complaint for purposes of determining a Civ.R. 12(B)(6) motion to dismiss.” *State ex rel. Crabtree v. Franklin Cty. Bd. of Health*, 77 Ohio St.3d 247, 249, fn. 1 (1997) (considering various articles and public health studies attached to the complaint); *see also Adlaka v. Giannini*, 2006-Ohio-4611, ¶ 34 (7th Dist.) (“If the plaintiff decides to attach documents to his complaint, which he claims establish his case, such documents can be used to his detriment to dismiss the case if they along with the complaint itself establish a failure to state a claim”).

{¶61} This material includes not only exhibits attached to the pleading at issue but also written instruments on which a claim is based. *Templeton v. Winner Ents., Ltd.*, 2024-Ohio-2745, ¶ 53 (7th Dist.). “When any claim or defense is founded on an account or other written instrument, a copy of the account or written instrument must be attached to the pleading.” Civ.R. 10(D). “Statements in a pleading may be adopted by reference in a different part of the same pleading or *in another pleading* or in any motion. A copy of any written instrument attached to a pleading is a part of the pleading for all purposes.” (Emphasis added.) Civ.R. 10(C). Thus, material attached to or incorporated in a counterclaim can be considered in ruling on a motion to dismiss a counterclaim.

{¶62} Before proceeding, we point out, in order to sue for breach of the Facility Lease, Appellant’s counterclaim used the admissions in its answer to incorporate the lease attached to Appellee’s complaint. *See* Counterclaim (repeatedly citing to the lease while incorporating prior paragraphs, which would include the Answer at ¶ 2-3 admitting the applicability of the Facility Lease and the NDE). In addition, Appellant’s counterclaim specifically cited “the Non-Disturbance and Estoppel Agreement as attached to the Plaintiff’s Complaint as Exhibit D”. *See* Counterclaim at Count 3 (and each subsequent count “realleges and reincorporates the foregoing paragraph as if fully rewritten herein”). Accordingly, contrary to Appellant’s arguments

otherwise, the court was permitted to read the NDE in ruling on Appellee's motion to dismiss the counterclaim.

BREACH OF LEASE (REPAIRS) COUNTERCLAIM

{¶63} Appellant's fourth assignment of error provides:

"The Trial Court Erred in Dismissing the Sixth Count of Beach Park's Amended Counterclaim With Prejudice."

{¶64} Appellant's counterclaim in count six alleged a breach of the lease for failing "to perform certain obligations including maintenance" and sought damages. In moving for dismissal of all counterclaims for breach of lease (for failure to make repairs and for quiet enjoyment), Appellee argued the claims failed as a matter of law because the counterclaim failed to allege the satisfaction of a condition precedent to bringing the claims or failed to assert Appellee refused to cure a defect that was recited in a contractual notice. Appellee pointed to the NDE as containing the contractually required notice.

{¶65} This agreement between the Commission, the fee simple owner, and the project sponsor/tenant (Appellant) incorporated the Facility Lease as an exhibit and specified the Commission agreement was establishing rights, safeguards, and obligations with respect to the parties' interests, pointing out the project sponsor was required to provide the Commission with these rights and safeguards as a condition of receiving Commission funds. NDE, Sec. 1, 3-4. The NDE was expressly made binding on and inuring to the benefit of the parties' successors. The clause relied upon by Appellee's motion to dismiss provides:

The Project Sponsor and/or the Fee Simple Owner agree to give prompt written notice to the Commission of any default by either the Project Sponsor or the Fee Simple Owner under the Facility Lease Agreement which would entitle The Project Sponsor or the Fee Simple Owner to cancel the Facility Lease Agreement or abate the rent payable thereunder, and both parties agree that notwithstanding any provision of Facility Lease Agreement, no notice of cancellation or termination thereof shall be effective unless the Commission has received notice of the aforesaid and the defaulting party has failed, within 30 days of the date of receipt thereof to cure such default, or If the default cannot be cured within 30 days, has failed to commence and to pursue diligently to cure the default which gave rise to such right of cancellation or termination.

Id. at Sec. 2. Notices were to be “in writing and delivered by hand against written receipt or sent by certified or registered mail, return receipt requested . . .” *Id.* at Sec. 9.

{¶66} “A cause of action for breach of contract requires the claimant to establish the existence of a contract, the failure without legal excuse of the other party to perform *when performance is due*, and damages or loss resulting from the breach.” (Emphasis added.) *Lucarell v. Nationwide Mut. Ins. Co.*, 2018-Ohio-15, ¶ 41.

{¶67} Appellant cites condition precedent law involving whether an entire agreement ever becomes effective in the first place. *See Mumaw v. W. & Southern Life Ins. Co.*, 97 Ohio St. 1, 9 (1917) (a condition precedent to be performed before the parties’ agreement becomes operative means if the failure of it makes the agreement null and void, as the life insurance policy never existed). However, a condition precedent to contract formation was not alleged here and is functionally distinct from a condition precedent to a duty under an already-existing contract or a condition precedent to filing suit for breach of the duty. *See, e.g., Transtar Elec., Inc. v. A.E.M. Elec. Services Corp.*, 2014-Ohio-3095, ¶ 22 (where the Supreme Court noted a condition precedent within a contract is an act that must occur before a particular performance obligation will arise); *LaSalle Bank, N.A. v. Kelly*, 2010-Ohio-2668, ¶ 13 (9th Dist.) (the reference to a notice of default in a note or mortgage is a condition precedent to the bank’s action).²

{¶68} Appellant then cites law stating the question of whether a condition precedent exists requires consideration of the language of the entire contract and its subject matter with the law disfavoring the condition precedent unless the intent is plain. *Evans, Mechwart, Hambleton & Tilton, Inc. v. Triad Architects, Ltd.*, 2011-Ohio-4979, ¶ 14-15 (10th Dist. 2011). This case also explained: “A condition precedent is an event that must occur before an obligation in the contract will become effective . . . The nonoccurrence of a condition precedent excuses a party from performing the duty promised under the contract.” *Id.* at ¶ 14. Likewise, we have explained a condition has a purpose of preventing or postponing the emergence of any immediate duty defined

² Even where a contract did not specifically require a demand notice (in a clause providing a right to incidental expenses), the Supreme Court opined, “It is illogical; and it defies common sense to expect [the promisor] to pay for incidental expenses that it does not know [the promisee] incurred.” *Kincaid v. Erie Ins. Co.*, 2010-Ohio-6036, ¶ 13-14 (upholding Civ.R. 12(C) dismissal of complaint as no actual controversy is alleged in the absence of notice and a denial prior to the complaint, emphasizing a breach of contract action does not accrue until actual damages were suffered due to an alleged breach), ¶ 20 of opinion as *modified on reconsideration* in 2011-Ohio-647 (no controversy an insured lacked standing to file suit unless and until he provided notice of the demand for performance and the other party responded with a denial or failed to respond after a reasonable time).

by the contract until the occurrence of the condition. *Morrison v. Bare*, 2007-Ohio-6788, ¶ 18 (9th Dist.) (the condition is something that must occur *during the performance stage* to activate a duty in an existing contract). We note Appellant elsewhere describes a notice to terminate as an “express precondition” in the Facility Lease and implicitly places the same label on a notice of default with time to cure in the Facility Lease. Apt.Br. 18-19.

{¶69} “In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred.” Civ.R. 9(C) (but a responding party’s “denial of performance or occurrence shall be made specifically and with particularity”). This is a liberal pleading requirement for the party asserting a claim subject to the condition precedent (compared to the responding party’s specific obligation under the same rule).

Where, however, a cause of action is contingent upon the satisfaction of some condition precedent, and the plaintiff fails to allege, even generally, that the condition has been satisfied, “[a] defending party may raise the defense of failure to state a claim upon which relief can be granted as late as the trial on the merits” .

. .

MERS, Inc. v. Vascik, 2010-Ohio-4707, ¶ 17 (6th Dist.), quoting *Natl. City Mtge. Co. v. Richards*, 2009-Ohio-2556, ¶ 24 (10th Dist.).

{¶70} In accordance, where a duty and thus a cause of action is contingent on the satisfaction of a condition precedent, Civ.R. 9(C) requires the party bringing the action to plead all conditions precedents were performed and allows the party defending against that cause to assert failure to state a claim under Civ.R. 12(B)(6). *Id.* at ¶ 16; *LaSalle Bank*, 2010-Ohio-2668, at ¶ 13 (9th Dist.) (where the bank failed to comply with the rule as it “did not allege in its complaint, even generally, that it complied with the requisite condition precedent” of providing notice of default, the answering party preserves the failure by pleading failure to state a claim upon which relief can be granted without specifically defining the failure of the condition precedent), citing *First Financial Bank v. Doellman*, 2007-Ohio-222, ¶ 20 (12th Dist.) (the rule requires a bank to assert it satisfied any condition precedent to acceleration or to filing suit where a note or mortgage required notice of default).

{¶71} On appeal, Appellant states notice under Section 2 of the NDE was not a required condition precedent to its claim because the clause applied to a discrete set of claims: rent

abatement, termination, or cancellation. Appellant concludes this section did not apply because its counterclaim did not specifically seek rent abatement, cancellation, or termination of the lease. Appellant theorizes a different clause applies to any defaults for which a tenant chooses to sue the landlord for damages (instead of providing notice of default and then threatening termination or rent abatement). The cited clause provides: “The Project Sponsor agrees to certify in writing to the Commission, upon request, whether or not any default on the part of the Fee Simple Owner exists under the Facility Lease Agreement and the nature of any such default.” NDE at Sec. 3; *see also* NDE at Sec. 4 (similar clause regarding written certification by fee simple owner upon Commission request).

{¶72} First, Section 3 clearly deals with the Commission proactively asking the tenant for updates about lease compliance and the condition of the property where its funds were being spent. It is not an exception to Section 2 or a statement that notice is not required for a default that would entitle the tenant to rent abatement, termination, or cancellation.

{¶73} Second, as Appellee points out, the NDE required written notice of default “which would entitle” Appellant to rent abatement, termination, or cancellation. Placing emphasis on “would entitle,” Appellee points out an alleged failure to repair purportedly resulting in over \$25,000 in damages “would entitle” Appellant to these remedies.

{¶74} Third, Appellant’s argument that Section 2 only applies to a discrete set of claims involving rent abatement, termination, or cancellation ignores count two. The second count set forth a claim for failing to maintain the premises by making repairs in violation of an inapplicable statute (on residential premises) but also referred to this as a breach of the lease (citing Facility Lease, Sec. VI). As Appellee emphasizes, this count specifically sought the remedy of rent abatement (and was captioned “landlord obligations/rent abatement”). Appealing only the dismissal of breach of lease counts that did not mention rent abatement will not avoid application of any notices required by the NDE.

{¶75} Recognizing this, Appellant’s reply brief retreats from the general argument about only a discrete set of claims requiring notice of default and the argument that the counterclaim did not seek rent abatement for breach of lease. Distinctly, Appellant asserts any condition precedent in Section 2 of the NDE only related to the effectiveness of any notice of cancellation or termination (if Appellant decided to invoke such remedy provide in the counterclaim). However, in addition to changing the crux of the argument in a reply brief with no chance of response by

Appellee, Appellant's contention is barred by waiver due to the arguments (or lack thereof) made to the trial court.

{¶76} As Appellee emphasizes, Appellant also waived the argument (from the original brief) that Section 3 rather than Section 2 of the NDE applied. That is, Appellant's response to the motion to dismiss did not raise arguments against Appellee's characterization of the notice obligation as a condition precedent to the lessor's duty to repair and thus to the bringing of a claim alleging breach of lease.

{¶77} Appellee's motion to dismiss relied on Section 2 of the NDE in arguing for dismissal of all breach of lease counts. It was argued Appellant was required to provide notice to Appellee with time to cure (by conducting any repair requested in the notice), indicating the duty could not arise unless Appellant knew a repair was needed and contractual terms provided how to provide notice. The motion concluded Appellant could not pursue a claim for breach of lease without complying with the condition precedent of serving notice on Appellee and on the Commission, neither of which were pled in the counterclaim (either with the minimum general statement of compliance with all conditions precedent or with a more specific recitation of the compliance).

{¶78} Addressing the failure to repair counts together, Appellant's response in opposition to dismissal recited general law on notice pleading (and on declaratory judgment). Appellant opined Appellee should wait until discovery to ask whether or how notice was provided, claiming the counterclaim need not plead all elements. Appellant also posited that Appellee's dismissal motion was assuming facts not presented in the counterclaim. Arguing only the content of the counterclaim can be viewed in considering a 12(B)(6) motion, Appellant suggested the court was not permitted to view the NDE (contrary to the well-established law on documents incorporated into the counterclaim set forth in our prior section).

{¶79} Appellant did not argue against the legal premise that Appellant was required to serve notice on the Commission or on Appellee under the NDE or that said notice was a condition precedent to the repair duty allegedly arising under the lease and thus to an action based on breach of lease, as argued in the dismissal motion.

{¶80} "Arguments that were not raised in the trial court cannot be raised for the first time on appeal." *JPMorgan Chase Bank v. Burden*, 2014-Ohio-2746, ¶ 12 (9th Dist.) (where only a specific aspect of a filing was challenged in the trial court, the appellate court would not address

different aspects of that filing challenged on appeal). A response to a motion to dismiss must set forth arguments on any contested principles in the dismissal motion to ensure preservation. *State ex rel. DeGroot v. Tilsley*, 2011-Ohio-231, ¶ 3, 9 (as explained by the Supreme Court in an appeal of a Civ.R. 12(B)(6) dismissal, an argument that a pleading stated a claim due to a certain statute was waived as it was not raised in the response, which raised a different statute as allowing the claim). Based on the arguments preserved for review, this assignment of error is overruled.

{¶81} We additionally observe despite a prior motion to dismiss the original counterclaim raising the same issue, Appellant amended the counterclaim by adding more claims without adding a statement about conditions precedent or about the serving written notice on Appellant or the Commission. Then, in response to the motion to dismiss the amended counterclaim, Appellant did not seek leave to amend the counterclaim to allege the provision of written notice. We also note Appellant did not seek amendment in the months after dismissal, despite being informed by the appellate court that the dismissal order was not final. Although a trial court cannot reconsider a final judgment, an order remaining interlocutory under Civ.R. 54(B) is subject to reconsideration by the trial court. *Pitts v. Ohio Dept. of Transp.*, 67 Ohio St.2d 378, 380-381, fn. 1 (1981); *Bencin v. Bencin*, 2016-Ohio-54, ¶ 8 (9th Dist.) (“In the absence of a final judgment, a trial court's order remains interlocutory and subject to reconsideration.”), citing *Dunkle v. Children's Hosp. Med. Ctr. of Akron*, 2013-Ohio-5555, ¶ 34 (9th Dist.) (trial court can sua sponte reconsider a non-final order to which res judicata and law of the case do not apply).

{¶82} As a final argument, Appellant says even if the NDE contained a condition precedent requiring the counterclaim to plead compliance with conditions precedent, a dismissal with prejudice was improper. Citing *Fifth Third Mtge. Co. v. Berman*, 2015-Ohio-4466, ¶ 13 (10th Dist.) (in a foreclosure case, the court observed “that a dismissal for failing to meet a condition precedent to filing suit operates as a decision on the merits only if the aggrieved party is permanently foreclosed from fulfilling the condition”); see also *H.J. Reedy Co. v. Harrison*, 24 Ohio C.D. 99, 100 (1911) (“no error in dismissing the action without prejudice to the bringing of a new suit whenever the conditions precedent on its part to be performed had been so performed”), *aff'd*, 88 Ohio St. 574 (1913).

{¶83} Contrary to the suggestion in Appellant’s brief, the municipal court’s dismissal entry did not say the dismissal for failure to assert satisfaction of the condition precedent was with prejudice. We notice Appellant does not make an argument that Civ.R. 41 rendered the dismissal

on the merits because the entry failed to contain “without prejudice” language. In any event, such an interpretation of a bare dismissal for failure to satisfy a condition precedent has been rejected. See *PNC Bank v. Richards*, 2012-Ohio-1610, ¶ 20-24 (10th Dist.) (the dismissal for failure to satisfy a condition precedent to bringing suit essentially meant the suit was premature and was not effectively a dismissal on the merits of the claim, rejecting an interpretation of Civ.R. 41(B)(3)-(4) that the failure to label the judgment meant it was with prejudice), citing *Costello v. United States*, 365 U.S. 265, 286 (1961) (“We do not discern in Rule 41(b) a purpose to change this common-law principle with respect to dismissals in which the merits could not be reached for failure of the plaintiff to satisfy a precondition.”).

{¶84} The dismissal for failure to plead satisfaction of a condition precedent was not on the merits as to the underlying issue of whether a repair existed that the landlord would be responsible for repairing after notice from the tenant (or on the issue of whether a notice was provided before or thereafter). Appellee’s motion to dismiss specifically acknowledged Appellant’s breach of lease claims were only barred “until such time” as there was compliance with the NDE. See *Gateway Royalty LLC v. EAP Ohio LLC*, 2025 WL 1643980, *3 (N.D. Ohio June 10, 2025) (a failure to satisfy a condition precedent is generally not a merits issue unless the party is permanently foreclosed from fulfilling the condition).

{¶85} A failure to specify an aspect of the dismissal was “without prejudice” did not mean it was with prejudice on the issues *underlying* the failure to plead a condition precedent. *Id.*; see also *Kincaid*, 2010-Ohio-6036, at ¶ 13-20 (equating absence of contractual notice of default and refusal to cure before filing a complaint as a lack of standing due to a lack of actual controversy alleged since the breach of contract cause of action does not accrue until the actual damages were suffered due to breach), with modification to ¶ 20 on reconsideration in 2011-Ohio-647; *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 2012-Ohio-5017, ¶ 40 (lack of standing to invoke the court’s jurisdiction at the commencement of action requires dismissal of the complaint as case is not justiciable, but this is not adjudication on the merits of the underlying indebtedness and is without prejudice if standing is thereafter obtained); *Deutsche Bank Natl. Tr. Co. v. Holden*, 2016-Ohio-4603, ¶ 19, 29 (clarifying *Schwartzwald* while maintaining the claimant’s lack of standing means the case is not justiciable so as to fall within the court’s jurisdiction); Civ.R. 41(B)(4)(a)

(jurisdictional dismissal operates as a failure otherwise than on the merits and is not presumed to be with prejudice as are other dismissals lacking “without prejudice” label).³

{¶86} Distinctly, however, the decision that notice under the NDE was a condition precedent and that the pleading must allege it was satisfied in order to state a claim would be res judicata in a subsequent action (after the dismissal became final). *See generally id.*; *see also* Civ.R. 41(B)(1) (dismissal for failure to comply with civil rules). Upon a review of Appellee’s motion, Appellant’s response, and Appellee’s reply, it was determined Appellant’s pleading failed to comply with a rule due to the contents of the NDE, and the decision on that matter was with prejudice. Accordingly, there was no error on the lack of a “without prejudice” label on the condition precedent holding in the dismissal entry.

{¶87} We also note throughout the proceedings Appellant did not seek to rectify the issue. As pointed out above, although the dismissal entry did not become final for many months, Appellant did not seek to amend the counterclaim to add a statement regarding satisfaction of any condition precedent (so Appellee’s reply could specify the failure to comply with a condition precedent and thereafter present summary judgment arguments on the topic).

{¶88} Similarly, although Appellant asked the court to add other language to the non-final order, under Civ.R. 54(B), Appellant did not then ask the trial court to add “without prejudice” language to the underlying breach of lease issue in the portion of the dismissal relevant to those particular claims (if Appellant believed this would assist in avoiding confusion in any future post-eviction action regarding previously unlitigated issues). *See* R.C. 1923.03 (the action is not a bar to a later action brought by either party); *Seventh Urban*, 67 Ohio St.2d at 25, fn. 11 (where counterclaim was bifurcated and then dismissed plus landlord initiated separate action for rent, a decision in the appeal from the forcible entry and detainer action merely “determines the right to immediate possession of the property and nothing else”); *Farla*, 2021-Ohio-4468, at ¶ 4 (9th Dist.) (forcible entry and detainer issue would become moot if the tenant moved out); *Hamdan*, 2015-Ohio-4561, at ¶ 40 (7th Dist.) (“R.C. 1923.03 permits subsequent suits between landlords and tenants involving issues and disputes not actually litigated in the previous cause of action”). Again, this assignment of error is without merit.

DISMISSAL OF QUIET ENJOYMENT COUNTERCLAIM

³ Likewise, Appellant described an alleged lack of a termination notice as a lack of “jurisdiction to proceed with an eviction action in this matter as the Court does not have jurisdiction to hear the case.” Answer.

{¶89} Appellant’s fifth assignment of error provides:

“The Trial Court Erred in Dismissing the Fifth Count of Beach Park’s Amended Counterclaim With Prejudice.”

{¶90} The fifth count in the counterclaim said: “Paragraph XII of the lease requires that Lessor/Defendant have quiet enjoyment of the leased Property. As a direct and proximate result of Plaintiff’s action, Plaintiff has prevented Defendant from its quiet enjoyment of the Property. Plaintiff’s actions constitute a breach of the lease agreement.” Incorporated allegations acknowledged Appellant was still operating from the premises. Appellant did not plead this possession-suffered interference akin to eviction.

{¶91} The trial court cited law stating the right to quiet enjoyment is the right to peaceful and undisturbed enjoyment of the leasehold and interference must be so substantial as to be tantamount to an actual or constructive eviction. *See Dworkin v. Paley*, 93 Ohio App.3d 383, 386 (8th Dist. 1994); *see also Telecom Acquisition Corp. v. Lucic Ents., Inc.*, 2016-Ohio-1466, ¶ 15 (8th Dist.). The court indicated count five in the counterclaim failed to state a claim by failing to plead Appellant suffered a deprivation so injurious as to deprive Appellant of the beneficial enjoyment of the premises equating to an eviction. The court noted there was no actual eviction at the time of ruling and Appellant was still in physical possession of the property.

{¶92} In discussing a constructive eviction, it has been explained, “it is necessary that the tenant relinquish possession of the premises in order, that there be a ‘constructive eviction,’ the theory being that the acts of interference by the landlord compel the tenant to leave, and that he is thus in effect dispossessed, though not forcibly deprived of possession.” *Liberal S. & L. Co. v. Frankel Realty Co.*, 137 Ohio St. 489, 499 (1940). The Supreme Court found it logically and legally inconsistent to argue there was a constructive eviction during retention of the premises. *Id.* “So long as the tenant remains in possession he cannot successfully maintain that he has been constructively evicted.” *Id.*

{¶93} The counterclaim’s allegation that Appellee breached a covenant of quiet enjoyment is a legal conclusion rather than a factual allegation to construe in a pleader’s favor. “In ruling on a motion to dismiss a complaint, pursuant to Civ.R. 12(B)(6), for failure to state a claim upon which relief may be granted, the trial court is not required to accept unsupported legal conclusions as true even when cast as factual allegations.” *Foy v. Ohio Dept. of Rehab. & Correction*, 2024-Ohio-1146, ¶ 11 (10th Dist.); *accord State ex rel. Duncan v. Am. Transm. Sys.*,

Inc., 2022-Ohio-323, ¶ 10 (where the Supreme Court held, “unsupported legal conclusions, even when cast as factual assertions, are not presumed true for purposes of a motion to dismiss”).

{¶94} An alluded to fear of future dispossession from Appellee’s filing of the eviction action does not constitute such allegation of conduct tantamount to an eviction. *See Lexford Props., Inc. v. Schiltz*, 2003-Ohio-4897, ¶ 31-34 (5th Dist.) (where the tenant remained on the premises until the municipal court granted an eviction under Chapter 1923, the appellate court upheld the Civ.R. 12(B)(6) dismissal of the counterclaim that alleged constructive eviction), citing *Liberal*, 137 Ohio St. 489. Due to count five’s incorporation of prior paragraphs, the quiet enjoyment count may have been claiming Appellee’s alleged failure to make (unspecified) material repairs constituted a breach of the covenant of quiet enjoyment in the lease.⁴

{¶95} On appeal, Appellant does not take issue with the appellate law recited by the municipal court in the dismissal entry. Nor does Appellant’s brief take issue with the application of the law to the counterclaim in reaching the legal conclusion regarding a failure to state a claim for breach of an *implied* covenant of quiet enjoyment. Rather, Appellant focuses only on the counterclaim’s assertion of a claim for breach of an *express* covenant in the Facility Lease and argues the quiet enjoyment clause therein *provided more protection than the implied covenant* of quiet enjoyment.

{¶96} According to the pertinent lease clause, “Lessor covenants . . . that if Lessee” performed as agreed, then “the Lessee shall . . . have the peaceable and quiet enjoyment and possession of the leased premises without any manner of let or hindrance from Lessor . . .” Facility Lease, Sec. XII. Appellant’s brief takes the position that the added phrase “without . . . let or hindrance” makes the express covenant in the lease broader than an implied covenant of quiet enjoyment because dictionaries define this phrase as meaning without interference. However, no case law is cited to support the assertion that the addition of “without interference” language acts to broaden the scope of the right to quiet enjoyment. We also note interference is already part of the constructive eviction test. *Liberal* at 499 (“when there is merely an interference with his possession and enjoyment, it is necessary that the tenant relinquish possession of the premises in order, that there be a ‘constructive eviction’”).

⁴ Even if other uncited law were pertinent, we note there was no assertion Appellee entered or caused another to enter into possession of the premises or part thereof or caused the rental value of the premises to drop below the actual rent, which was a mere \$583 a month for a 15,000 square foot building.

{¶97} In any event, Appellee responds by incorporating arguments from the prior assignment of error on count six: under the NDE, any alleged breach of lease that would entitle Appellant to rent abatement, termination, or cancellation *required notice of default* to be provided to the Commission and to Appellee with a right to cure; this was a condition precedent to a duty and thus to a claim for breach; and the counterclaim failed to assert conditions precedent were satisfied. Appellee made this argument below as well, which was adopted by the trial court on the repair breach of lease allegations (in the prior assignment of error). Appellant’s reply brief incorporates the argument from count six as well, stating it was not seeking to cancel or terminate the lease (even if it was entitled to do so along with the rent abatement it sought).

{¶98} We incorporate the analysis from the prior assignment of error where it was pointed out Appellant did not preserve the argument below (such as that any condition precedent under the NDE would only arise if it was seeking to terminate or cancel the lease). We also note the cited quiet enjoyment clause in the Facility Lease only applied “if Lessee” performed as agreed.

{¶99} Appellee also points out Appellant failed to argue the theory below that the addition of “without let or hinderance” covered a broader range of annoyance to a tenant than the implied covenant of quiet enjoyment. Appellee’s motion to dismiss cited law on a covenant of quiet enjoyment in general and emphasized there was no allegation of actual or constructive eviction as it was clear from the answer with counterclaim that Appellant had not vacated the premises. *See Telecom Acquisition*, 2016-Ohio-1466, at ¶ 15-16 (8th Dist.) (claim requires act tantamount to eviction, and constructive eviction occurs when the landlord interferes with the tenant’s possession and enjoyment of the premises so that “the acts of interference by the landlord compel the tenant to leave”), citing, *e.g.*, *GMS Mgt. Co. v. Datillo*, 2000 WL 776982, *9 (8th Dist. June 15, 2000) (where the court cited the Supreme Court’s *Liberal* case)

{¶100} In response to the dismissal motion, Appellant generally asserted notice pleading and argued Ohio law recognizes a claim for breach of quiet enjoyment and the degree of impairment of possession is a factual question (which is not set forth as an argument on appeal). Appellant’s response to the dismissal motion did not argue the express covenant in the Facility Lease was broader than the implied covenant or quote the language of the clause at all. As Appellee points out, “Arguments that were not raised in the trial court cannot be raised for the first time on appeal.” *JPMorgan*, 2014-Ohio-2746, at ¶ 12 (9th Dist.) (where an appellant challenged only a specific aspect of an affidavit before the trial court, the appellate court would not address

different aspects of the affidavit challenged on appeal). Again, a response to a motion to dismiss must set forth arguments on any contested principles from the dismissal motion to ensure preservation. *DeGroot*, 2011-Ohio-231, at ¶ 3, 9 (where the Supreme Court explained the appellant waived the argument that a certain statute supported the existence of his claim because his response to the Civ.R. 12(B)(6) motion to dismiss raised only a different statute). This assignment of error is overruled.

FAILURE TO CERTIFY TO COMMON PLEAS

{¶101} Appellant’s sixth and final assignment of error argues:

“The Trial Court Erred and Exceeded its Authority by Failing to Certify the Case to the Common Pleas Court and by Making its Order on the Writ of Restitution after Wrongfully Dismissing Beach Park’s Counterclaims.”

{¶102} The municipal court’s jurisdiction extends to cases in which the amount claimed is \$15,000 or less. R.C. 1901.17 (but judgment may be rendered for more if the excess consists of interest, damages for detention of personal property, or costs accrued after the action’s commencement). “In the event that a counterclaim . . . exceeds the jurisdiction of the court, the court shall certify the proceedings in the case to the court of common pleas.” Civ.R. 13(J); *see also* R.C. 1901.22(E).

{¶103} Appellant recognizes “the municipal court is authorized to examine whether the counterclaim states a claim exceeding its jurisdiction and is not required to certify cases to the common pleas court based *solely* upon the amount of the monetary demand in a counterclaim.” *Lewallen v. Mentor Lagoons, Inc.*, 85 Ohio App.3d 91, 95-96 (8th Dist. 1993) (the certification rule is not self-executing), citing *Hersch v. Debreczeni*, 33 Ohio App.2d 235 (8th Dist. 1973) (otherwise the defendant could avoid the jurisdiction of a particular municipal court by filing a counterclaim which does not state a claim for relief but which makes a demand for judgment in excess of the municipal court’s jurisdiction, all while anticipating the claim will be dismissed in the common pleas court). Appellant similarly acknowledges “the municipal court is authorized to examine the [counter]claims to determine whether they state authentic claims that exceed its monetary jurisdiction . . .” *State ex rel. El Turk v. Comstock*, 2018-Ohio-2125, ¶ 6 (8th Dist.) (if the claims are authentic, then the case is certified).

{¶104} “Certification to the common pleas court is not automatic when a counterclaim is filed that prays for damages in excess of the municipal court’s jurisdiction. ‘Rather, the municipal

court should first determine if the counterclaim satisfies the formalities of the civil rules and states a claim showing that the party is entitled to relief.’” *Rickard v. Solley*, 2010-Ohio-2786, ¶ 27 (7th Dist.), quoting *Crisalli v. Mearini*, 2004-Ohio-6018, ¶ 2 (8th Dist.), citing *Hersch* at 238-239 (municipal court is entitled to ascertain “whether the formalities of the Civil Rules are satisfied and whether the counterclaim contains a short and plain statement of the claim showing that the pleader is entitled to relief”).

{¶105} Accordingly, in addition to seeking justification for the damage amount in order to ascertain authenticity, a municipal court can rule on a Civ.R. 12(B)(6) motion to dismiss a counterclaim for failure to state a claim, despite being faced with a certification request based on a demand exceeding the court’s monetary jurisdiction. *Hersch* at 237-239. “The Civil Rules do not deprive the municipal court of the opportunity to inquire as to the validity of the counterclaim although the amount of damages alleged exceeds the court’s jurisdiction.” *Univ. Ortho & Sports v. Pleasant*, 2007-Ohio-1347, ¶ 11 (2d Dist.) (upholding the refusal to certify as there was no private cause of action under the cited statute).

{¶106} Therefore, where all counts in a counterclaim are dismissed by the municipal court under Civ.R. 12(B)(6) there would be no certification. It thus follows that even if a dismissal was erroneous on certain counts, only if the dismissal was erroneous on the counts used to justify the damage request would the certification be affected by a successful appeal.

{¶107} Here, the municipal court ordered briefing on the question of certification to the common pleas court. Appellee’s brief explained it did not become Appellant’s direct lessor until TBP’s lease was terminated on March 14, 2024, before which Appellant was a subtenant paying \$583 a month in rent to TBP. Describing Appellant’s allegation of over \$25,000 in damages as inexplicable and extreme, it was emphasized a mere ten weeks passed between the time Appellee became the direct landlord of Appellant and the time Appellant filed the initial answer and counterclaim.

{¶108} Appellee’s opposition to certification cited law pointing out the process is not automatic merely because a demand for an amount exceeding the municipal court’s jurisdiction was inserted in the counterclaim, as the court can determine whether the alleged damage amount was legitimate or an inflated sham with intent to delay the eviction. Pointing to the accompanying motion to dismiss, Appellee also cited law allowing the municipal court to determine if the counterclaim satisfies the formalities of the Civil Rules and states a claim for relief. (6/26/24 Br.)

{¶109} Appellant’s response brief in support of certification argued the damage amount alleged in the counterclaim was justified by generally pointing to the tortious interference claims (counts three and four). Appellant then discussed only the contractual relationship with the Commission and said the Commission could seek repayment of a percentage of the grant amount in the event of an eviction, which Appellant believed could total \$83,000 under a contractual formula. (7/12/24 Br.) (also stating the municipal court certified the TBP case to the common pleas court without delving into authenticity of the damage demand, attaching the *Stop 65 v. TBP* July 1, 2022 judgment containing no indication of a pending dismissal motion).

{¶110} In reply, Appellee emphasized how Appellant was only attempting to justify the high damage prayer by relying on count three, which was described as speculative and not ripe (as the eviction did not yet occur and the Commission may not file suit for damages). Appellee’s opposition to certification also pointed to its motion to dismiss all counts in the counterclaim. As to counts three and four, the motion to dismiss argued a failure to state a claim for tortious interference due to the economic loss rule. (6/26/24 Mot.).

{¶111} The municipal court agreed and dismissed counts three and four on the cited basis. (7/29/24 J.E.). The other counts in the counterclaim were also dismissed for various reasons. The entry additionally stated Appellee’s opposition to certification (along with a bifurcation motion) was moot and thus denied.

{¶112} Essentially, the court announced certification would not proceed due to the Civ.R. 12(B)(6) dismissal of all counts of the counterclaim, as permitted by the case law reviewed above. *See, e.g., Rickard*, 2010-Ohio-2786, at ¶ 27 (7th Dist.) (certification is not automatic on filing of a counterclaim with a prayer for damages over monetary jurisdiction as the municipal court may determine the counterclaim does not comply with the civil rules such as by failing to state a claim for relief); *Lewallen*, 85 Ohio App.3d at 95-96 (8th Dist) (“the municipal court is authorized to examine whether the counterclaim states a claim exceeding its jurisdiction and is not required to certify cases to the common pleas court based *solely* upon the amount of the monetary demand in a counterclaim”), citing *Hersch*, 33 Ohio App.2d at 238-239 (8th Dist.) (before certification the municipal court is entitled to ascertain “whether the formalities of the Civil Rules are satisfied and whether the counterclaim contains a short and plain statement of the claim showing that the pleader is entitled to relief”); *El Turk*, 2018-Ohio-2125, at ¶ 6 (8th Dist.) (“examine the [counter]claims to determine whether they state authentic claims that exceed its monetary jurisdiction”).

{¶113} Therefore, contrary to any suggestion otherwise, there was not a failure to rule on the question of certification to the common pleas court. Also, as Appellee points out, the further proceedings in the case would demonstrate an implicit denial of certification as well. *See Wolford v. Sanchez*, 2005-Ohio-6992, ¶ 41 (9th Dist.) (“motions not ruled upon are deemed denied and the motions were clearly denied upon the entry of summary judgment for Appellees”).⁵

{¶114} Notably, Appellant argues the municipal court exceeded its authority by proceeding in the action because certification was required on the improperly dismissed claims. The argument is essentially that certification was required if we agree with one or both of Appellant’s assignments of error on the municipal court’s dismissal entry. Those assignments of error argue against the dismissal of counts five and six and *do not raise issues with the dismissal of counts three and four*.

{¶115} Moreover, Appellee argues waiver on the topic of whether counts five and six authentically exceeded the monetary limit due to Appellant’s failure to raise the counts addressed on appeal when arguing to the trial court that other counts exceeded the court’s monetary jurisdiction. “Arguments that were not raised in the trial court cannot be raised for the first time on appeal.” *See JPMorgan*, 2014-Ohio-2746, at ¶ 12 (9th Dist.) (thus limiting the analysis to only the specific aspect of an affidavit challenged before the trial court rather than all aspects challenged on appeal).

{¶116} Despite having jurisdiction over the general class of case, courts have described the monetary jurisdiction of a municipal or county court a matter of subject matter jurisdiction. The legal issue of subject matter jurisdiction is not subject to waiver. *Pratts v. Hurley*, 2004-Ohio-1980, ¶ 11. However, a court is permitted to evaluate its own jurisdiction. *Allstate Ins. Co. v. Cleveland Elec. Illum. Co.*, 2008-Ohio-3917, ¶ 11. As Appellant recognizes, the municipal court faced with a demand in a counterclaim over the monetary limit and faced with authenticity and Civ.R. 12(B)(6) motion can seek arguments and briefing on the matter prior to certifying the case to the common pleas court. Likewise, in making arguments on the amount of damages demanded, a party may waive a factual argument about whether a particular count in a counterclaim

⁵ Contrary to an alternate argument by Appellee, the municipal court’s October 20, 2024 judgment did not reiterate its denial of certification to the common pleas court. The language “the motion to certify is hereby denied” clearly referred to “the defendant’s motion to certify an immediate appeal” in response to “the appellate decision” (i.e., Appellant asked the municipal court to add Civ.R 54(B) language to the July 29, 2024 dismissal entry after the appeal from that entry was dismissed for lack of a final appealable order).

authentically exceeds the jurisdiction of the court or whether other particular counts were necessary to push the counterclaim over the limit.

{¶117} Such situation is not a waiver of the legal issue of subject matter jurisdiction (which is prohibited) but is a waiver of the factual description of a particular claim by relying only on another claim. *See, e.g., In re Palmer*, 12 Ohio St.3d 194, 196-197 (1984) (where a factual issue affects subject matter jurisdiction, statements or filing failures of a party or an attorney can result in the conferring of jurisdiction via estoppel), citing *Beatrice Foods Co. v. Porterfield*, 30 Ohio St.2d 50, 1972), syllabus (“Although adverse parties may not confer jurisdiction upon a court by mutual consent, where none would otherwise exist, they may stipulate the truth of facts that are sufficient to confer jurisdiction.”); *Weber v. Devanney*, 2018-Ohio-4012, ¶ 13 (9th Dist.) (even though parties may not confer subject matter jurisdiction by consent, they may agree to the facts relevant to the issue of jurisdiction). That is to say:

a party may not challenge the jurisdiction of the court when such jurisdiction is based upon previously uncontested or admitted facts . . . [I]f a party seeks to challenge the factual predicate underlying the trial court's exercise of subject matter jurisdiction, rather than whether the trial court had subject matter jurisdiction over the claim based on that factual predicate, such a challenge can be waived . . . a narrow, but important distinction regarding challenges to subject matter jurisdiction that comports with the well-established principle that trial courts determine their own jurisdiction.”

Wiczynski v. Hutton, 2024-Ohio-2660, ¶ 22 (6th Dist.) (citing cases).

{¶118} Appellant’s brief implicitly recognizes this principle. *See App.Br. 26-27; Lewallen*, 85 Ohio App.3d at 96 (8th Dist.). We also note in replying to Appellee’s brief (where this type of waiver is raised), Appellant’s reply brief only responds to Appellee’s alternative argument that waiver occurred by failing to seek a writ against the judge.⁶

⁶ Appellee additionally and unconvincingly claims waiver by Appellant’s failure to file a writ of prohibition against the municipal court, citing law showing a writ may be available in some cases but not showing a writ is required to avoid waiver in a future appeal. *See El Turk*, 2018-Ohio-2125, at ¶ 9-12 (8th Dist.) (and the writ would not be available if the court found a counterclaim that was necessary to make the case exceed the monetary limit was not authentic). As Appellant points out, such writs are often denied on a holding that the party has an adequate remedy at law by way of appeal after the final order is entered. *See State ex rel. Garling v. Nicastro*, 2012-Ohio-3161, ¶ 5 (8th Dist.) (“respondent has the authority to determine whether it is necessary to certify proceedings to the court of common pleas. Additionally, appeal of respondent's determination on the motion to certify is an adequate remedy”).

{¶119} Although in the prior assignments of error Appellant contests the dismissal of counts five and six, Appellant does not set forth an argument on appeal contesting the dismissal of counts three or four. As these tortious interference counts in the counterclaim were the only ones mentioned in Appellant's certification request filed below in attempting to justify the certification to common pleas court, this assignment of error must be overruled. Appellant was provided an opportunity to explain why its demand was authentic. This was *after* receiving Appellee's motion to dismiss with specific arguments related to each count, *after* receiving Appellee's brief in opposition to certification, and after being ordered to brief the issue of certification.

{¶120} Appellant chose to support its certification request (and oppose Appellee's brief in opposition to certification) by only citing to counts three and four. In fact, specific arguments on the amount of damages exceeding the monetary limit were only presented on one of those counts. (The existence of any arguments presented orally at the pretrial held after the briefing and before the dismissal decision are not alluded to or presented for our review via a transcript.) As these counts were dismissed by the trial court and are not subjects raised on appeal, the certification decision has not been shown to constitute reversible error under the case law Appellant sets forth on certification (regardless of the disposition of the assignments of error on counts five and six). Based on the arguments presented, this assignment of error is overruled.

{¶121} For the foregoing reasons, the trial court's judgment is affirmed.

Judgment Affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Avon Lake Municipal Court, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to

mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

JUDGE CAROL ANN ROBB
SEVENTH DISTRICT COURT OF
APPEALS, SITTING BY ASSIGNMENT
FOR THE COURT

Waite, P.J., Seventh District Court of Appeals, Sitting by Assignment
Dickey, J., Seventh District Court of Appeals, Sitting by Assignment
CONCUR.

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