

IN THE SUPREME COURT OF OHIO

Open Container, Ltd.,	:	
	:	Case No. _____
Appellant,	:	
	:	
vs.	:	On Appeal from the Tenth District
C.B. Richard Ellis, Inc., et al.,	:	Court of Appeals
	:	
Appellees.	:	Appellate Case No. 14-AP-133
	:	
	:	

**MEMORANDUM IN SUPPORT OF JURISDICTION OF
APPELLANT OPEN CONTAINER, LTD.**

Marcell Rose Anthony J.D., LL.M. (0026115)
Law Offices of Marcell Rose Anthony, LLC
155 West Main Street – Suite 100
Columbus, OH 43215
PH: 614.220.9081
FX: 614.228.5058
Marrose50@aol.com
Co-Counsel for Appellant

Keith E. Golden (0011657)
Adam H. Karl (0082103)
Golden & Meizlish Co., LPA
923 East Broad Street
Columbus, OH 43205
PH: 614.258.1983
FX: 614.253.5071
keg@golmeiz.com
ak@golmeiz.com
Co-Counsel for Appellant

John H. Burtch (0025815)
Robert J. Tucker (0082205)
Baker and Hostetler
65 East State Street – Suite 2100
Columbus, OH 43215
PH: 614.228.1541
FX: 614.462.2616
jburtch@bakerlaw.com
rtucker@bakerlaw.com
Counsel for Appellee CBRE

Andrew W. Owen (0059646)
Carpenter Lipps & Leeland, LLP
280 Plaza – Suite 1300
280 North High Street
Columbus, OH 43215
PH: 614.365.4149
FX: 614.364.9145
owen@carpenterlipps.com
Counsel for Appellee GOLC

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**THIS CASE INVOLVES A CONSTITUTIONAL QUESTION AND IS OF GREAT
PUBLIC IMPORTANCE**

It is respectfully urged that this Honorable Court first read the Statement of the Facts and Case prior to reading this portion regarding Constitutional Question and Great Public Importance, in order to better comprehend this matter.

This case involves denial of procedural and substantive due process, and equal protection (based upon Andrew's religion) under the law to have the law applied uniformly without consideration of counsel or the parties, with a view that all courts act both in law and in equity. Urged by opposing counsel, who poisoned the trial judge's mind-set, and without analyzing, perhaps even reading Andrew's listing contract, followed the Realtor's deposition and held that Andrew was selling property, meaning land and building. Being a trial lawyer and appellate lawyer for at least fifteen years in Franklin County, Ohio with a Juris Doctor from Ohio State University College of Law and a Masters of Law in Taxation from Georgetown University Law Center, it is clear the after the appearance of CBRE and its agents, Natoli null and voided the (Second) Option to Purchase, CBRE null and voided its listing contract with Andrew and signed a listing contract with Natoli which included the sale of Andrew's upscale French turnkey furnished restaurant, CBRE kept Andrew's keys to the restaurant, music system, security system, office, and the like gave those keys to Natoli, thereby causing a commercial lockout when up to that point Andrew was paid up in the rent, and then a null and void of Andrew's 1997 Lease with options lasting until 2013 by Natoli in effect by the lockout caused by CBRE and Natoli together.

Then constitutional deprivations persisted in Andrew's quest for redress in Courts. Even Andrew's expert averred by Affidavit that Andrew was selling his restaurant and long term lease in Andrew's listing contract, and real estate by the (Second) Option to Purchase, Andrew was

evicted on an Order without a showing of owing rent up to the time of the commercial lockout by CBRE and GOLC. (CBRE and GOLC then signed a listing contract which included Andrew's French restaurant.)

The trial court viewed the wrong parol evidence on an ambiguous contract, and denied jury trial, and combed two depositions which although noticed as filed were not filed in the Refiled case. The appellate court viewed the wrong parol evidence on an ambiguous contract which modified and changed the clear language of Andrew's listing contract, and upheld the trial court's grant of summary judgment, then on a motion to certify the case for appeal to the Ohio Supreme Court, called the contract "unambiguous" but reiterated all of the wrong parol evidence in order to prevent certification. Without a motion for summary judgment, without briefing, the appellate court ruled specifically on the eight tort claims contained in the Refiled Complaint. If the law is clear, which it is at most appellate district levels, including the district from which this case comes to this Ohio Supreme Court, and is not uniformly applied due to a reason dealing with counsel or the parties, then that too is a denial of equal protection and due process, both substantive and procedural, as guaranteed under the U.S. Constitution.

Replete in this is that this Ohio Supreme Court has not spoken often about contract interpretation, unambiguous and ambiguous, and the concomitant disposition by summary judgment for unambiguous and trial for ambiguous contracts. A well-reasoned opinion from this Honorable Court would be beneficial for all appellate districts and trial courts in the State of Ohio and thus would be of great public interest to all of its citizens, since almost all adults enter into a contract at some point in their lives.

In addition, of great public interest is the ethical obligations of Realtors' who practice their trade in the State of Ohio. Almost every adult has used the services of a realtor or real

estate agent, some good, some not so good, others terrible, only to find that courts lean toward the realtor, and not the purchaser or buyer according to surveys. The ethical statutes of realtors, including ethical obligations to market and advertise the described property for the period of the listing contract, will be addressed upon briefing.

A review of the Realtor's ethical obligations by statute or by custom is very necessary to put Realtors on notice, as well as their customers, of what falls within the purview of acceptable conduct. In the present case, Andrew's real estate expert gave an expert opinion that CBRE acted unethically in its dealings with Andrew including CBRE's nulling and voiding Andrew's listing contract, all to no avail, to prevent a summary judgment on CBRE's purported argument that CBRE had an ethical obligation to null and void Andrew's listing contract because according to CBRE Andrew was selling "property" that he did not own, real estate.

STATEMENT OF THE FACTS AND CASE

In 1997, Open Container, Ltd. ("OCLTD" or "Andrew") signed a Lease Agreement with Greater Ohio Leasing Corp. ("GOLC" or "Natoli") for a bare bones, four walls and a roof "warehouse," which had two options to renew up to 2013. Andrew renovated the warehouse within a year adding plumbing, electricity, drywall, paint, walls, bathrooms, kitchen, music system, security system, and beautifully furnished it to be an upscale French restaurant located downtown at a cost exceeding \$1 million dollars. The 1997 Lease Agreement between Andrew and Natoli contained an "Option to Purchase" with no conditions, except notice. That lease was also assignable with the consent of landlord which is never withheld absent bad creditworthiness of an intended assigned purchaser. This upscale downtown French restaurant was called Le Metropolitan.

Due to economic climate, the upscale French restaurant closed, everything intact, and Andrew kept paying the rent to Natoli, with whom he had a father-son like relationship in order to preserve Andrew's investment. In 2006, Andrew decided to sell his upscale French turnkey furnished restaurant with its long-term assignable lease, and after speaking to two or three realtors, signed a one year listing contract for \$1.5 million for this "property" described as "A 10,000 sq. restaurant/warehouse located at 9395 Liberty St. Cols. OH 43215" on February 2, 2006. Please note the "/" between the words, "restaurant" and "warehouse."

The listing agent or realtor was C.B. Richard Ellis, Inc. ("CBRE" or "Realtor"). Andrew and Natoli were also negotiating and signed a (Second) Option to Purchase the land and building, but they were still negotiating terms even after signatures. This (Second) Option to Purchase had a 45 day financing condition. The original "Option to Purchase" was in the 1997 Lease itself with no conditions except notice.

Realtor commenced to sell the property of Andrew's furnished French Restaurant with its long term lease, by advising Andrew of viewings by prospective purchasers whereupon Andrew would turn on lights, music system, and otherwise make the restaurant more appealing for purchase. About late March 2006, Greiner of CBRE asked Andrew if he also had an Option to Purchase and wanted to see the document. Greiner had a twenty year friendship with Natoli, and soon after Greiner spoke to Natoli, Andrew receives a letter from Natoli's attorney voiding the (Second) Option to Purchase contract between Andrew and Natoli for failure to comply with the 45 day financing condition, which Natoli waived/was estopped by his conduct. On May 1, 2006, Natoli then had signed a listing contract with CBRE for four months for \$1.2 million dollars, for the "property" described as "being approximately a 10,000 square foot, one story warehouse and restaurant building and the land upon which the same is situated identified in

Franklin County Auditor's parcel 010-017850" (Emphasis added). When Natoli signed, CBRE unilaterally voided the listing contract with Andrew because Andrew was selling "property." (Of course Andrew was selling "property" – his upscale turnkey downtown French restaurant with its long term lease of the warehouse, improved.) Even Andrew's listing contract calls it "property described as..." Upon the signing with Natoli, CBRE gave Natoli all of Andrew's keys to the restaurant, thereby through CBRE and Natoli, causing a commercial lock-out of Andrew from his own property of the French restaurant with its long-term lease. Andrew was paid up in the rent at the time of this CBRE-GOLC commercial lockout.

CBRE did not sell the Natoli land and building, which in 2003 was worth less than \$450,000 and that is with all of the improvements of plumbing, electricity, walls, drywall, bathrooms, kitchen fixtures, etc. that Andrew had paid for – not the four walls-roof warehouse.

In November 2006, GOLC sued Andrew in Municipal Court for rent, and Andrew answered, counter-claimed and filed a third-party complaint against CBRE which brought the case to the Court of Common Pleas. In early February 2007, Andrew's deposition was taken and he was questioned about the (Second) Option to Purchase whether in it he was selling land and building. Andrew, very distraught over losing his French restaurant and his \$1 million or more investment, was not shown the Andrew-Realtor listing contract or asked questions relating to its language. Since Andrew did not know what the term "leasehold" meant, he replied he was not selling a "leasehold" when in fact he was selling (sic.by assignment) his "long-term lease."

Also in this initial case, the trial judge, without motion, without any motion for summary judgment, or a hearing, the trial court entered an order evicting Andrew, and Andrew was evicted by an "Order" of the trial judge, albeit Andrew was paid up in the rent until the GOLC-CBRE commercial lockout, which thereafter tolls the rental obligation.

The case was set for jury trial in 2010, and the day of jury trial commencement, the trial judge heard argument on a pending “Motion to Strike Third-Party Complaint” brought by CBRE, and after testimony by Andrew describing inter alia, his damages, the trial court granted the motion, an appeal was taken, and the lower court was reversed. All parties dismissed claims and in 2011, Andrew filed a Refiled Case, with about three contract claims, and eight tort claims (including two that could be construed as 42 U.S.C., Sections 1981 and 1982 civil rights claims), and attached the 1997 Lease, and the two listing contracts. Andrew is French American Jewish.

Almost immediately after the Appellees filed Answers, CBRE filed a Motion for Summary Judgment, and GOLC also followed with a Motion for Summary Judgment. Both such Motions dealt with the contract only claims, failed to discuss or argue or move on the tort claims and requested summary judgment on the “complaint.” CBRE attached portions of the 2007 Andrew deposition, which portions did not say what they were purported to say, that Andrew was selling land and building which he did not own and therefore, ethically, CBRE had to null and void the listing contract with Andrew. GOLC argued that since the (Second) Option to Purchase Agreement was voided, the Statute of Frauds applied.

Andrew responded with his sixteen page affidavit which inter alia, outlined the conduct of Natoli in waiver/estoppel the 45 day financing condition in the (Second) Option to Purchase, along an affidavit from a real estate expert which, after review of both listing contracts and the lease, averred that Andrew was selling his restaurant and long-term lease, and in the Option to Purchase was selling real estate. He further averred that CBRE breached its ethical duties to Andrew, not visa versa.

Both Defendants-Appellees argued no damages since the property did not sell. Andrew’s deposition, hearing transcript and Affidavit lists damages of about \$1 million for improvements.

The trial judge ignored Andrew's listing contract, law on contract interpretation, unambiguous or ambiguous, but treated Andrew's listing contract as ambiguous by looking at parol evidence, albeit the wrong parol evidence, taking most of it from Realtor's depositions.

The trial judge granted both motions and dismissed the Refiled complaint. The trial judge took most of the (contraverted) facts from the CBRE deposition in its recitation of the facts of the case in contrast to the Affidavits of Andrew and his real estate expert. At no time, did the trial judge review the property language in Andrew's listing contract for the French turnkey restaurant with its long-term lease, but merely took CBRE's depositions, not filed, at its word which stated Andrew was selling land and building, a fact clearly not true in Andrew's listing contract with CBRE. The trial court ignored the waiver/estoppel defense of the Statute of Frauds argument and Andrew's Affidavit relating to conduct by Natoli. See Appendix "A" for the Decision and Judgment Entry.

Although a final order, an appeal was dismissed due to GOLC's counter-claim for rent. Upon remand, GOLC dismissed its counter-claim for rent, with prejudice, as if admitting that rent was never owed by Andrew. An appeal was again taken.

Extensive briefing was conducted, with Appellant's Brief arguing the Andrew's listing contract was unambiguous and stated only the upscale French Restaurant with the warehouse which had to be construed as the warehouse lease which is what Andrew owned in the form of exclusive possession of the land and building. Furthermore, parol evidence such as depositions, could not be considered as a matter of law. Alternatively, Appellant argued that even if Andrew's listing contract was ambiguous, the best parol evidence was the 1997 lease of the warehouse with its "Option to Purchase" without conditions, and the subsequent 2006 listing contract with Natoli for contrast of described property language with Andrew's listing contract.

Appellant then argued that there were questions of fact inherent in any ambiguities, requiring a jury trial and ambiguities are questions of fact and credibility not to be decided on motions for summary judgment.

In its January 13, 2015 Decision, the appellate court limited itself to what the trial judge reviewed, namely the depositions of Realtor Greiner, and Andrew Cohodes, misquoted the listing contract property language with Andrew, and spoke of Andrew's ultimate "intention" to sell everything, which was not in Andrew's listing contract with CBRE and which was never amended. The appellate court essentially denied a de novo review of the entire record. Intention does not equate with what was actually in the described property language of Andrew's listing contract with Realtor. And it is obvious that Andrew's "intention" was based upon the (Second) Option to Purchase.

What must be emphasized is that the appellate court also treated this case as an ambiguous contract because it looked at parol evidence as did the trial court. The appellate court also affirmed that no damages existed based on CBRE-GOLC argument that the property did not sell, even though on appeal, GOLC stated that it just sold the land and building for something around \$450,000. But this was improved property, replete with Andrew's plumbing, electricity, drywall, partitioning, paint, bathrooms, kitchen, and the like, which the appellate court erroneously reasoned that Andrew should have taken this (sic. plumbing and electricity, drywall, kitchen sink, bathrooms, etc.) on eviction, but chose not to. These are damages for Andrew with these improvements to the building selling, improvements that Andrew paid for. As for Realtor, the fact that the restaurant and lease did not sell in three months is of no consequence and not the proper scope for damages as argued by Appellees. The question for damages is whether within a year CBRE would have sold within reasonable certainty with the ethical obligation of Realtor to

advertise and market Andrew's property of his upscale French turnkey restaurant with its long term lease with options up to 2013.

The appellate court stated at some points, that Andrew failed to make an argument before the trial court, which defies, what the trial judge actually did. Although not moved for in the GOLC and CBRE motions for summary judgment, the appellate court upheld summary judgment on the eight tort claims because Andrew touched upon them in his thirty page affidavit, to which neither GOLC nor CBRE responded, which went contrary to a precedential case previously decided by that appellate court. Without a motion for summary judgment by Appellees, the appellate court ruled on those eight tort claims sua sponte, denying all.

The appellate court also overruled the constitutional issues. The appellate court affirmed the trial court's grant of summary judgment on the entire complaint. The Judgment Entry on the Decision was mailed January 14, 2015. See, Appendix "B" for the Decision, Judgment Entry and page of the docket reflecting the mailing of the Judgment Entry on January 14, 2015.

On January 26, Andrew filed a timely Motion to Certify the Case for Appeal, and a Motion for Reconsideration En Banc. On March 12, 2015, the appellate court denied both motions, although both GOLC and CBRE filed Memoranda Contra in which neither refuted the law, or any cases cited, but summarily requested the Court to deny those two motions. For the first time, the appellate court called Andrew's listing contract with CBRE an "unambiguous" contract, and reiterated its ruling after reviewing depositions and affidavits, which are parol evidence not permitted on unambiguous contracts to alter or modify the plain language of the contract itself. The appellate court again failed to review the 1997 Lease and Andrew's 2006 listing contract and the 2006 listing contract with Natoli and CBRE which said land and building

and a specific parcel number, but held for the first time that Andrew was selling real estate, land and building in Andrew's listing contract, clearly altering and changing that listing contract.

The appellate court denied certification for appeal to this Ohio Supreme Court, despite at least four other districts ruling that ambiguous contracts require trials and/or cannot be decided on motions for summary judgment; the appellate court opined that Andrew's listing contract was found not to be ambiguous, despite the appellate court's interpretation of that listing contract with depositions and affidavits, and proceeded to distinguish cases cited by Andrew on ambiguous contracts requiring trials. See Appendix "C" for the Decision and Judgment Entry.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: If Andrew's listing contract is an unambiguous contract, the language of what property was being sold was clearly Andrew's, namely, the upscale French furnished restaurant with its long term lease of a warehouse. If ambiguous, the appellate court used the wrong parol evidence, and relied on depositions which modified and altered Andrew's listing contract, instead of using documents such as the 1997 Lease and the 2006 listing contract with Natoli, to explain Andrew's listing contract so that the Appellees' motions for summary judgment should have been denied and remanded for jury trial.

This Honorable Court has spoken on interpretation of unambiguous contracts, to wit:

- A. Courts will not give an unambiguous contract a construction other than that which the plain language of the contract provides. Aultman Hospital Association v. Community Mutual Insurance Company, 46 Ohio St. 3d 51 (1959).
- B. A court cannot create a new contract by parol evidence that goes contrary to the express language of the contract. Alexander v. Buckeye Pipeline Co., 53 Ohio St. 2d 241 (1978).

Diligent research on Casemaker of the Ohio State Bar Association website, has not disclosed an Ohio Supreme Court case that specifically involves ambiguous contracts let alone proper parol evidence, and trials. However, in Westfield Ins. Co. v. Hunter, 128 Ohio St. 3d 540 (2011), this court reversed the trial and appellate courts in a complex insurance contract case and

remanded the case to the trial judge either to hold an evidentiary hearing prior to jury trial for additional fact finding on the term “property.”

Appellate District Courts have so spoken, and the following cases are presented to this Court as instructive: If a contract is ambiguous, then parol evidence can be viewed to explain, but not to modify or alter the contract. Burton v. Elsea, Inc., 99 LW 6199 (CA 4th 1999) where the appellate court reversed the granting of a directed verdict at the trial involving a contract claim, saying that it was a jury issue. Accord, Carter v. New Buckeye Redevelopment Corp., 98 LW 1670 (CA 8th 1998) where the appellate court reversed the trial judge’s dismissal of plaintiff’s contract claim at trial on grounds that the trial judge considered parol evidence to alter the terms of the contract.

It was initially argued by Andrew that Andrew’s listing contract was unambiguous and that under the listing contract (not the Second Option to Purchase or the 1997 Lease Option to Purchase), Andrew was selling his upscale downtown French restaurant/warehouse lease. If ambiguity in the use of the term “/warehouse.” which was not in existence in 2006, the only parol evidence necessary is the 1997 Lease which stated that Andrew was leasing Natoli’s “warehouse.” Thus, Andrew had a long term exclusive possessory interest in the warehouse which was improved in about a year by virtue of the 1997 Lease which explains what Andrew owned and thus the property he was selling in his listing contract with Realtor. That lease was assignable. That this parol evidence “explains” the word, “warehouse” which has some ambiguity because it was not in existence in 2006, the date of the Andrew’s listing contract with CBRE, is appropriate parol evidence at trial.

It is Realtor’s Agent Greiner who at his deposition stated without reference to the listing contract and mingled his testimony relating to the (Second) Option to Purchase that Andrew was

selling “real estate” which is a clear modification and alteration of the actual 2006 listing contract with Andrew-Realtor. Yet the trial and appellate courts accepted this parol evidence, and upheld summary judgment on an ambiguous contract when it should have been a jury question.

Another acceptable parol evidence is the 2006 Natoli listing contract with CBRE mentioning, “land”, “building”, “parcel no.” all of which connote that it was Natoli who was selling real estate, in addition to Andrew’s downtown furnished French turnkey restaurant.

For trial and appellate courts to accept CBRE’s depositions of what Andrew was selling which clearly modifies and alters the express language of Andrew’s 2006 listing contract is contrary to all law. Certainly, Andrew too talks about selling real estate in connection with the (Second) Option to purchase with Natoli, but again, that was a different document, and real estate was not in Andrew’s listing contract with CBRE. Both the trial and appellate courts erred as a matter of fact and law in their Decisions.

For the foregoing reasons, this Honorable Court is requested to accept this appeal.

Proposition of Law No. II: Damages is not measured whether Natoli’s property (which included Andrew’s restaurant) sold, but whether within reasonable certainty, Andrew’s downtown upscale French furnished restaurant would have sold within a year if CBRE had ethically used its best efforts, including advertising and marketing, to so sell that property, or market value of \$1.5 million, or costs expended which exceeded \$1 million.

That should be the standard, which CBRE failed to initially meet as required by Deshner v. Burt, 75 Ohio St. 3d 280 (1996). Either that or the market value of the property at the time of the breach of the contract, which is late March 2006 and was \$1.5 million according to Realtor in Andrew’s listing contract. At the minimum, damages were Andrew’s cost investment of at least \$1 million dollars, as averred to by Andrew’s Affidavit. Likewise, Natoli failed to initially meet Deshner v. Burt, supra, and the damages would be the difference between the value of a barebones

warehouse, and the improved building actually sold which is approximately \$350,000. These damages standards and figures are only on the contract, not tort, claims.

Proposition of Law No. III: Summary judgment should not have been granted on, or the appellate court specifically sua sponte rule on, the eight tort claims contained in the Complaint when Appellees did not move for summary judgment, did not brief, nor did Andrew, on those eight tort claims in the Refiled Complaint.

The Tenth Appellate District defied its own precedent, for reasons unknown, that precedent being on all fours factually with the case at bar. That case is Ford Motor Credit Company v. Ryan, 2010-Ohio-4601 (CA 10th 2010). In that case with multiple parties, the lower court granted summary judgment to the plaintiff and dismissed defendants' claims which included contract claims as well as four tort claims. That appellate court reversed the trial court on summary judgment that related to the tort claims and remanded the case to the lower court.

In the case at bar, there was no motion or argument for summary judgment on the eight tort claims, and instead of following Ford Motor Credit Company v. Ryan, supra, cited by Appellant in briefing, the appellate court proceeded, without briefing, motion or otherwise, to decide and grant summary judgment on those tort claims, in disbelief of this appellate attorney.

Accordingly, it is respectfully requested that this Honorable Court accept appeal, and to reverse the trial and appellate courts on the tort claims in addition to the contract claims.

Proposition of Law No. IV: The Appellant's Motion to Certify the Case for Appeal should have been granted, there being at least four other appellate districts that have held that ambiguous contracts require a trial and/or cannot be decided on a motion for summary judgment, and other conflicts.

Those cases and districts cited by Appellant in its Motion to Certify are as follows:

- A. Central Ohio Joint Vocational School District Board of Education v. Peterson Construction Company, 125 Ohio App. 3d 58 (CA 12th 1998), where both the contract as well as the exception for enforcement (which in the case at bar is the

ethics statute cited by CBRE) went to jury trial, and the government lost which was upheld on appeal.

- B. Andrefsy v. Shapiro, 04 LW 5922 (CA 9th 2004) is a case where the Ninth Appellate District reversed summary judgment on an ambiguous contract and its terms and held there was a need for a jury trial on that ambiguous contract.
- C. Wagoner v. Leach Company, 99 LW 2552 (CA 2nd 1999). Again, the appellate court reversed summary judgment on an ambiguous contract and remanded the case for jury trial, with emphasis on reasonableness and fairness.
- D. Farakay v. Graham, 83 LE 3049 (CA 11th 1983) is a case plaintiff sued an oil company on a disputed ambiguous contract case which went to jury trial, where the trial court sustained the oil company's motion for directed verdict. The appellate court reversed stating that it should have been submitted to the jury. The appellate court also held that any "...doubt or ambiguity in the language of a contract is to be strictly construed against the party preparing the contract or selecting its language." It appears this was not done by the trial judge in the case at bar, nor the appellate court, with the trial judge failing to quote the "property" language in Andrew's listing contract, and the appellate court misquoting that language.
- E. Estoppel and Waiver are jury questions, not questions for summary judgment, was ruled in Millersport Hardware, Ltd. v. The Weather Hardware Co., 2009-Ohio-6556 (CA 5th 2009). Both courts ignored the defenses of waiver and estoppel, and strictly applied the Statute of Frauds to the (Second) Option to Purchase between Natoli and Andrew.

Accordingly, this case should have been certified for appeal to this Honorable Court.

CONCLUSION

Whether by discretionary grant of appeal, or appeal as of right due to conflicts in appellate districts, it is respectfully requested that this Honorable Court grant appeal. Appeal briefing will set forth law at the highest Ohio level for ethics, ambiguous contracts and parol evidence which does not modify or alter the language of the contract.

Respectfully submitted,

/s/ Marcell Rose Anthony _____

Marcell Rose Anthony, J.D., LL.M. (I0026115)
Law Offices of Marcell Rose Anthony, LLC
155 West Main Street, Suite 100
Columbus, Ohio 43215
Phone: (614) 220-9081
Fax: (614) 228-5058
E-Mail: Marrose50@aol.com
Attorney for Appellant, Open Container, Ltd.

CERTIFICATE OF SERVICE

I, Marcell Anthony, hereby certify that a copy of the foregoing was served on Robert Tucket, Esq. and John Butcher, Esq., Baker and Hostetler, and on Andrew Owen, Esq., Carpenter Lipps & Leeland, LLP by regular U.S. mail at the addresses shown on the front cover hereof and/or by e-mail, on this 17th day of April 2015.

/s/ Marcell Rose Anthony _____
Marcell Rose Anthony

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO
GENERAL DIVISION

OPEN CONTAINER, Ltd., :
 :
 Plaintiff, : Case No. 11-CV-6683
 :
 vs. : Judge Pat Sheeran
 :
 CB RICHARD ELLIS, INC., et al., :
 :
 Defendants. :

**DECISION AND ENTRY SUSTAINING DEFENDANT CB RICHARD ELLIS' MOTION
FOR SUMMARY JUDGMENT**

AND

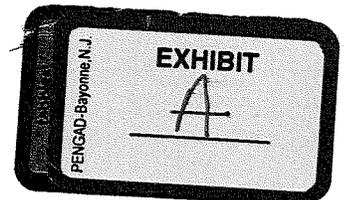
**DECISION AND ENTRY SUSTAINING DEFENDANT GREATER OHIO LEASING
CORPORATION'S MOTION FOR SUMMARY JUDGMENT**

Rendered this 30th day of September, 2013

Sheeran, J.

This case is before the Court on two Motions for Summary Judgment, one filed by Defendant Greater Ohio Leasing Corporation ("Greater Ohio") and one filed by Defendant CB Richard Ellis ("CBRE") for Summary Judgment.

For the relevant times in this case, Greater Ohio Leasing Corporation owned real property located at 93-95 West Liberty Street, in Columbus, Ohio. Greater Ohio, as owner/landlord, leased the premises to Plaintiff Open Container ("Plaintiff") on November 1, 1997. This lease was amended on November 5, 1998. The lease period was for six years, with two options to renew of five years' apiece. In 2003, the first option to renew was exercised by Plaintiff. The lease also included an option to purchase the premises.



On January 5, 2004, the parties entered into an agreement, entitled "Offer to Purchase Real Estate." Paragraph 2 of that agreement reads in pertinent part as follows:

This agreement is contingent upon Purchaser obtaining mortgage financing in an amount and upon terms satisfactory to Purchaser. Should Purchaser not receive a satisfactory commitment for such financing within 45 days after the conclusion of Purchasers (sic) due diligence period, at either parties (sic) option, this agreement may be declared null and void.

The "due diligence" period was defined in paragraph 10 of this agreement, which, in pertinent part, reads as follows.

This offer is expressly contingent upon Purchaser obtaining satisfactory inspections and approvals of the premises by inspectors of Purchaser's choice within a Forty Five (45) day due diligence period after Seller's acceptance. Unless Purchaser indicates to Seller, in writing, that he is dissatisfied with the results of the inspections within seven (7) days after the due diligence period, this contingency shall be deemed waived.

Plaintiff asserts that it invested in and significantly improved the leasehold, which it claims resulted in a "restaurant grade facility."¹ Plaintiff asserts that Greater Ohio "consented to these improvements on the Property."² Plaintiff also asserts that the aforementioned Offer to Purchase was assignable without the consent of Greater Ohio.³ Plaintiff admits that it did not obtain financing, but states that "the conduct of the parties waived Greater Ohio's right to void the Offer to Purchase."⁴

On February 2, 2006, Plaintiff entered into a listing agreement with Defendant CB Richard Ellis ("CBRE") where CBRE agreed to list the property for sale.⁵

On February 26, 2006, Greater Ohio wrote Plaintiff that it was terminating the Offer to Purchase, declaring it to be null and void.⁶ On April 24, 2006, CBRE terminated its exclusive

¹ Complaint, at ¶15.

² Id., at ¶19.

³ Id., at ¶26.

⁴ Id., at ¶29.

⁵ A copy of the listing agreement is attached to the Complaint. The listing agreement commenced on April 21, 2006, and expired on August 20, 2006.

listing agreement with Plaintiff.⁷ Plaintiff asserts that Greater Ohio entered into an agreement with CBRE to sell the property at a reduced price on or about April 21, 2006. Plaintiff also asserts that CBRE had a duty to continue to market the property.⁸ Defendants argue that no such agreement, if it ever existed, has been reduced to writing, and therefore the Statute of Frauds makes any such agreements unenforceable.

1. Defendant CB Richard Ellis' Motion for Summary Judgment

This Defendant's involvement in the case is based on its entering into, and then removing itself from, a listing agreement with Open Container to sell the property in question. Plaintiff notes in its Memorandum Contra that "CBRE was aware that it [Open Container] was not the titled owner of the property when it entered into the exclusive listing agreement with Open Container."⁹

However, this is not exactly what the deposition says. Mr. McNulty initially denies (at p. 29, line 10) knowing that Open Container was the actual property owner. He then notes that Mr. Cohodes told him "that he had an option to purchase the building."¹⁰ Mr. McNulty then notes that "we said we're going to need to see that document."¹¹ Mr. McNulty then notes that he checked the auditor's website and, based on that, he concluded that Chuck Natoli was the actual owner.

It is apparent that Open Container being a mere lessee—without more—was not sufficient for CBRE to enter into a listing agreement to sell the property. The prospect of Open Container becoming a purchaser, however, was.

⁶ Letter from Charles Natoli to Andrew Cohodes, February 21, 2006, paragraph 2. Exhibit E, Reply of CBRE in support of the Summary Judgment motion; the letter is also marked as Exhibit F in the Complaint.

⁷ Complaint, at ¶40.

⁸ Affidavit of Robert Kutschbach, attached to Plaintiff's Memo Contra.

⁹ Id., at p. 3, citing the McNulty Deposition at pp. 29-30.

¹⁰ Id., at lines 12-13.

¹¹ Id., at lines 14-15.

But the status of Open Container as a possible purchaser did not last long. Greater Ohio terminated the written agreement¹² and thereby voided any real possibility that Open Container could purchase the premises. As a result, CBRE had little choice but to end the agreement with Open Container, since Open Container had no right to sell the property and Greater Ohio did not give its consent to Open Container to sell the property. Legally, therefore, Open Container had no right, as a mere lessee, to sell the property. At best, it could assign its leasehold interest, but that, by Mr. Cohodes' own admission, is not what Open Container asked CBRE to do.¹³

R.C. 4735.18(A)(20) reads in pertinent part as follows:

[T]he Ohio Real Estate Commission shall...impose disciplinary sanctions upon any licensee who...in the licensee's capacity as a real estate broker or salesperson...is found guilty of:

(20) Having offered real property for sale or for lease without the knowledge or consent of *the owner or the owner's authorized agent*, or on any terms other than those *authorized by the owner or the owner's authorized agent*.

(Emphasis added)

Until the letter terminating the agreement between Open Container and Greater Ohio was received by CBRE, there were ample grounds for the latter to accept that Open Container was the (or "an") "authorized agent" for Greater Ohio; that is, that Open Container did have the option (assuming successful financing) to purchase the property in question. However, the record is very clear that this option was closed by Greater Ohio in its letter terminating the written agreement.

CBRE cannot assume an illegality on the part of Greater Ohio in the termination of the agreement. Therefore, to continue to list the property under the agreement with Open Container would have been to violate R.C. 4735.18 (A)(20).

¹² February 21, 2006 Letter from Charles Natoli to Andrew Cohodes, Reply Memo, Ex. E.; see also: Affidavit of Andrew Cohodes, Ex. 2, attached to Plaintiff's Memo Contra.

¹³ Cohodes Deposition at 140.

The affidavit of Robert Kutschbach does not affect this conclusion. To address his conclusions *seriatim*, the deposition of Mr. Cohodes indicates that he did not intend to list the leasehold estate; therefore, whether that estate had value is irrelevant to the case. As to the fiduciary duty claimed in subparagraph 11(b), that duty existed relative to the leasehold estate IF Mr. Cohodes wanted the leasehold estate marketed. He did not.

Mr. Kutschbach then opines, in subparagraph (c), that CBRE breached the contract by unilaterally terminating the listing. This opinion assumes that Mr. Cohodes wanted to sell the leasehold estate, which he did not, and as a result fails to take into account the requirements of R.C. 4735.18 (A)(20).

Mr. Kutschbach raises the question of whether CBRE breached a fiduciary duty. Mr. Kutschbach assumes that CBRE “abandon[ed]” Open Container.¹⁴ However, to restate once again, this alleged “abandonment” only holds true IF Mr. Cohodes wanted to list the leasehold estate. His own deposition clearly indicates otherwise.¹⁵

Finally, Mr. Kutschbach notes that it may “appear” that Greater Ohio and CBRE were “attempting to take the value of the leasehold improvements.”¹⁶ Certainly, to the extent that a case exists against Greater Ohio, which will be discussed *infra*, a plan to deprive Open Container of leasehold improvements may well present a damages issue. However, as to CBRE, which had a statutory obligation to remove the listing, this is a non-issue.

Based on the foregoing, reasonable minds can come to only one conclusion and that is that summary judgment should be granted to CBRE.

2. Greater Ohio’s Motion for Summary Judgment

¹⁴ Affidavit of Mr. Kutschbach, at paragraph 11, subsection (d).

¹⁵ To the extent Mr. Cohodes’ affidavit, attached to the Memo Contra, contradicts his deposition testimony on this point, that direct contradiction is without merit, and the Court disregards that portion of the affidavit.

¹⁶ Kutschbach affidavit, *supra*, at paragraph 11, subsection f.

Defendant Greater Ohio's Motion for Summary Judgment essentially holds that it owns, and has always owned, the subject premises; that Plaintiff only had a leasehold interest in the premises, that although there was an agreement to allow Plaintiff to purchase the subject premises, that agreement was properly nullified by Greater Ohio; that any verbal agreements, "if they ever existed at all" were not in writing and therefore not enforceable under the Statute of Frauds; that Plaintiff was given the opportunity by this Court to remove certain property, but failed to do so; and, finally, that the property in question was never sold, either to the "2700 Partnership" or to anyone else.¹⁷

Thus, Open Container asserts that it is entitled to summary judgment because the only writing relating to the sale of the premises was properly terminated by Open Container, a fact that no party effectively disputes.

Plaintiff's Memorandum Contra first notes that Greater Ohio did not contain "an affidavit from an individual...with personal knowledge of the facts related to this case."¹⁸ However, a personal affidavit is not necessary if there are pleadings, deposition testimony, or other evidentiary materials that justify summary judgment.¹⁹

Plaintiff goes on to assert that there was an agreement between the parties to jointly market and sell the property, including the restaurant. Plaintiff also notes that "the financing provision [in the written agreement] had been repeatedly waived by Mr. Natoli."²⁰ Accepting this as true does not mean that Greater Ohio did not have the right to terminate the contract based on the failure of Open Container to ever obtain the financing. Greater Ohio did have this right, and properly exercised it.

¹⁷ Memo in Support, at 1-3.

¹⁸ Plaintiff's Memo Contra (Greater Ohio), at 2.

¹⁹ See Civ. R. 56.

²⁰ Plaintiff's Memo Contra (Greater Ohio), at 2.

Plaintiff asserts that there were numerous agreements, which, however, were not in writing, concerning the marketing and sale of the property. Greater Ohio responds that, because the alleged agreements were not in writing, they are not enforceable under the Statute of Frauds.²¹

R.C. 1335.05 specifically includes the necessity of a writing for “a contract or sale of lands, tenements...or interest in...them.”

For purposes of this Motion, all inferences that can reasonably be made from the facts before the Court must be viewed in favor of the non-moving party. Therefore, this Court (notwithstanding the denial regarding alleged agreements by Greater Ohio) will for summary judgment purposes presume that verbal agreements were made. But the salient issue, based on the requirements of the Statute of Frauds, is whether or not the agreement that Mr. Cohodes speaks of was reduced to writing, given the requirements of R.C. 1335.05.

Regrettably for the Plaintiff, there is no evidence before this Court that indicates that any such writings exist. This Court notes the “regret” because it is evident that Plaintiff had put considerable improvements into the premises. However, this Court is also aware that it has worked hard to give Plaintiff the opportunity to remove *any* improvements from the premises that Plaintiff wished to do.²²

²¹ Reply Memo of Greater Ohio, at p. 4

²² On September 11, 2007, this Court, after a consensual physical inspection of the premises, wrote and filed an Entry and Order. It noted that Mr. Cohodes was given the opportunity (which all parties agreed upon) to remove “all property that Mr. Cohodes wished to remove.” There were arguments over the (im)possibility of compliance to this Order, as Mr. Cohodes alleged that his access to the premises was completely restricted. This led to an Order filed on November 30, 2007, that Plaintiff “shall hire a duly qualified...contractor to remove all [of Open Container’s]...property. The record in that case, including another Entry filed by this Court, made it clear that Plaintiff herein did not comply with the Court’s Order. Thus, despite having been given a considerable amount of time to remove Plaintiff’s property, Plaintiff simply did not do so.

Because the requirements of the Statute of Frauds were not met in this instance, Plaintiff does not have an enforceable contract, as a matter of law, and therefore the Motion for Summary Judgment is SUSTAINED.

It is so Ordered.

Copies to: all counsel.

Franklin County Court of Common Pleas

Date: 09-30-2013
Case Title: OPEN CONTAINER LTD -VS- CB RICHARD ELLIS INC
Case Number: 11CV006683
Type: ENTRY

It Is So Ordered.

The image shows a handwritten signature in cursive, "Patrick E. Sheeran", written over a circular official seal. The seal contains the text "FRANKLIN COUNTY OHIO" and "CLERK OF COURTS".

/s/ Judge Patrick E. Sheeran

Court Disposition

Case Number: 11CV006683

Case Style: OPEN CONTAINER LTD -VS- CB RICHARD ELLIS INC

Case Terminated: 18 - Other Terminations

Final Appealable Order: Yes

Motion Tie Off Information:

1. Motion CMS Document Id: 11CV0066832012-01-2699980000
Document Title: 01-26-2012-MOTION FOR SUMMARY
JUDGMENT
Disposition: MOTION GRANTED
2. Motion CMS Document Id: 11CV0066832011-10-0699970000
Document Title: 10-06-2011-MOTION FOR SUMMARY
JUDGMENT
Disposition: MOTION GRANTED

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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

D E C I S I O N

Rendered on January 13, 2015

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

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

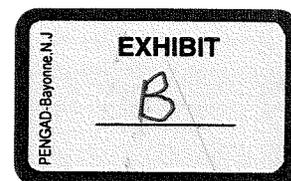
Carpenter Lipps & Leland LLP, and Andrew W. Owen, for appellee Greater Ohio Leasing Corporation.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} Plaintiff-appellant, Open Container, Ltd. ("Open Container"), appeals the granting of summary judgment for defendants-appellees, CB Richard Ellis, Inc. ("CBRE") and Greater Ohio Leasing Corporation ("Greater Ohio"). For the following reasons, we affirm.

{¶ 2} Open Container leased property from Greater Ohio. The lease was initially commenced on November 1, 1997 and was subsequently amended on November 5, 1998.



The period of the lease was six years, with two five-year renewal options. Open Container operated a restaurant on the property until 2001.

{¶ 3} In 2003, Open Container exercised its option to renew the lease. In January 2004, Open Container entered into an "Offer to Purchase Real Estate" ("offer to purchase") with Greater Ohio whereby Open Container was given 45 days to obtain financing and purchase the property; otherwise, the agreement could be considered null and void. Appellant claims there were various oral agreements about marketing the property, the closed restaurant, and a long-term agreement for sale following expiration of the 45-day period. As a result, appellant believed that the offer to purchase was still in effect. However, Open Container failed to obtain the required financing.

{¶ 4} On February 2, 2006, Open Container entered into a listing agreement with CBRE whereby CBRE agreed to list the property for sale, but first required documentation that Open Container had authority to sell the property. Open Container's president, Andrew Cohodes, indicated that the authority to sell the property came from the offer to purchase agreement with Greater Ohio.

{¶ 5} On February 21, 2006, Greater Ohio terminated the lease due to Open Container's failure to pay rent. Greater Ohio also informed Open Container that it was formally declaring the offer to purchase agreement to be null and void. CBRE later was informed that Open Container lacked the authority to sell the property and cancelled the listing. On May 1, 2006, CBRE entered into a new listing agreement with Greater Ohio to list the property.

{¶ 6} In August 2006, Greater Ohio filed an action in the Franklin County Municipal Court seeking to evict Open Container. Open Container filed a counterclaim and the case was transferred to the common pleas court. An interim appeal was pursued to this court and in March 2011, we remanded the case back to the common pleas court. *Greater Ohio Leasing Corp. v. Open Container, Ltd.*, 10th Dist. No. 10AP-629, 2011-Ohio-1258.

{¶ 7} Greater Ohio and CBRE both filed motions for summary judgment which were granted by the common pleas court on September 30, 2013. Open Container appealed. This court dismissed the appeal as there was a counterclaim still pending and

Civ.R. 54(B) language was absent. (R. 91.) Greater Ohio dismissed its counterclaim and Open Container filed another notice of appeal which is now properly before this court.

{¶ 8} As noted earlier, the trial court granted CBRE's motion for summary judgment. CBRE's involvement in the case is based on its entering into and then removing itself from a listing agreement with Open Container. The trial court reasoned that CBRE had a statutory obligation to remove the listing with Open Container once CBRE could no longer believe that Open Container was an authorized agent of Greater Ohio following notice of the termination of the lease agreement between Open Container and Greater Ohio.

{¶ 9} The trial court also granted Greater Ohio's motion for summary judgment agreeing that any possible verbal agreement between Greater Ohio and Open Container was not reduced to writing and therefore could not overcome the requirements of the Statute of Frauds, R.C. 1335.05. The offer to purchase agreement was the only written contract between Open Container and Greater Ohio concerning the sale of the property and it was properly voided. The trial court noted that Open Container made many of the improvements to the property to convert what was essentially an unimproved warehouse into a restaurant. The trial court noted, however, that Open Container had ample opportunity to remove any of its property from the premises but chose not to take advantage of a court order allowing it to do so.

{¶ 10} Open Container brings seven assignments of error for our consideration:

[I.] THE TRIAL JUDGE ERRED WHEN HE RULED THAT "PROPERTY" IN THE CBRE - OCLTD LISTING CONTRACT ONLY MEANT "REAL ESTATE," NAMELY LAND AND BUILDING. TO THE CONTRARY, THAT UNAMBIGUOUS CONTRACT REFLECTS THAT APPELLANT WAS SELLING HIS 10, 000 SQUARE FOOT TURNKEY RESTAURANT WITH THE LONG TERM LEASE OF GOLC'S WAREHOUSE, FOR \$1.5 MILLION, ALL OF WHICH WAS KNOWN TO APPELLEE, CBRE, AT THE SIGNING OF ITS LISTING CONTRACT WITH OCLTD, IN THE 2006 CASE AND APPEAL, AND APPELLEE'S FILING OF ITS MOTION FOR SUMMARY JUDGMENT IN THE 2011 CASE AND THIS APPEAL.

[II.] THE TRIAL JUDGE ERRED WHEN HE RULED THAT APPELLEE, CBRE, WAS FORCED DUE TO ETHICS AND

R.C. 4735.18(A)(20) TO CANCEL THE CBRE - OCLTD LISTING CONTRACT IN ITS ENTIRETY, AND RE-SIGN A LISTING CONTRACT WITH APPELLEE, GOLC, FOR A LISTING PRICE OF \$1.2 MILLION FOR THE "REAL ESTATE" THAT WAS WORTH LESS THAN \$.5 MILLION WHILE THE REMAINDER WAS BY DEFAULT FOR APPELLANT'S TURNKEY RESTAURANT. THE RECORD REFLECTS THAT APPELLEE, CBRE VIOLATED ETHICS AND COMMITTED FRAUD ON THE COURT, AND R.C. 4735.18(A)(20) WAS MISAPPLIED IN THE TRIAL JUDGE'S GRANT OF SUMMARY JUDGMENT TO APPELLEE, CBRE.

[III.] THE TRIAL JUDGE ERRED WHEN HE APPLIED THE STATUTE OF FRAUDS TO A SEPARATE OPTION PURCHASE AGREEMENT FOR REAL ESTATE BETWEEN APPELLANT AND APPELLEE, GOLC, WHICH WAS PURPORTEDLY VOIDED BY GOLC. R.C. 1335.05 DOES NOT APPLY DUE TO THE FACT THAT THAT SEPARATE OPTION PURCHASE AGREEMENT WAS WAIVED AS TO THE FINANCING REQUIREMENT, OR ESTOPPEL APPLIED REGARDING FINANCING AS A MATTER OF LAW, LEAVING THE DISPUTED MATERIAL FACTS OF ESTOPPEL AND WAIVER FOR THE JURY.

[IV.] THE TRIAL JUDGE ERRED WHEN HE APPLIED THE STATUTE OF FRAUDS TO A SEPARATE OPTION TO PURCHASE AGREEMENT FOR THE REAL ESTATE BETWEEN APPELLANT AND APPELLEE, GOLC, BECAUSE THE LONG-TERM LEASE ITSELF CONTAINED AN OPTION TO PURCHASE THE REAL ESTATE WHICH WAS VIABLE AND R.C. 1335.05 DOES NOT APPLY TO THAT LONG-TERM WRITTEN LEASE.

[V.] THE TRIAL JUDGE ERRED WHEN IT TERMINATED THE CASE SINCE NINE OTHER CLAIMS IN THE REFILED COMPLAINT WERE VIABLE AND SHOULD NOT HAVE BEEN GRANTED SUMMARY JUDGMENT FOR APPELLEES.

[VI.] THE TRIAL COURT ERRED BY RESOLVING QUESTIONS OF MATERIAL FACT AND BY RESOLVING ON CREDIBILITY OF PARTIES AND WITNESSES, SINCE THESE ISSUES WERE JURY QUESTIONS, THUS REQUIRING DENIAL OF SUMMARY JUDGMENT TO THE APPELLEES.

[VII.] APPELLANT'S GUARANTEES UNDER THE U.S. CONSTITUTION, AND APPELLANT'S CIVIL RIGHTS, HAVE BEEN VIOLATED.

{¶ 11} Addressing Open Container's argument that the trial court did not have the proper record before it when deciding both summary judgment motions, we note that Open Container did not object to any of Greater Ohio's or CBRE's summary judgment evidence. The trial court was free to then consider the evidence presented by Greater Ohio and CBRE. *Leonard v. Georgesville Ctr., LLC*, 10th Dist. No. 13AP-97, 2013-Ohio-5390, ¶ 22, citing *Reed v. Davis*, 10th Dist. No. 13AP-15, 2013-Ohio-3742, ¶ 14. Courts may consider other forms of evidence than those specified in Civ.R. 56(C) if there is no objection to the evidence. *State ex rel. Gilmour Realty, Inc. v. Mayfield Hts.*, 122 Ohio St.3d 260, 2009-Ohio-2871, ¶ 17. We therefore elect to consider only the same evidence that was before the trial court on the summary judgment motions.

{¶ 12} Civ.R. 56(C) states that summary judgment shall be rendered forthwith if:

[T]he pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion * * *.

Accordingly, summary judgment is appropriate only where: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the non-moving party. *Tokles & Son, Inc. v. Midwestern Indemn. Co.*, 65 Ohio St.3d 621, 629 (1992), citing *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 65-66 (1978). "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record * * * which demonstrate the absence of a genuine issue of fact on a material element of the non-

moving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). Once the moving party meets its initial burden, the non-moving party must then produce competent evidence showing that there is a genuine issue for trial. *Id.* at 293.

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

Civ.R. 56(E). Summary judgment is a procedural device to terminate litigation, so it must be awarded cautiously with any doubts resolved in favor of the non-moving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59 (1992).

{¶ 13} De novo review is well established as the standard of review for summary judgment. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). We stand in the shoes of the trial court and conduct an independent review of the record applying the same summary judgment standard. As such, we must affirm the trial court's judgment if any of the grounds raised by the moving party, at the trial court's level, are found to support it, even if the trial court failed to consider those grounds. *See Dresher; Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41-42 (9th Dist.1995).

{¶ 14} The first assignment of error argues the trial court improperly concluded that the property for sale in the CBRE and Open Container listing contract only meant the land and the building. Appellant's assertion is simply incorrect. The listing agreement clearly states that the property is described as "A 10,000 [square foot] restaurant/warehouse located at 93-95 Liberty St. Cols. OH 43215," for the price of \$1,500,000. (R. 4: Complaint, exhibit C, Exclusive Sales Listing Agreement.) The trial court does not conclude that the listing agreement only meant the land and building. Rather, based on the submitted depositions, affidavits, the plan language of the listing agreement, and the price of \$1,500,000, the trial court concluded that Open Container intended to sell the land, buildings, and all the amenities of the restaurant within. Andrew Cohodes admitted in affidavits that the intention was to "sell the entire property, including the restaurant, and long-term lease." (R. 47: Memo Contra to SBRE Motion for

Summary Judgment, Cohodes' December 21, 2011 affidavit, ¶ 35.) We agree that the listing agreement between CBRE and Open Container included everything on the property. Appellant's assertion is without merit.

{¶ 15} The first assignment of error is overruled.

{¶ 16} Open Container's second assignment of error argues that CBRE was not forced by ethics and R.C. 4735.18(A) to cancel the listing contract between CBRE and Open Container, arguing that CBRE wrongfully terminated the contract. R.C. 4735.18(A) Disciplinary Action reads:

[T]he Ohio real estate commission * * * may impose disciplinary sanctions upon any licensee who, in the licensee's capacity as a real estate broker or salesperson, or in handling the licensee's own property, is found guilty of:

(20) Having offered real property for sale or for lease without the knowledge and consent of the owner or the owner's authorized agent, or on any terms other than those authorized by the owner or the owner's authorized agent[.]

It is clear that once CBRE became aware that Open Container was not the owner's authorized agent, it would need to terminate the contract or face possible disciplinary sanctions. It also was clear from Andrew Cohodes' deposition that CBRE was in a contract to sell the property and not merely the long-term lease.

{¶ 17} Any offer Open Container had to purchase the property ended at the very latest when Charles Natoli, president of Greater Ohio, sent Andrew Cohodes a letter on February 21, 2006 giving formal notice that Open Container's offer to purchase was null and void and that the lease was terminated for substantial default. (R. 101.) CBRE was informed that Open Container was not the Greater Ohio's authorized agent. CBRE was then required to cancel the contract, which it did after being contacted by Greater Ohio which inquired about the for sale sign on the property. The trial court did not error in concluding that CBRE had a statutory obligation to remove the listing. The second assignment of error is overruled.

{¶ 18} The third and fourth assignments of error argue the trial court erred in applying the statute of frauds, R.C. 1335.05. The statute of frauds requires that certain agreements be in writing. R.C. 1335.05 states, in pertinent part:

No action shall be brought whereby to charge the defendant, upon a special promise, to answer for the debt, default, or miscarriage of another person * * * upon a contract or sale of lands, tenements, or hereditaments, or interest in or concerning them * * * unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized.

The purpose of the statute of frauds is to prevent "frauds and perjuries." *Wilber v. Paine*, 1 Ohio 251, 255 (1824). The statute does so by informing the public and judges of what is needed to form a contract and by encouraging parties to follow these requirements by nullifying those agreements that do not comply. *Olympic Holding Co., L.L.C. v. ACE Ltd.*, 122 Ohio St.3d 89, 2009-Ohio-2057, ¶ 33.

{¶ 19} The third assignment of error argues the trial court erred in applying the statute of frauds to the January 2004 option to purchase agreement between Open Container and Greater Ohio. Open Container again misconstrues the trial court's decision. The trial court did not apply the statute of frauds to the option to purchase agreement. The trial court merely found that the option to purchase was rendered null and void at the latest by the February 21, 2006 letter from Greater Ohio to Open Container.

{¶ 20} Open Container argues that the financing requirement of the option to purchase was orally waived by Greater Ohio and thus Greater Ohio was barred from voiding the purchase agreement. Viewing this in the light most favorable to the non-moving party, even if Greater Ohio did in fact waive the financing requirement, such a waiver would still be required to be reduced to writing. "[T]he statute of frauds bars a party from enforcing an oral agreement falling within the statute." *FirstMerit Bank, N.A. v. Inks*, 138 Ohio St.3d 384, 2014-Ohio-789, ¶ 22.

{¶ 21} The third assignment of error is overruled.

{¶ 22} The fourth assignment of error claims that the lease between Greater Ohio and Open Container contained an option to purchase separate from the 2004 offer. Open Container failed to bring such argument before the trial court. A party who fails to raise an argument in the court below waives his or her right to raise it on appeal. *State ex rel.*

Zollner v. Indus. Comm., 66 Ohio St.3d 276, 278 (1993). An appellate court must, therefore, limit its review of the case to the arguments contained in the record before the trial court. *Litva v. Village of Richmond*, 172 Ohio App.3d 349, 2007-Ohio-3499, ¶ 18 (7th Dist.).

{¶ 23} The fourth assignment of error is overruled.

{¶ 24} The fifth assignment of error claims that there were several viable claims remaining before the trial court and therefore summary judgment should not have been granted. Firstly, we note that the trial court granted summary judgment as to Open Container's breach of contract claim against Greater Ohio, and the breach of contract claim against CBRE. Therefore, the trial court denied Open Container's request for declaratory judgment. We also note that summary judgment pertaining to the trespass claim was not disputed. We therefore examine any other possible remaining claims.

{¶ 25} The trial court may not have addressed all such claims individually, but such claims were addressed in appellees' motions for summary judgment. As such, we must affirm the trial court's judgment if any of the grounds raised by the moving party, at the trial court's level, are found to support it, even if the trial court failed to consider those grounds. *See Dresher; Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41-42 (9th Dist. 1995).

{¶ 26} Appellees sought summary judgment on the remaining claims based primarily on Open Container's lack of damages. We find Open Container's remaining claims did, in fact, require some showing of loss or damages. "Summary judgment may be granted to the defendant in a breach-of-contract case where the plaintiff has failed to provide evidence of economic damages resulting from a breach of contract and has failed to seek injunctive relief or specific performance of a contractual duty, but instead rests his or her right to proceed to trial solely on a claim for nominal damages." *DeCastro v. Wellston City Sch. Dist. Bd. of Edn.*, 94 Ohio St.3d 197, 201 (2002).

{¶ 27} Further, the remaining claims which Open Container now alleges do require proof of damages. To successfully prosecute a claim for breach of an implied-in-fact contract, a plaintiff must present evidence of loss or damage as a result of defendant's breach. *See Barlay v. Yoga's Drive Thru*, 10th Dist. No. 03AP-545, 2003-Ohio-7164. A claim of promissory estoppel involves four elements including that the party relying on

the promise must have been injured by the reliance. *Holt Co. v. Ohio Mach. Co.*, 10th Dist. No. 06AP-911, 2007-Ohio-5557. To prevail on a claim for unjust enrichment: (1) the plaintiff must have conferred a benefit on defendant; (2) defendant knew of the benefit; (3) defendant would be unjustly enriched to retain the benefit without compensating plaintiff. *Hambleton v. R.G. Barry Corp.*, 12 Ohio St.3d 179, 183 (1984). An element of tortious interference with a contract is resulting damages. *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St.3d 171 (1999). A plaintiff that suffers no actual damages from the underlying unlawful act cannot bring a successful civil conspiracy action. *Porter v. Saez*, 10th Dist. No. 03AP-1026, 2004-Ohio-2498, ¶ 77. A claim of breach of fiduciary duty requires an injury resulting proximately therefrom. *Strock v. Pressnell*, 38 Ohio St.3d 207, 216 (1988).

{¶ 28} Viewing the evidence most favorably to Open Container, we find that Open Container did not suffer any damages. Open Container did not receive a single offer while marketing the property for sale in 2006. After appellant was excluded from marketing the property, the property sold for \$435,000. Pursuant to any alleged agreement between the parties, Greater Ohio was entitled to at least the first \$445,000 from the sale. Thus, Open Container was not entitled to any proceeds from the sale. Without any damages suffered, the remaining claims do not survive summary judgment.

{¶ 29} The fifth assignment of error is overruled.

{¶ 30} Open Container argues in the sixth assignment of error that the trial court improperly resolved questions of material fact. Open container argues that there was an issue as to what Open Container was selling in the listing between CBRE and Open Container. There is no outstanding genuine issue of material fact as to what Open Container contracted for CBRE to list as for sale. As noted earlier, Andrew Cohodes, president of Open Container, clearly indicated in his deposition that CBRE was to sell the whole restaurant and the property. The sale was not merely the sale of a long-term lease as Open Container now claims.

{¶ 31} The trial court was correct in concluding that the affidavits of Robert Kutschback, Open Container's expert and Andrew Cohodes do not create a genuine issue of material fact. A genuine issue of material fact is not created by the contradictory evidence submitted from a nonmoving party in a summary judgment motion absent some

sufficient explanation of the contradiction. "[W]hen an inconsistent affidavit is presented in support of, or in opposition to, a motion for summary judgment, a trial court must consider whether the affidavit contradicts or merely supplements the affiant's earlier sworn testimony. * * * A nonmoving party's contradictory affidavit must sufficiently explain the contradiction before a genuine issue of material fact is created." *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, ¶ 29.

{¶ 32} The sixth assignment of error is overruled.

{¶ 33} The seventh assignment of error asserts for the first time that Greater Ohio and CBRE violated civil rights of Open Container guaranteed by the United States Constitution. Ordinarily, reviewing courts do not consider questions not presented to the court whose judgment is sought to be reversed. *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 81 (1997). A party who fails to raise an argument in the court below waives his or her right to raise it on appeal. *State ex rel. Zollner v. Indus. Comm.*, 66 Ohio St.3d 276, 278 (1993). We will not further consider the argument that Open Container's civil rights were violated.

{¶ 34} The seventh assignment of error is overruled.

{¶ 35} Having overruled all the assignments of error, we affirm the decision of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and SADLER, JJ., concur.

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Open Container, Ltd., :

Plaintiff-Appellant, :

v. :

No. 14AP-133
(C.P.C. No. 11CVH-05-6683)

CB Richard Ellis, Inc. et al., :

(REGULAR CALENDAR)

Defendants-Appellees. :

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on January 13, 2015, appellant's assignments of error are overruled. Therefore, it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs shall be assessed against appellant.

TYACK, KLATT & SADLER, JJ

/s/JUDGE

Judge G. Gary Tyack

Franklin County Ohio Court of Appeals Clerk of Courts- 2015 Jan 13 4:38 PM-14AP000133

Tenth District Court of Appeals

Date: 01-13-2015
Case Title: OPEN CONTAINER LTD -VS- CB RICHARD ELLIS INC
Case Number: 14AP000133
Type: JEJ - JUDGMENT ENTRY

So Ordered

/s/ Judge G. Gary Tyack

Electronically signed on 2015-Jan-13 page 2 of 2

THE STATE OF OHIO Franklin County, ss	} I, MARYELLEN O'SHAUGHNESSY, Clerk OF THE COURT OF APPEALS WITHIN AND FOR SAID COUNTY, HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY TAKEN AND COPIED FROM THE ORIGINAL <i>Judgment Entry</i> NOW ON FILE IN MY OFFICE. WITNESS MY HAND AND SEAL OF SAID COUNTY THIS <u>13th</u> DAY OF <u>Jan</u> , A.D. 20 <u>15</u> MARYELLEN O'SHAUGHNESSY, Clerk By <i>[Signature]</i> Deputy
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OPEN CONTAINER LTD -VS- CB RICHARD ELLIS INC

FILE

#	DATE	SUB#	ACTN	DESCRIPTION	FIELD VALUES
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				JOURNAL ENTRY	
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				FICHE: 0A145	FRAME: I15 PAGES: 11
				RENDERED ON 1/13/15 JUDGMENT AFFIRMED	
	011315	0002	5834C	PROOF OF REG MAILING	
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	011315	0004	5834C	PROOF OF REG MAILING	
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36	012615	0001	9148	MOTION TO RECONSIDER P OPEN CONTAINER LTD	
				FICHE: 0A147	FRAME: C35 PAGES: 49
				NARRATIVE - SYS GEN ACTION HAS BEEN DENIED	031315
37	012615	0002	9100	MOTION P OPEN CONTAINER LTD	
				FICHE: 0A147	FRAME: C84 PAGES: 44
				MOTION TO CERTIFY CASE FOR APPEAL TO OHIO SUPREME	
				CRT BASED UPON CONFLICTING LAWS	

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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

D E C I S I O N

Rendered on March 12, 2015

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

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

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

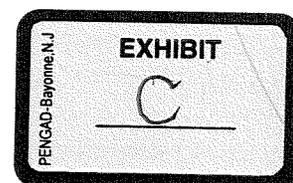
ON MOTIONS

TYACK, J.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

KLATT and SADLER, JJ., concur.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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

JOURNAL ENTRY

For the reasons stated in the decision of this court rendered herein on March 12, 2015, it is the order of this court that the motions for en banc consideration and to certify a conflict are denied.

TYACK, KLATT & SADLER, JJ.

/s/JUDGE
Judge G. Gary Tyack

Court Disposition

Case Number: 14AP000133

Case Style: OPEN CONTAINER LTD -VS- CB RICHARD ELLIS INC

Motion Tie Off Information:

1. Motion CMS Document Id: 14AP0001332015-01-2699970000
Document Title: 01-26-2015-MOTION
Disposition: 3200
2. Motion CMS Document Id: 14AP0001332015-01-2699980000
Document Title: 01-26-2015-MOTION TO RECONSIDER
Disposition: 3200

Tenth District Court of Appeals

Date: 03-13-2015
Case Title: OPEN CONTAINER LTD -VS- CB RICHARD ELLIS INC
Case Number: 14AP000133
Type: JOURNAL ENTRY

So Ordered



/s/ Judge G. Gary Tyack

Electronically signed on 2015-Mar-13 page 2 of 2