[Cite as *Templeton v. Winner Ents., Ltd.*, 2024-Ohio-2745.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

MARK A. TEMPLETON et al.,

Plaintiffs-Appellants,

v.

WINNER ENTERPRISES, LTD. et al.,

Defendants-Appellees.

OPINION AND JUDGMENT ENTRY
Case No. 23 MA 0067

Civil Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2020 CV 00533

BEFORE:
Cheryl L. Waite, Carol Ann Robb, Judges, and William A. Klatt, Judge of the Tenth District Court of Appeals, Sitting by Assignment (Retired).

JUDGMENT:
Affirmed in part.
Reversed and Remanded in part.

Atty. Jeffrey A. Kurz, for Plaintiffs-Appellants

Atty. Lynn A. Maro, Maro & Schoenike Co., for Defendants-Appellees

Dated: May 28, 2024

WAITE, J.

{¶1} Appellants Mark and Mary Templeton appeal a November 16, 2020 Mahoning County Court of Common Pleas judgment entry granting Appellees', Earl Winner, Winner Group Holdings ("WGH"), and Winner Enterprises, Ltd. ("WEL"), Civ.R. 12(B)(6) motion to dismiss Appellants' complaint. Appellants argue that the court's dismissal was premature. Based on the language of the complaint and the applicable law, Appellants' claims regarding promissory estoppel, unjust enrichment, fraud, fraud in the inducement, fraudulent misrepresentation, tortious interference with a business and contractual relationship, and civil liability for criminal acts were erroneously dismissed for failure to state a claim. However, Appellants' remaining claims were properly barred. Accordingly, the judgment of the trial court is affirmed in part and reversed and remanded in part consistent with this Court's Opinion.

Factual and Procedural History

{¶2} Because this appeal is the result of a Civ.R. 12(B)(6) dismissal, the facts are sparse. Appellee Earl Winner is a resident of Boardman, Ohio. Winner is the sole owner, member, agent, and authorized agent of two Ohio limited liability companies in Mahoning County: WGH and WEL. Relevant to these proceedings, WGH is the title holder to a restaurant called the Brickhouse Tavern, located on Midlothian Boulevard in Youngstown. WEL owns the Brickhouse Tavern's business assets, equipment, and licenses. The Brickhouse Tavern is the focus of this litigation.

{¶3} It is unclear whether a prior relationship existed between Winner and Appellants, but at some point in time Winner approached Appellants to inquire whether

they were interested in purchasing the Brickhouse Tavern. In September of 2014, the parties worked towards an agreement in which Appellants were to purchase the Brickhouse Tavern along with its "equipment, inventory, barware, furniture, fixtures, intellectual property, assets, real estate, and rights to contracts and licenses." (3/5/20, Complaint, p. 2.) In exchange, Appellants were to pay Appellees for a "temporary trial lease of 6 mos. At a rate of $2,500/mo. to see if the business generated enough revenue for [Appellants] to engage in a transfer agreement." (Complaint.) The parties dispute almost all of the facts in this case thereafter.

{¶4} According to Appellants, from September of 2014 through March of 2015 they made payments to Appellees under the temporary lease agreement, and the parties worked towards an agreement for the final purchase. While negotiations continued, it was understood that Appellants were to make an upfront payment, followed by monthly payments. Winner's attorneys prepared a proposed purchase agreement providing Appellants would purchase the Brickhouse Tavern for a total of $230,000. The purchase price was to be comprised of two lump sum payments of $10,000 to be paid in April and September of 2015. Thereafter, Appellants would pay monthly installments in the amount of $4,883 for a period of forty-three months (until the aggregate payment amount reached the remaining $210,000). Title to the restaurant would then be transferred to Appellants for $1. While the parties agreed to the payment amounts, there was no agreement reached on the other terms and the contract was never signed.

{¶5} Winner proposed to Appellants they continue with an agreement "without the use of lawyers in what he called a 'handshake' deal." (2/5/20 Complaint, p. 3.) This agreement was similar to the previous one, particularly as to the price: $20,000 paid

upfront in two installments followed by monthly payments. The parties agreed Appellants would operate the business during this time, but were to deposit all revenues in an account solely in WEL's name. This was because Winner wanted the monthly payments and revenues placed in one account so he could pay the monthly bills for the business and withdraw the monthly expenses. Winner also wanted control over sales tax payments.

{¶6} The parties proceeded according to the terms of this "handshake deal" until the fall of 2016, when the Brickhouse Tavern was not generating sufficient income. The parties modified the agreement to lower the monthly payments to $2,800 and add six additional months of payments in order to reach the $210,000 final payment amount. The parties continued to act according to the handshake agreement and Appellants made the final payment in January of 2020.

{¶7} In addition to the monthly payments, Appellants made approximately $30,530 worth of sales tax payments to Appellees. Appellants had previously requested an accounting of the sales tax account, however, Winner denied that request. Appellants later learned that Winner had been comingling those funds with funds from his other bar, "Utopia." He apparently had this same practice regarding the worker's compensation account.

{¶8} Of more concern to Appellants, Winner revealed to them several months before they made the final payment that he had not paid his taxes, which might affect the transfer. Despite this knowledge, Appellants continued to tender the monthly payments and Winner continued to accept them.

{¶9} Winner then informed Appellants he had failed to make payments on a loan he took out using the Brickhouse Tavern as collateral. When Appellants became upset, he told them "I'm not trying to fight. I just want it figured out. I have no means to pay off the loan and the taxes. Just being honest." (3/5/20 Complaint, Exh. H.) Shortly before the final payment was made in January of 2020, Winner texted Appellants: "I'm not sure what to do or say but don't worry. I'll make sure you have the Brickhouse in February." (3/5/20 Complaint, Exh. I.)

{¶10} Winner's financial problems resulted in a tax hold on his liquor license. Winner texted Appellants: "I'm not signing any agreement until I make sure the D5 [liquor license] is OK. Tim Tusek is working on that now. I'm sorry she didn't fix my worker's comp." (3/5/20 Complaint, Exh. J.) Thereafter, Appellants made the final payment.

{¶11} Following final payment, Winner hired counsel and for the first time alleged that Appellants' monthly payments were merely rental payments, and that no agreement to purchase the business had ever been reached. Winner's counsel sent Appellants' counsel a letter stating in part that Appellants' assertions the parties had acted pursuant to a previous agreement were not supported by the facts, but that Winner would sell the Brickhouse Tavern to them for an additional $150,000, taking into account the prior payments. (3/5/20 Complaint, Exh. K.)

{¶12} Thereafter, Winner removed money from one of the Brickhouse Tavern accounts. Appellants asked him if he had taken the money to pay for a food service license. He responded: "Yes, so I could write a check. It's paid. That's why I called u [sic] the other night. U didn't answer I asked the Atty he said ok." (3/5/20 Complaint,

Exhs. L and M.) However, Winner did not pay for the license and his counsel sent a letter to Appellants saying he would not renew the license, which had expired.

{¶13} Appellants allege that on March 2, 2020, Winner and his friends drank liquor at the Brickhouse Tavern without paying. Winner then served Appellants with a criminal trespass notice and sent the liquor license for the business back to the State of Ohio. He also removed Appellants from all of the bank accounts.

{¶14} On March 5, 2020, Appellants filed a complaint against Winner and his companies. The complaint included claims seeking both equitable relief and relief based on contract. Appellants also sought a temporary restraining order ("TRO").

{¶15} During the lengthy oral hearing on the TRO, Appellees' counsel orally moved to dismiss the complaint pursuant to Civ.R. 12(B)(6). The court denied the TRO based on its finding that the statute of frauds would bar all of Appellants' claims. Appellees then filed a motion to dismiss the remaining allegations in the complaint, which was granted by the magistrate on November 16, 2020. Appellants filed a motion for stay, seeking to prevent Appellees from selling the restaurant during the pendency of the appeal. The court denied the motion.

{¶16} While the parties awaited a ruling on the motion to dismiss, on May 27, 2020, Appellees filed an answer and counterclaims to the original complaint. Those counterclaims asserted: breach of contract, civil theft, defamation/slander, tortious interference with business, and conversion. The court determined that its entry was not a final appealable order due to the existence of the counterclaims filed by Appellees. On May 10, 2023, Appellees dismissed their counterclaims. This timely appeal followed.

Timely Appeal

{¶17} While the judgment entry at issue is dated November 16, 2020, the trial court determined it was not yet final and appealable due to Appellees' counterclaims. Once the counterclaims were voluntarily dismissed on May 10, 2023, the court's prior entry became a final appealable order.

{¶18} "Dismissal under Civ.R. 41(A)(1) gives a party an absolute right to dismiss its claim any time before commencement of the trial." *Capital One Bank v. Woten*, 169 Ohio App.3d 13, 2006-Ohio-4848, 861 N.E.2d 859, ¶ 8 (3rd Dist.), *Douthitt v. Garrison*, 3 Ohio App.3d 254, 255, 3 OBR 286, 444 N.E.2d 1068 (9th Dist.1981).

{¶19} "When an entire action is dismissed without prejudice pursuant to Civ.R. 41(A), as opposed to only certain claims or parties, interlocutory orders which do not contain Civ.R. 54(B) language that there is no just reason for delay are dissolved and rendered a nullity." *F & R White Farm, LLP v. Kemp*, 7th Dist. No. 19 BE 0038, 2020-Ohio-1364, 153 N.E.3d 722, ¶ 20. In other words, a Civ.R. 41 voluntary dismissal is self-executing and automatically renders a prior entry final and appealable as long as no additional claims remain pending. Thus, even though the trial court did not file a second judgment entry following dismissal of the counterclaims, such entry is unnecessary.

General Law – Civ.R. 12(B)(6)

{¶20} This action was dismissed pursuant to Civ.R. 12(B)(6). "A Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted tests only the legal sufficiency of the complaint." *Youngstown Edn. Assn. v. Kimble*, 2016-Ohio-1481, 63 N.E.3d 649, ¶ 11 (7th Dist.), citing *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 605 N.E.2d 378 (1992).

{¶21} When reviewing a Civ.R. 12(B)(6) motion, "the court must accept the factual allegations contained in the complaint as true and draw all reasonable inferences from these facts in favor of the plaintiff." *Kimble, supra*, at ¶ 11, citing *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). In order to grant a Civ.R. 12(B)(6) motion, "it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *O'Brien v. Univ. Community Tenants Union, Inc*., 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus. However, "[i]f there is a set of facts consistent with the complaint that would allow for recovery, the court must not grant the motion to dismiss." *Kimble, supra*, at ¶ 11, citing *York v. Ohio State Hwy. Patrol*, 60 Ohio St.3d 143, 144, 573 N.E.2d 1063 (1991).

{¶22} A Civ.R. 12(B)(6) claim is reviewed *de novo*. *Ford v. Baska*, 2017-Ohio-4424, 93 N.E.3d 195, ¶ 6 (7th Dist.), citing *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5.

ASSIGNMENT OF ERROR NO. 1

> The trial court erred when it dismissed Appellants' claims of Promissory Estoppel, Equitable Estoppel and Unjust Enrichment by finding that Appellants' Complaint failed to alleged facts that, if taken as true, (a) established a change in position by Appellants for the worse and (b) established an enforceable agreement

ASSIGNMENT OF ERROR NO. 2

The trial court erred when it dismissed Appellants' claims for Fraud, Fraud in the Inducement, Misrepresentation, Conversion and Civil Liability for Criminal Acts by finding that they were all barred by the Statute of Frauds.

{¶23} Stressing that Ohio is a notice-pleading state, Appellants urge that they were required only to place Appellees on notice of the claims intended to be pursued. Appellants argue that promissory estoppel is not an exception to the statute of frauds, but is a mechanism to allow for damages where a party is injured due to that party's reliance on what was believed to be an enforceable contract. Appellants contend that they paid a total of $294,429.87 over a sixty-month period, expecting to purchase the business and property. Despite paying this significant amount of money in order to satisfy their end of the bargain, they did not receive what they were promised, the Brickhouse Tavern and its business.

{¶24} Similarly, Appellants urge that a claim for unjust enrichment is not based on the existence of a contract, but is a claim based on receipt of an unfair benefit, and so the statute of frauds does not apply. Again, Appellants argue that they paid Appellees $294,429.87 to complete their end of the agreement but were not given ownership of the restaurant, showing Appellees were unjustly enriched as a result. Appellants urge that these facts are all set out within the complaint and if viewed as true, as required under a 12(B)(6) analysis, they are entitled to damages. Appellants contend that pursuant to the appropriate standard of review, the trial court erroneously dismissed these two claims.

{¶25} Appellees respond that the Ohio Supreme Court has held a party cannot escape the statute of frauds by pleading promissory estoppel. Appellees urge that it was Appellants who refused the sign the purchase agreement they now seek to enforce.

Appellees further contend that while negotiations took place regarding the sale of the business, Appellants continued to lease the restaurant and any payments made were intended merely to lease the premises.

{¶26} A threshold issue in this matter involves the statute of frauds. The statute of frauds, last updated in 1976, provides:

> 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; nor to charge an executor or administrator upon a special promise to answer damages out of his own estate; nor to charge a person upon an agreement made upon consideration of marriage, or upon a contract or sale of lands, tenements, or hereditaments, or interest in or concerning them, or upon an agreement that is not to be performed within one year from the making thereof; 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.

{¶27} This matter turns entirely on *Olympic Holding Co. v. ACE Ltd*., 122 Ohio St.3d 89, 2009-Ohio-2057, 909 N.E.2d 93. *Olympic Holding* addressed whether the statute of frauds also bars claims rooted in a theory of estoppel. This Court has clearly laid out its interpretation of *Olympic Holding*.

> First, regarding Appellant's claim for title to the decedent's real property via promissory estoppel, this court has held that promissory estoppel is not an

> exception to the statute of frauds. *Filo v. Liberato*, 2013-Ohio-1014, 987 N.E.2d 707, ¶ 10 (7th Dist.). Thus, it is not a means to secure real property as damages. *Id*. citing *Olympic Holding Co. v. ACE Ltd*., 122 Ohio St.3d 89, 2009-Ohio-2057, 909 N.E.2d 93, ¶ 35. Instead, promissory estoppel is a cause of action that may provide another remedy, other than the recovery of an interest in real property, to a party who is injured due to one's reliance on an otherwise unenforceable promise, such as one barred by the statute of frauds. *Id*.

Matter of Estate of McDaniel, 2023-Ohio-1065, 212 N.E.3d 351, (7th Dist.) ¶ 64.

{¶28} Unquestionably, the statue of frauds does not bar all claims as Appellees would have us read *Olympic Holding.* While Appellees are correct in that any request for specific performance of the sale is barred by the statute of frauds, *Olympic Holding* and its progeny have clearly and repeatedly held that claims seeking money damages suffered as a result of fraud that do not request specific performance for transfer of real property are not barred by the statute of frauds.

{¶29} It is axiomatic that claims seeking specific performance of a contract that does not satisfy the statute of frauds are barred by the statute of frauds. However, in its most basic form, the statute of frauds is completely inapplicable to a claim that looks only to equitable remedies where there is no attempt to enforce the invalid agreement involving transfer of real estate. To allow potential fraud not only to prevent specific performance but also deny the ability of an injured party to be made whole and recover damages suffered as a result of the fraud is inconsistent with Ohio law.

{¶30} With this in mind, in accordance with *Olympic Holding,* we turn to the complaint to determine whether the claims in this case seek specific performance of the alleged agreement, or request equitable damages as a result of the actions of Appellees. Turning first to the claims regarding promissory estoppel, count four of the complaint, it is well established a plaintiff must prove the following four elements to successfully raise a claim of promissory estoppel: (1) a clear and unambiguous promise; (2) reliance on the promise; (3) the reliance is reasonable and foreseeable; and (4) the party relying on the promise was injured by his or her reliance. *Dunn v. Bruzzese*, 172 Ohio App.3d 320, 2007-Ohio-3500, 874 N.E.2d 1221, ¶ 21 (7th Dist.).

{¶31} This Court has previously addressed whether claims for promissory estoppel are barred by the statute of frauds. *Filo v. Liberato*, 2013-Ohio-1014, 987 N.E.2d 707 (7th DIst.). In *Filo,* we acknowledged that "[p]romissory estoppel, itself, does not operate as an exception to the statute of frauds. Instead, where an agreement is required by the statute to be in writing and no writing exists, promissory estoppel specifically exists to provide an action for damages to compensate a party injured due to his reliance on an unenforceable promise." *Id.* at ¶ 10, citing *Olympic Holding* at ¶ 38. As such, when promissory estoppel is brought as a cause of action for damages, *Olympic Holding* expressly allows such claims. *Filo* at ¶ 12, citing *Olympic Holding.* With this in mind, we determined:

> The allegations in the complaint meet the pleading requirements of Civ.R. 8 and contain the necessary elements of a claim for promissory estoppel, an equitable remedy that is not barred by the statute of frauds. A Civ.R. 12(B)(6) motion tests the sufficiency of the pleading only, not the merits of

> the claim. Whether Appellant can prove the facts as he presents them is an issue for a later determination by the trial court. It was error for the court to dismiss Appellant's promissory estoppel claim because a motion to dismiss may not be granted where there exists a set of facts consistent with the complaint that would allow recovery. *York, supra*, 60 Ohio St.3d 143, 573 N.E.2d 1063 (1991). *Olympic Holding*, ¶ 52.

Filo at ¶ 15.

{¶32} We recently revisited the issue and reaffirmed that the statute of frauds does not bar a promissory estoppel claim in *Estate of McDaniel.* In that case, we held that while the statute of frauds continues to bar all claims seeking transfer of real property, "promissory estoppel is a cause of action that may provide another remedy, other than the recovery of an interest in real property, to a party who is injured due to one's reliance on an otherwise unenforceable promise, such as one barred by the statute of frauds." *Id*. at ¶ 64, citing *Olympic Holding.*

{¶33} Contrary to Appellees' arguments, the statute of frauds does not bar a claim for promissory estoppel and, in fact, expressly allows for such a claim. Reviewing Appellants' complaint at count four, it states in relevant part: "[a]s a direct and proximate cause of the actions of the Defendants, Plaintiffs have suffered damages, including financial loss, economic hardship, interest expense, loss of business, loss of reputation, attorney's fees and such other damages to be determined at trial." (3/5/20 Complaint, paragraph 44). Thus, Appellants do not demand specific performance of the alleged oral contract, but seek damages suffered as a result of Appellees' alleged fraud. Those claims

are not barred by the statute of frauds based on the clear law of *Olympic Holding* and its progeny.

{¶34} Next, we address Appellants' equitable estoppel claim, found in count five of the complaint. "Equitable estoppel prevents relief when one party induces another to believe certain facts exist and the other party changes his position on reasonable reliance on those facts to his detriment." *Wilson v. Beck Energy Corp*., 2016-Ohio-8564, 77 N.E.3d 408, ¶ 8 (7th Dist.), citing *Casto v. Positron*, 4th Dist. No. 14 CA 39, 2016-Ohio-285, ¶ 19.

> Ohio "[c]ourts have recognized that a party who accepts the benefits of a contract or transaction will be estopped to deny the obligations imposed on it by that same contract or transaction," *Dayton Securities Assoc. v. Avutu*, 105 Ohio App.3d 559, 563, 664 N.E.2d 954, 957 (1995), a species of estoppel described as "acceptance of benefits" or "quasi estoppel." *Id*. at 564, 664 N.E.2d at 957 (citing *Hampshire Cty. Trust Co. of N. Hampton, Mass. v. Stevenson*, 114 Ohio St. 1, 13-17, 150 N.E. 726, 729-731 (1926)). "[S]trict adherence to some of the elements of technical estoppel, such as knowledge and reliance, may not be required for the doctrine to be invoked." *Id*. For estoppel to apply, the conduct of the party to be estopped must be "inconsistent" with the termination of the contract. *Stevenson*, 114 Ohio St. at 19, 150 N.E. at 731.

Wilson, at 8, citing *Sims v. Anderson*, 2015-Ohio-2727, 38 N.E.3d 1123, ¶ 23 (4th Dist.); *Bonner Farms, Ltd. v. Fritz*, 355 Fed.Appx. 10 (6th Cir.2009).

{¶35} Unlike promissory estoppel, equitable estoppel does not create a cause of action, instead it acts as a defense. It prevents a party from raising a claim that it would ordinarily be entitled to raise. *Marden Rehab. Servs., Inc. v. E. Liverpool Convalescent Ctr., Inc*., 7th Dist. Columbiana No. 10 CO 24, 2011-Ohio-6638, ¶ 20.

{¶36} "The defense of equitable estoppel applies when a party prosecuting a claim for relief has induced the adverse party to believe that certain facts exist and the adverse party changed his position in reasonable reliance thereon, to his detriment." *Id.,* citing *Sky Bank-Ohio Bank Region v. Sabbagh*, 161 Ohio App.3d 133, 2005-Ohio-2517, 829 N.E.2d 743, at ¶ 10; *Ensel v. Levy*, 46 Ohio St. 255, 19 N.E. 597 (1889). While equitable estoppel does not create an independent claim and typically applies as a shield to a claim raised in a complaint, the statute of frauds does not bar an argument amounting to equitable estoppel. *Id.* at ¶ 45. Thus, the trial court erred in dismissing these claims on the basis of the statute of frauds. However, as Appellants incorrectly used these allegations in an attempt to establish a claim for relief improperly, these allegations are ripe for dismissal on other grounds and are barred by Civ.R. 12(B)(6).

{¶37} Turning to Appellants' claim for unjust enrichment, found within count eight, "[t]he elements of unjust enrichment are '(1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment ("unjust enrichment")." *Filo v. Liberato*, 2013-Ohio-1014, 987 N.E.2d 707, ¶ 35 (7th Dist.), citing *Hambleton v. R.G. Barry Corp*., 12 Ohio St.3d 179, 183, 465 N.E.2d 1298 (1984). "Unjust enrichment occurs when a person 'has and retains money or benefits which in justice and equity belong to another.' " *Bldg. Industry Consultants, Inc. v. 3M*

Parkway, Inc., 182 Ohio App.3d 39, 2009-Ohio-1910, 911 N.E.2d 356, ¶ 16, (9th Dist.) quoting *Hummel v. Hummel*, 133 Ohio St. 520, 528, 14 N.E.2d 923 (1938). "The purpose of an unjust enrichment claim is to compensate the plaintiff for the benefit she has conferred on the defendant." *Lucas v. Eclipse Companies, LLC*, 7th Dist. Monroe No. 23 MO 0007, 2023-Ohio-4728, citing *Johnson v. Microsoft Corp*., 106 Ohio St.3d 278, 2005-Ohio-4985, 834 N.E.2d 791, ¶ 21.

{¶38} While Appellees claimed at oral argument that *Olympic Holding* prevents a claim of unjust enrichment from being raised where the statute of frauds bars the agreement, the words "unjust enrichment" appear nowhere in that case. Recently, the Tenth District addressed the issue, and explained:

> In fact, unjust enrichment is available as an equitable remedy for that very reason:
>
> An oral contract that cannot be performed within a year of its making is unenforceable under the Statute of Frauds; but where one party fully performs and the other party, to his unjust enrichment, receives and refuses to pay over money which, under the unenforceable contract, he agreed to pay to the party who has fully performed, a quasi-contract arises, upon which the performing party may maintain an action against the defaulting party for money owed.

Longmire v. Danaci, 2020-Ohio-3704, 155 N.E.3d 1014, ¶ 27 (10th Dist.); citing *Hosterman v. French*, 7th Dist. No. 13 CO 25, 2014-Ohio-5855, ¶ 20, citing *Hummel v. Hummel*, 133 Ohio St. 520, 14 N.E.2d 923 (1938), paragraph one of the syllabus.

{¶39} The *Longmire* court also held that "when an oral contract is deemed unenforceable under the statute of frauds but one party has fully performed under the contract, the fully performing party may maintain a cause of action against the defaulting party. Where no remedy exists in contract or tort, "the equitable remedy in unjust enrichment may be afforded to prevent injustice." *Id.* at ¶ 29, citing *Saraf v. Maronda Homes, Inc*., 10th Dist. No. 02AP-461, 2002-Ohio-6741, ¶ 12; *Banks v. Nationwide Mut. Fire Ins. Co.,* 10th Dist. No. 99AP-1413, 2000 WL 1742064 (Nov. 28, 2000). "As such, the statute of frauds does not preclude appellees' claim for unjust enrichment and afforded appellees a viable equitable remedy under the law." *Id.*

{¶40} Count eight of the complaint details the remedy sought in regard to unjust enrichment. In relevant part, the claim asserts:

> Defendants have refused to provide the Brickhouse Tavern to Plaintiffs despite being paid in full. Defendants should not continue to benefit from the use of the funds paid to them. Therefore, Defendants have been unjustly enriched in an amount equal to $294,429.87 and have been further unjustly enriched by having Plaintiffs pay their sales taxes in an amount equal to $30,530.41. Defendants should be required to return these funds to Plaintiffs plus accruing interest, Court costs, statutory interest and reasonable attorney's fees.

(3/5/21 Complaint, paragraph 64.)

{¶41} It is apparent on its face that in this count Appellants do not seek specific performance, but seek damages for the money they paid Appellees to purchase the

business, which they never received. This claim is not barred by the statute of frauds and the trial court erred in dismissing the claim.

{¶42} Reviewing Appellants' claim for "fraud, fraud in the inducement and misrepresentation," while all three causes of action are pleaded in the same count of the complaint, they involve different sets of elements. The following must be proven to establish a claim of fraud:

> (a) a representation or, where there is a duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance.

Lucarell v. Nationwide Mutual Insurance Company, 152 Ohio St.3d 453, 2018-Ohio-15, 97 N.E.3d 458, ¶ 61, quoting *Gaines v. Preterm-Cleveland, Inc*., 33 Ohio St.3d 54, 55, 514 N.E.2d 709 (1987).

{¶43} "Fraud in the inducement arises when a party is induced to enter an agreement based on a misrepresentation." *Matter of Estate of McDaniel* at ¶ 78, citing *Terry v. Bishop Homes of Copley, Inc.*, 9th Dist. Summit No. 21244, 2003-Ohio-1468, ¶ 21. "The fraud or misrepresentation must be made with the intent of inducing the party's reliance." *Id*. A plaintiff must establish all six elements to successfully assert a claim for fraud in the inducement.

{¶44} The elements of fraudulent misrepresentation are: "(1) a material false misrepresentation; (2) knowingly made; (3) with intent of misleading another into relying on it; (4) reasonable reliance on the misrepresentation; and (5) injury resulting from the reliance." *Isaac v. Alabanza Corp*., 7th Dist. Jefferson No. 05 JE 55, 2007-Ohio-1396, ¶ 21, citing *Gaines v. Preterm-Cleveland, Inc.*, 33 Ohio St.3d 54, 55, 514 N.E.2d 709 (1987).

{¶45} Count six of the complaint states in relevant part: "[a]s a result of Plaintiffs' reliance on Defendants' representations, Plaintiffs have suffered damages, including financial loss, economic hardship, interest expense, loss of business, loss of reputation, attorney's fees and such other damages to be determined at trial." (3/5/20 Complaint, paragraph 52.) Again, Appellants seek damages due to Appellees' alleged fraud, and not specific performance. Regardless, a claim of fraud sounds in tort. Hence, the statute of frauds clearly does not apply. *Spradlin v. Collier*, 4th Dist. Scioto No. 97CA2521, 1998 WL 154538, *5. Even when the claim is rooted in contract, it falls outside the statute of frauds where the plaintiff has included "actual damages attributable to the wrongful acts of the alleged tortfeasor which are in addition to those attributable to the breach of the contract." *Everstaff, L.L.C. v. Sansai Environmental Techs., L.L.C*., 8th Dist. Cuyahoga No. 96108, 2011-Ohio-4824, ¶ 28, citing *Textron Fin. Corp. v. Nationwide Mut. Ins. Co.*, 115 Ohio App.3d 137, 151, 684 N.E.2d 1261 (9th Dist.1996). Here, Appellants have raised an array of claims grounded in fraudulent actions, in addition to their claims of unjust enrichment by Appellees. These claims do not implicate the statute of frauds and should not have been dismissed for failure to state a claim.

{¶46} The tort of civil liability for criminal acts is based on two statutes. First, R.C. 2307.60(A)(1) provides that:

> Anyone injured in person or property by a criminal act has, and may recover full damages in, a civil action unless specifically excepted by law, may recover the costs of maintaining the civil action and attorney's fees if authorized by any provision of the Rules of Civil Procedure or another section of the Revised Code or under the common law of this state, and may recover punitive or exemplary damages if authorized by section 2315.21 or another section of the Revised Code.

{¶47} The second statute, R.C. 2307.61 provides in relevant part:

> (A) If a property owner brings a civil action pursuant to division (A) of section 2307.60 of the Revised Code to recover damages from any person who willfully damages the owner's property or who commits a theft offense, as defined in section 2913.01 of the Revised Code, involving the owner's property, the property owner may recover.

{¶48} As previously discussed, a tort is not subject to the statute of frauds. This claim is found in count nine, and is based on the premise that Appellees stole the money that Appellants paid monthly to purchase the business. The “property” at issue is not the restaurant, but is Appellants’ money. This claim also does not fall within the statute of frauds and should not have been dismissed under Civ.R. 12(B)(6).

{¶49} Moving to Appellants' claim for intentional interference with business relationships and contractual relationships, they allege that as a result of Appellees' failure to sell them the business as promised, Appellants were forced to breach contracts with third parties. Hence, they claim in counts two and three: "[a]s a direct and proximate cause of the Defendants, Defendants are liable for the debts incurred by Plaintiffs' inability to fill their contracts as well as the loss of business relationships severed by Defendants' actions." (3/5/20 Complaint, paragraph 40.)

{¶50} Pursuant to Ohio law:

> " '[I]t usually is held that contracts which are voidable by reason of the statute of frauds, formal defects, lack of consideration, lack of mutuality, or even uncertainty of terms, still afford a basis for a tort action when the defendant interferes with their performance.' " *Harris v. Perl, 41 N.J. 455, 461, 197 A.2d 359* (1964), quoting Prosser, Handbook of the Law of Torts, Section 106 (2d Ed. 1955). This is based on the idea that "the statute of frauds was enacted for the benefit of a party to the transaction and is not available to strangers who tortiously interfere with contractual or advantageous relations created by the transaction." *Geo. H. Beckmann, Inc. v. Charles H. Reid & Sons, Inc*., 44 N.J. Super. 159, 130 A.2d 48, 52 (App.Div. 1957) (collecting cases).

Blain's Folding Serv., Inc. v. Cincinnati Ins. Co., 2018-Ohio-959, 109 N.E.3d 177, ¶ 7 (8th Dist.). As such, Appellants' claims in this regard do not fall within the statute of frauds and should not have been dismissed.

{¶51} However, Appellants' conversion claim, which is found at count seven of the complaint, does request specific performance of the alleged contract. In relevant part, the claim states: "Defendants have exercised dominion and control over the Brickhouse Tavern, which is Plaintiffs' rightful property, and have done so without Plaintiffs' consent and over their objection." (3/5/20 Complaint, paragraph 56.) Because this claim seeks enforcement of an agreement that is subject to the statute of frauds, Appellants have failed to state a valid claim and it was properly dismissed.

{¶52} As we have determined that several of Appellants' claims are not barred by the statute of frauds and the trial court erred in deciding otherwise, we now examine whether the surviving claims satisfy Civ.R. 8. In relevant part, Civ.R. 8(A) provides:

> A pleading that sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, 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.

{¶53} Preliminarily, Appellees' defense to this lawsuit is that Appellants failed to sign the contract they now seek to enforce. This assertion is somewhat misleading, however. Appellants did not sign the first contract proposed and drafted by lawyers for Appellees. However, taking the allegations in the complaint as true, it was Appellee Earl Winner who then suggested the parties create an agreement "without the lawyers" and enter into a "handshake deal." Thus, Appellants' claims for loss based on the terms of

this alleged agreement may not be dismissed out of hand on the basis that they failed to produce a signed contract.

{¶54} Appellants attached a plethora of exhibits to their complaint. According to Ohio law:

> Although the rule itself states that matters to be considered on a Civ.R. 12(B)(6) motion are limited to those that appear within the relevant pleading, material incorporated within a complaint is part of that pleading. *Boyd* at ¶ 14, citing *State ex rel. Crabtree v. Franklin Cty. Bd. of Health*, 77 Ohio St.3d 247, 249, 673 N.E.2d 1281, fn. 1, (1997) ("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."). Such material includes not only exhibits to a complaint, but also written instruments "upon which a claim is predicated," regardless of whether such material actually is attached to the pleading. Id., citing *Columbus Green Bldg. Forum v. State*, 2012-Ohio-4244, 980 N.E.2d 1, ¶ 23 (10th Dist.), *Fillmore v. Brush Wellman, Inc.*, 6th Dist. Ottawa No. OT-03-029, 2004-Ohio-3448, 2004 WL 1468337, ¶ 8, *Irvin v. Am. Gen. Fin., Inc*., 5th Dist. Muskingum No. CT2004-0046, 2005-Ohio-3523, 2005 WL 1607460, ¶ 6.

Ajibola v. Ohio Med. Career College, Ltd., 2nd Dist. No. 27975, 2018-Ohio-4449, 122 N.E.3d 660, ¶ 13. These exhibits should have been considered in its Civ.R. 12(B)(6) determination by the trial court and must be considered in our review.

{¶55} Again, while we have determined a few of Appellants' claims were properly dismissed at this early stage, many were not. Claims based on theories of promissory estoppel, unjust enrichment, fraud, fraud in the inducement, misrepresentation, and civil liability for criminal acts were sufficiently supported in the complaint.

{¶56} As previously stated, when reviewing a Civ.R. 12(B)(6) motion, all facts asserted by the complaining party must be viewed as true. The complaint in this matter is quite detailed and lays out specific evidence as to these claims.

{¶57} The facts as plead by Appellants assert that in addition to their monthly payments, they made two $10,000 installments towards the purchase of the business. If this fact is true, it does support their allegations that they were acting towards a purchase and were not merely engaged in leasing the business. The conduct of the parties mirrors the original agreement, albeit unsigned, that is attached to the complaint. In other words, the payments made by Appellants and accepted by Appellees mirrored the payments specified for purchase of the business contained in the documents drafted by Appellees, suggesting the parties conduct comported with that purchase agreement.

{¶58} In addition to the two large installment payments, Appellants alleged that the monthly payments were significantly higher than reasonable rental payments. For instance, Appellants plead that they had previously been paying $2,500 per month during the temporary leasing period, then began paying $4,883 after the parties entered into their agreement to purchase. Appellants allege that their monthly payments were "two and a half times greater than the average rental value for such an establishment in the lower Midlothian Avenue Agreement." (Complaint.) This suggests that they were making higher payments with expectations of purchasing the restaurant and its business. Again,

none of these allegations is yet proven, but we must accept them as true for purposes of the civil rule.

{¶59} Appellees' text messages, which are cited within the complaint and copies of which are attached as exhibits, provide facts that tend to show Appellees believed the agreement was enforceable and Appellants had fully performed on their part. These messages also indicate that in addition to the damages caused Appellants when Appellees refused to comply with their end of the alleged agreement, Appellants were also forced to pay other debts incurred by Appellees, including sales tax and licensing fees that were not renewed by Appellees as promised.

{¶60} There are also text messages that suggest Appellees were taking action counter to the agreement without Appellants' knowledge. These messages indicate that Appellee Earl Winner used the property as collateral for a loan, which he failed to pay. Earl Winner also allowed several licenses essential to operation of the restaurant to lapse. Taking these facts as true, which we are required to do, they satisfy the standards of Civ.R. 8.

{¶61} As the pleading requirements of both civil rules were met, claims regarding promissory estoppel, unjust enrichment, fraud, fraud in the inducement, fraudulent misrepresentation, tortious interference with a business and contractual relationship and civil liability for criminal acts were improperly dismissed and the matter must be returned to the trial court for further proceedings on these claims.

ASSIGNMENT OF ERROR NO. 3

The trial court erred when it dismissed Appellants' claims for Breach of Contract (express or implied in fact), Tortuous Interference with a

Contractual Relationship, Tortuous Interference with a Business Relationship and Declaratory/Injunctive Relief by finding that they were all barred by Statute of Frauds.

{¶62} Appellants argue that an exception to the statute of frauds exists where it would have been possible for the agreement to be completed within a year, even if it was not. Appellants claim that the facts as articulated in the complaint, if taken as true, show that the agreement, theoretically, could have been completed within a year, particularly as purchase of the real property was only a fraction of the business that was to be transferred. In other words, they could have purchased the business, goodwill, equipment, etc. within the year and, if necessary, simply purchased another property on which to relocate the restaurant.

{¶63} In response, Appellees again assert the parties had no signed agreement. They contend the price and payment amounts changed throughout the relevant time period, demonstrating failure on their parts to reach a meeting of the minds. However, Appellees do not address the argument that their agreement involved more than sale of real estate, alone. Appellants contend the deal could have been completed as to the actual business of the restaurant i.e. the name, goodwill, inventory, and equipment absent transfer of the actual real estate and they could have purchased other property on which to relocate the restaurant business.

{¶64} This leads us to the last remaining claim; breach of contract. As to this claim, Appellants argue that a signed agreement need not exist where it is possible to perform the contract within one year. Appellants appear to concede that the transfer of

the building itself would not likely be enforceable, but argue that other aspects of the agreement (good will, equipment, etc.) could have been completed within one year.

{¶65} Caselaw involving this exact issue is sparse. However, the Tenth District has held that the issue regarding whether a contract is divisible for purposes of the statute of frauds "is one of law. The factors governing such a decision are, of necessity, flexible depending on the unique circumstances of each case but will largely turn on the subject matter of the contract, the form and allocation of consideration, and the circumstances surrounding the formation of the contract." *Royal Doors, Inc. v. Hamilton-Parker Co*., 10th Dist. Franklin No. 92AP-938, 1993 WL 141233, *2.

{¶66} Appellants pleaded no facts showing the parties had discussions regarding separating the sale of the real estate (the building) from the remaining aspects of the business (good will, inventory, equipment, etc.) Instead, it appears that all the parties' negotiations were based on a "package deal," and the real estate and other business-related items were all one transaction. While theoretically Appellants could have moved the business to a different location as they now claim, there is no showing Appellees would have agreed to sell off the business in pieces. We note that the option to buy provision in the unsigned contract provided that the agreement included "the premises hereby and business known as the Brickhouse Tavern." (Complaint, Exh., A.) There is no breakdown as to the value of the real estate versus the value of the remaining aspects of the business. Based on the facts within the complaint, Appellants have not met their burden as to their contract claims. Appellants' third assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 4

> The trial court erred by not acknowledging that the "Leading Object Rule" adopted by the 7th District would bar Defendant, Earl Winner, from applying the statute of frauds because he made promises to Plaintiffs, which they relied upon to the detriment, to subserve his own business interests.

{¶67} Appellants contend that the leading object rule holds a principle liable where it has promised performance and holds a pecuniary interest in the transaction at issue. When this rule applies, the promise does not fall within the statute of frauds. As sole owner of the business, Appellee Earl Winner obviously had a pecuniary interest in the transaction. He promised Appellants he would make sure they obtained the business in February of 2020. He also held an interest in terminating the agreement, as he retained all property, including equipment and inventory.

{¶68} In response, Appellees argue that there was no personal promise to pay the debt of another, so the leading object rule does not apply. Appellees again argue that the statute of frauds provides a complete bar to the agreement, as it involves real estate.

{¶69} The leading object rule is discussed at length in this Court's Opinion in *Filo.* Simply put, "[u]nlike the doctrine of promissory estoppel, which creates a remedy for parties who could not otherwise recover because they acted to their detriment on an unenforceable oral promise, the 'leading object' rule excuses the writing requirement of the statute of frauds and, in effect, makes an oral promise into an enforceable contract." *Id.* at ¶ 17. "The driving principle of the leading object rule is to prevent the use of the writing requirement to 'effectuate a wrong' 'which the statute's enactment was to prevent.' " *Id.,* citing *Wilson Floors v. Sciota Park, Ltd*., 54 Ohio St.2d 451, 460, 377 N.E.2d 514 (1978).

{¶70} The leading object rule is an exception to the statute of frauds. "When the leading [object] of the promisor is not to answer for another's debt but to subserve some pecuniary or business purpose of his own involving a benefit to himself, his promise is not within the statute of frauds, although the original debtor may remain liable." *Wilson Floors, supra,* at syllabus.

{¶71} While the leading object rule has routinely been applied to issues involving a subcontractor situation, there is no law applying the doctrine to the purchase of real estate. Further, the facts as alleged in the complaint do not support this theory. Hence, Appellants' arguments in this regard are not well taken.

Conclusion

{¶72} Appellants argue that the court's dismissal was premature. Based on the language of the complaint and the applicable law, Appellants' following claims as to promissory estoppel, unjust enrichment, fraud, fraud in the inducement, fraudulent misrepresentation, tortious interference with a business and contractual relationship, and civil liability for criminal acts were erroneously dismissed. However, Appellants' remaining claims were properly dismissed pursuant to Civ.R. 12(B)(6). The judgment of the trial court as it relates to the improperly dismissed claims is reversed and these claims are remanded for further action consistent with this Court's Opinion. The trial court's judgment is affirmed as to the remaining claims.

Robb, P.J. concurs.

Klatt, J. concurs.

For the reasons stated in the Opinion rendered herein, Appellants' first and second assignments of error are sustained and their third and fourth assignments are overruled. It is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed in part and reversed in part. This matter is remanded to the trial court in part for further proceedings according to law and consistent with this Court's Opinion. Costs to be taxed against the Appellees.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.