[Cite as *Shoregate Towers Partners, L.L.C. v. Antebi*, 2021-Ohio-2688.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

SHOREGATE TOWERS PARTNERS :
L.L.C., ET AL., :

Plaintiffs-Appellees, :

No. 109817

v. :

ELLIOT ANTEBI, ET AL., :

Defendants-Appellants. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: August 5, 2021

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-18-893911

Appearances:

Mark S. O'Brien, *for appellees*.

The Lindner Law Firm L.L.C., and Daniel F. Lindner, *for appellants*.

MARY J. BOYLE, A.J.:

{¶ 1} Defendants-appellants/cross-appellees, Elliott Antebi ("Elliott"), and counterclaim plaintiff, Ellemark Management, LLC (collectively "defendants" or "appellants"), appeal from the trial court's judgment in favor of plaintiffs-

appellees/cross-appellants, Shoregate Towers Partners, LLC ("Shoregate Partners"), Shoregate Towers NS, LLC (the "company" or "Shoregate Towers"), L&G Lakeshore, LLC, SG Apartment Investors, LLC, and Inspirion Shoregate, LLC (collectively "plaintiffs" or "appellees"). Appellants raise five assignments of error for our review:

> 1. The trial court erred by failing to dismiss all of appellees' breach of contractual warranty claims, as they merged out of existence on February 28, 201[6], more than a year before this lawsuit was filed, per the express language of Contract 1 and the integration clause of contract 2. * * *
>
> 2. The trial court erred as a matter of law by denying appellants' motion for summary judgment as to appellees' claims and appellants' counterclaims, as appellees did not present any opposing Civ.R. 56 evidence that could in any way create any genuine issues of material fact.
>
> 3. The trial court erred as a matter of law by not awarding damages to Elliott Antebi for matters not in dispute, to wit: the undisputed portion of the escrow refund * * * and the overpayment of personal monies to [Shoregate Towers] for operating expenses[,] * * * assessing contingent liability for 405 tenant security deposits to [Elliott] (the wrong party), and permitting appellees' contract warranty claims to proceed to an errant judgment.
>
> 4. The trial court erred by entering judgment against the wrong party, appellant Elliott Antebi, for breach of fiduciary duty related to the handling of the property's security deposits. * * *
>
> 5. The trial court erred as a matter of law by denying appellants' recovery for their counterclaims, as appellees were in default and waived all right to present any affirmative defenses.

{¶ 2} Appellees cross-appealed and raise one cross-assignment of error for our review:

> The trial court erred by determining that appellant Mark Antebi was not liable for breach of the membership interest purchase agreement[.]

{¶ 3} After a thorough review of the record and law, we affirm the trial court's judgment.

I. Procedural History and Facts

{¶ 4} Plaintiffs filed a complaint against Elliot and Mark Antebi in March 2018 for breach of contract, fraud, and conversion.

{¶ 5} Defendants moved to dismiss plaintiffs' fraud claims for failure to state a claim upon which relief could be granted. Defendants also filed an answer and brought counterclaims against plaintiffs for breach of contract and conversion. Elliott's management company, Ellemark Management, LLC, joined in the lawsuit and brought a claim against Shoregate Towers for breach of contract, claiming that it was still owed management fees for managing the property between February 29, 2016, and November 30, 2017. Plaintiffs filed an answer to defendants' counterclaims.

{¶ 6} On July 20, 2018, plaintiffs filed an amended complaint, asserting their original claims, expanding upon their fraud claim, and adding a claim for breach of fiduciary duty. Defendants filed an answer and brought counterclaims against plaintiffs. Plaintiffs did not answer defendants' counterclaims that they refiled after plaintiffs filed their amended complaint.

{¶ 7} Defendants again moved to dismiss plaintiffs' fraud claims for failure to state a claim upon which relief could be granted. The trial court granted defendants' motion to dismiss plaintiffs' fraud claim against Mark Antebi without prejudice.

{¶ 8} Defendants and Ellemark moved for summary judgment on all of plaintiffs' claims and requested judgment as a matter of law in their favor on their counterclaims. The trial court granted summary judgment to defendants on plaintiffs' claims for fraud against Elliott and their conversion claims against both Elliott and Mark Antebi. It denied defendants' summary judgment motion with respect to plaintiffs' claims of breach of contract and breach of fiduciary duty. It also denied defendants' summary judgment motion on defendants' counterclaims and Ellemark's claim against Shoregate Towers for breach of contract.

{¶ 9} The case proceeded to a bench trial in November 2019. The following facts were presented at trial.

{¶ 10} Elliott and his father, Mark Antebi, were the sole members of Shoregate Partners before February 29, 2016. Shoregate Partners owned the company, which owned Shoregate Towers, an apartment complex located in Willowick, Ohio. Elliott and his father purchased the property in 2010. Elliott owned 81 percent of the membership interest of the company, and Mark Antebi owned 19 percent of the membership interest.

{¶ 11} Elliott and his father agreed to sell their membership interests in the company to Guenet Indale and Lemma Getachew in bifurcated transactions in four agreements, which were all signed on February 29, 2016. The first three agreements were titled "Membership Interests Purchase Agreement[s]." The fourth agreement was titled "Second Membership Purchase Agreement." Elliott testified that he and Mark Schildhouse, Indale's and Getachew's attorney, negotiated the agreements.

Elliott said that he never spoke to the buyers. Elliott agreed that Schildhouse had represented him for three or four previous transactions. Elliott stated that he did not know that Schildhouse failed to disclose his past relationship with Elliott to the buyers.

{¶ 12} The first transaction closed on February 29, 2016, and the second closed on November 30, 2017. The first closing involved the sale of 49 percent of the Antebis' membership interest and the second closing involved the sale of the remaining 51 percent of Elliot's remaining membership interest. Elliot explained that as a condition for the second closing, Indale and Getachew had to obtain their own financing and pay off the Antebis' loan on the property so that the Antebis would no longer be a guarantor on the mortgage loan. Elliott said that this "was a very, very large consideration of what we considered with all of this."

{¶ 13} The first three purchase agreements were identical except for the names of the sellers (Elliot on the first and third and Mark on the second) and buyers. Indale and Getachew formed three entities, L & G Lakeshore, LLC, SG Apartment Investors, LLC, and Inspirion Shoregate, LLC, to enter into the purchase agreements with Elliott and Mark so that no one entity would acquire more than 20 percent interest under the first three agreements. They did this at Elliott's request so that he would not go into default on his loan. Inspirion was the only buyer in the second transaction.

{¶ 14} According to the first three membership interest purchase agreements, the Antebis received $3,707,666 as cash consideration upon closing on

February 29, 2016. In these three agreements, Elliot transferred 11 percent of his membership interest to SG Apartment for $1,500,000 and 19% to Inspirion for $1,607,666, and Mark transferred his entire 19 percent membership interest to L&G Lakeshore for $600,000. According to the fourth agreement, Elliott transferred the remaining 51% of his membership interest in the company to Inspirion for $50,000 cash consideration upon closing on November 30, 2017, for a total of $3,757,666 in cash consideration.

{¶ 15} Elliott explained that he wanted the agreements structured this way because there was a provision in his loan that stated if he transferred more than 49 percent of the company, the bank would consider it a default on the loan and he would face "a large prepayment penalty." Elliott testified that there were similar issues under the mortgage requirements regarding management transfers. Because of these reasons, Elliott stated that structuring the agreements the way they were also benefited the buyers.

{¶ 16} Elliott identified a document titled Conditional Assignment of Management Agreement and Subordination of Management Agreement, which was dated July 14, 2014. The agreement was between Shoregate Towers NS, Morgan Stanley Bank, and Ellemark Management, LLC, which was referred to as the "manager." Ellemark was Elliott's property management company. This agreement states in paragraph 4 that "Manager and Borrower represent and warrant that (a) Manager is an Affiliate of Borrower." Paragraph 3 of the agreement states,

> Borrower hereby covenants with Lender that during the term of this Assignment: (a) Borrower shall not transfer the responsibility for the management of the Property from Manager to any other person or entity without prior written notification to Lender and the prior written consent of Lender, which consent may be withheld by Lender in Lender's sole discretion; (b) Borrower shall not terminate or amend any of the terms or provisions of the Management Agreement without the prior written consent of Lender, which consent may be withheld by Lender in Lender's sole discretion; and (c) Borrower shall, in the manner provided for in this Assignment, give notice to Lender of any notice or information that Borrower receives which indicates that Manager is terminating the Management Agreement or that Manager is otherwise discontinuing its management of the Property.

{¶ 17} The Property Management Agreement between Shoregate Towers NS and Ellemark Management dated January 1, 2010, was attached to the Conditional Assignment of Management Agreement and Subordination of Management Agreement. Paragraph 6 of this agreement sets forth the management fees. It states that the "Manager shall receive three percent (3%) of all Receipts per year."

{¶ 18} Elliott testified that when negotiating the four purchase contracts with Schildhouse, no one asked him if he would ask the lender if he could change the management company from Ellemark Management to another management company or person. Elliott further stated that during the time between the first and second closing, from February 29, 2016, to November 30, 2017, he never received any email or letters from the buyers or Schildhouse asking why he had not transferred management of the company to them.

{¶ 19} Section 1.1 of the fourth agreement specified that Inspirion must fully pay off the amount outstanding on the first mortgage loan and the mezzanine loans. Section 1.1 further stated:

> Buyer and Guarantor acknowledge and agree that such payoff will be as a result of a refinancing of the debt on the Property as identified on Schedule 1 attached hereto and made a part hereof. If the then current appraised value of the Property is less than the value ascribed to the Property for the Seller's current debt, Buyer and/or Guarantor shall provide such additional funding for any shortfall as may be required to accomplish the refinancing and debt payoff, which shall be personally guaranteed by Guarantor. It is understood and agreed that Elliot Antebi shall not be entitled to any cash flow from the Company following the Effective Date of this Agreement, and that there shall be no prorations or allocations applied against the Second Purchase Price. Further, neither Seller nor Elliot Antebi may mortgage, pledge, hypothecate, collaterize or otherwise secure any new or modified debt with the Property.

{¶ 20} Schedule 1, which was attached to the fourth agreement (and was the same as Schedule 3.1(D) of the first three agreements), listed the outstanding debts on the property, including $19,600,000 owed on the loan "originally made by Morgan Stanley Bank, N.A. ('Original Lender') to Shoregate Towers NS, LLC" and secured by a mortgage on the property that was serviced by Wells Fargo, and $1,500,000 and $500,000 mezzanine loans "originally made by Morgan Stanley to Shoregate Towers Partners, LLC."

{¶ 21} Elliott testified that under the first three agreements, he and his father agreed to the "Representations and Warranties" set forth in Article III of the first three agreements. According to the agreements, the "representations and warranties shall survive closing for a period of one (1) year except as otherwise specifically set forth" in the agreement. The agreement further stated that "[n]either the Company nor the Property Owner has any outstanding liabilities, written or oral

contracts, debts, unpaid taxes, or other obligations to any persons, entities, or governmental authorities except as set forth in Schedule 3.1(D)."

{¶ 22} In Section 3.2 of Article III, the first three agreements listed "Representations and Covenants by Each Party," and stated, "such covenants to survive Closing for a period of one (1) year." The closing is defined in Section 1.3 of Article I as "[t]he closing of this transaction," which took place on February 29, 2016.

{¶ 23} In Section 4.1 of Article IV, "Charges and Prorations," the first three agreements stated, "The parties agree that all revenue and expenses attributable to the Property shall be prorated as of the Closing Date, including without limitation, rents, utilities, but excluding real estate taxes (the 'Prorated Items'). * * * It is understood that there shall be no prorations for real estate taxes or security deposits." Elliott testified that he believed the real estate taxes and the security deposits were liabilities that stayed with the company. Elliot stated that the security deposits were never held in a separate escrow account on behalf of tenants. He said that the security deposits were not assets that he had to turn over to the buyers.

{¶ 24} Section 4.1 in the first three agreements further stated, "Expenses not yet known shall be estimated based upon prior invoices and shall be trued up within sixty (60) days after Closing." Elliot agreed that as of the date of closing, "there were amounts that were due and owing" and that he never had a meeting with the buyers within 60 days of the February 29, 2016 closing. Elliot also agreed that there was a $70,000 bill due to the Lake County water department that was due before the February 29, 2016 closing, but he did not agree that the bill was "paid out of the cash

flow of the company after March 1, 2016." Elliot stated that he "wired money to the company" to pay it.

{¶ 25} Section 3 of the fourth agreement stated:

> BUYER REPORTING REQUIREMENTS. From and after the Effective Date hereof, Buyer shall on a monthly basis or as reasonably requested, provide Seller with copies of rent rolls, Profit & Loss statements, and access to the OneSite system, or such other tenant management system as is employed by Buyer, so that Seller may effectively communicate with the Lender regarding the financial condition of the Property. Further, Buyer shall provide Seller with copies of any and all Lender correspondence that directly affects the underlying loans and mortgage, and shall on a monthly basis, confirm that the monthly mortgage payment has been paid in a timely manner, not later than the fifth (5th) day of each month.

{¶ 26} Elliott stated that he was not sure why this provision would be in the agreement if he and his property management company were supposed to be managing the property. He disagreed, however, that the provision meant that the buyers were supposed to manage the property. The court asked Elliott why if he was managing the property, the buyers would have to provide him with copies of rent rolls and profit and loss statements. Elliott stated he was not sure, but he believed the agreements were drafted poorly.

{¶ 27} Section 7.9 of the fourth agreement stated, "Personal Guaranty. Lemma Getachew shall provide a personal guaranty as to the performance of Buyer, in the form of Exhibit 'B' attached hereto and made part hereof." Exhibit B set forth the "Personal Guaranty" stated:

> In consideration of and as an inducement to Seller to enter into that certain Membership Interests Purchase and Sale Agreement dated February 29, 2016 ("Purchase Agreement") between Elliot Antebi

> ("Seller") and Inspirion Shoregate, LLC ("Buyer"), Lemma Getachew ("Guarantor"), unconditionally guarantees the prompt and punctual compliance of all obligations, requirements, distributions and payments as defined in and proscribed by those certain Loan Documents by and between Seller and Morgan Stanley Bank, N.A. in the principal amount of $19,600,000" as securitized in the U.S. Bank National Association, as Trustee for Morgan Stanley Bank of America Merrill Lynch Trust 201-TCI 8, Wells Fargo, National Association, Commercial Mortgage Servicing, and $1,500,000.00 (Mezzanine Loan #30-1001001) and $500,000.00 (Mezzanine Loan #30-1001002) made by Morgan Stanley to Shoregate Towers Partners, LLC, including, but not limited to any and all personal guarantees of Elliot Antebi which are triggered by the acts of Buyer or Central Properties, LLC as Property Manager, and Guarantor agrees to pay all of Seller's costs, expenses and reasonable attorney's fees incurred in enforcing the obligations and agreements of Buyer, or incurred by Seller in enforcing this Guaranty, and/or the Membership Purchase Agreement or Management Agreement (collectively, the "Agreements").

{¶ 28} Elliott agreed that he required Getachew to sign this when entering into the agreement and that he wanted Getachew "to indemnify [Elliott] and the company for any losses [Elliott] might suffer by any default on the mortgage." But Elliott would not agree that Central Properties, which is Getachew and Indale's management company, should have been the property manager after February 29, 2016. Elliott stated that this clause "had to do strictly with paying off the loan." He explained that he wanted the guarantee for a situation where "the loan was coming due, and they did not have the money, or they couldn't refinance the property[.]" He further explained, "What I mean, meaning time to refinance, if they couldn't get a mortgage for 21 or 22 million for the balance, and they went and they could only get 18 or 19, they were responsible for the difference in the shortfall. That's what the purpose of this document was."

{¶ 29} Elliott testified that when the clause in Exhibit B states, "triggered by the acts of Buyer or Central Properties, LLC as Property Manager," he interpreted that to mean Central Properties was the buyers' property manager, but it would not manage Elliott's property. Elliott agreed that he did not want to lose control until the mortgage was paid.

{¶ 30} Section 1.3 of the fourth purchase agreement states:

> At Second Closing (or prior thereto if hereinafter specified), Seller shall deliver such additional documents as shall be reasonably required to consummate the transaction contemplated by this Agreement, including but not limited to, signed authorizations, assignments, or termination statements in recordable form as to any liens existing against the Improvements, Personal Property, or the Leases.

{¶ 31} Elliott testified that he did as required under this section of the agreement.

{¶ 32} Section 1.6 of the fourth purchase agreement states:

> If Seller defaults under this Agreement with respect to the obligations required for the Second Closing, and such default shall continue for a period of thirty (30) business days after receipt of written notice thereof by Buyer, Buyer shall be entitled, as its sole remedy, and at Buyer's election, to receive the alternative remedies of either (i) completed specific performance, or (ii) to seek its damages, including all losses, costs, expenses and reasonable attorney fees, in the jurisdiction set forth in Section 6.2 herein below.

{¶ 33} Elliott testified that no one gave him written notice of any default under the contract. He further stated that there are no other provisions in any of the documents that provide for attorney fees other than this provision.

{¶ 34} Elliott testified to the many bank accounts that he held. He explained that the last four digits of the company's operating account, from which all expenses

were paid, ended in 4777. The last four digits of the company's deposit account ended in 4890. Elliott said that most of the rent deposits went into this account, but they sometimes went into 4777. Elliott testified that the account ending in 6887 is the account where Indale and Getachew would obtain cash deposits from once he gave Indale access to it. Elliott identified account number 6879 as another account in the name of Shoregate Towers, NS, LLC, which is the account Elliott used to pay noteholders. He also identified several of his personal accounts, including 6807 and 6815 (the Highland Woods accounts).

{¶ 35} Elliott would not agree that all of the deposits in his accounts were from rent because he said that he wired money into the accounts to cover expenses. When identifying a transfer to one of his personal accounts or a check written to him, he stated that he was paying himself back for money that he "fronted" to the company. He agreed that he never documented these transactions to and from himself, but he denied that he took cash flow from the company after March 1, 2016.

{¶ 36} Elliott testified that there was less cash flow after September 2016 because his monthly mortgage payment increased from $115,000 to approximately $150,000. He agreed, however, that the net operating income from October 2016 to December 2016 was almost $500,000, which was similar to previous quarters that year.

{¶ 37} Elliott explained that he used the software OneSite for the company. He would give his accountant, Steve Freireich, profit and loss statements from this software. Elliott could not identify where in any of the bank statements he "fronted"

money to the company. He insisted that Freireich would have all of that information because he reconciled the books. He agreed that Freireich would be able to tie each transfer of money from the Shoregate accounts into his personal accounts to money that he paid into the business. Elliott testified that sometimes he wired money into the 6879 account and sometimes directly into the 4777 account. He said that Freireich had "all of that information."

{¶ 38} Indale testified that she and Getachew were presented with the opportunity to purchase Shoregate Towers in early 2016. They met with Elliott three or four times at Indale and Getachew's office. Elliott showed them the "financial statements" that "he submitted every three months to his lender."

{¶ 39} Indale stated that Elliott told them that due to the "high prepayment penalty that he had on the loan," that they could not purchase the building. Elliott also told them that he could not transfer control because he had to get his lender's permission, so he could only transfer 49 percent interest in the first transaction. Indale said in the past when they acquired properties, they always purchased the building. But they agreed to do as Elliott requested.

{¶ 40} Indale and Getachew showed the financial statements to their CPA accountant and to Apple Grove accounting firm. Both their accountant and the firm looked at the documents that Elliott gave them and subsequently told them that the property was profitable and that it would be a good investment. Indale stated that she and Getachew also toured the property and determined that it was "in decent condition."

{¶ 41} Indale testified that their counsel, Schildhouse, drew up a document showing how they arrived at the purchase price. Elliott was at the meeting with Indale, Getachew, and Schildhouse when they negotiated the price. Indale stated that the "numbers were discussed between the buyer and the seller and the counsel." They considered the primary loan balance, the balances on the mezzanine loans, the promissory note balance, and the appraised value as of 2014, which was $27 million. They then subtracted liabilities from the appraised value to come up with the cash purchase price of $3,645,666. Indale explained that they added $112,000 onto that price because Elliott wanted credit for the "$112,000 on the reserve account with the bank," which he could not withdraw due to the loan. Indale explained that is how they arrived at the total cash purchase price of $3,757,666. Indale stated that when she and Getachew were able to refinance, they believed that the cash reserve money would be theirs because they had already given Elliott credit for the amount. When determining the purchase price, they did not consider the security deposits because they agreed that they would remain with the company. She stated that she reviewed the purchase agreements before she signed them, and they reflected the "deal that [they] entered with Mark and Elliott Antebi."

{¶ 42} Indale testified that Central Property Management manages all of her and Getachew's properties, which she said is about 900 units. Central Property Management handles the leasing, maintenance, accounting books, and day-to-day management. It has three office employees and seven to eight maintenance employees. However, it has an additional two office employees at Shoregate

apartment complex as well as seven to eight employees who handle the maintenance there.

{¶ 43} Indale stated that her understanding of the purchase agreements was that they were purchasing the cash value of the building minus $50,000 that was due when they refinanced. In return, they were supposed to receive 100 percent of the cash flow and "also manage the property." She stated that she believed that Elliott was supposed to transfer all bank accounts and access to the property's bookkeeping software, and that they "would be in charge of all of the day-to-day activity and * * * be entitled to the management fee[.]"

{¶ 44} Indale testified that she believed the prorations provision, Section 4.1 of the first three agreements, meant that the seller was responsible for all liabilities before February 29, 2016, and was entitled to all revenues that were collected or incurred before February 29, 2016. She and Getachew were responsible for and entitled to all liabilities and revenues after that date.

{¶ 45} Indale and Getachew believed that they would meet with Elliott approximately 60 days after the first closing to "true up" any expenses and revenue that had occurred during the period between the signing of the contracts and closing. Indale stated that despite making several attempts to meet with Elliott, the meeting never happened. She said that they met with Elliott at the end of April or beginning of May 2016. At that meeting, Elliott showed them bank accounts, but he did not have invoices and they never reconciled the preclosing or post-closing expenses.

Indale stated that they continued to ask Elliott for the invoices so they could determine what expenses were paid, but he never gave the invoices to them.

{¶ 46} Indale testified that she and Getachew expected to receive 100 percent of the cash flow after the first closing because they paid the Antebis almost 100 percent of the equity in the company at that point. She stated that Elliott did give them some cash flow after February 29, 2016, for a total of $382,374.80.

{¶ 47} After their meeting with Elliott in late April or early May 2016, Elliott added Indale's name to one bank account. When he did, she believed that he was giving her control of the operating account and that she and Getachew would be able to manage the property, but she discovered that the account was not the operating account for the property. Indale stated the account had "almost no activity." But she stated that Elliott would put money into this account and tell her to withdraw money from that account.

{¶ 48} Indale testified that when Elliot gave them the first cash distribution, she used it to pay a credit card that she, Getachew, and their property manager used for renovating apartments in the Shoregate Towers building. Elliott's property manager told them soon after the first closing that "some units [needed to] be turned over so that she [could] lease them," so Indale and Getachew started renovating almost immediately after the first closing.

{¶ 49} Indale testified that she believed that they would receive the security deposits when they purchased the company. If not, they would have included the

security deposits as a liability when they came up with the purchase price, which "would [have] decrease[d] the value" of the company.

{¶ 50} Based on discussions that they had with Elliott when they negotiated the purchase agreements, Indale said, "We agreed we were going to take control of management." Indale further testified that Elliott "explained to us that he would be a silent partner from the first closing date of February 29th. He * * * would turn over bank account access to the company websites, and all of the invoices would come to us, and we would take control of that." Indale explained that she and Getachew signed a property management agreement that gave them management control of the property, but they never received a signed copy back from Elliott.

{¶ 51} Indale testified that Section 3 of the fourth purchase agreement (stated in full at ¶ 22 of this opinion) listed the buyers' obligations under the agreements. She stated that this provision was one of the ways they guaranteed to Elliott that they would take care of and manage the property. Indale stated that her husband also signed a personal guarantee that was attached to the fourth purchase agreement, and they included "an indemnification of the seller" clause as well. Indale stated that her husband signed the personal guarantee because the parties had agreed that the buyers would "take the management control of the property, so we would be getting rents, we would collect rents, pay all of the bills, and pay the mortgage, and everything under the Central Property Management Company[.]" Indale stated that she would have never signed the agreements and made the guarantees that they did if they were not going to be in control.

{¶ 52} Indale explained that they tried to take control of the property "from the beginning." She said they saw Elliott a couple of times right after the initial closing, but then they "started getting reasons why he couldn't come." Elliott was in Florida with his wife, and there were several occasions where he either missed his flight or cancelled his trip for one reason or another. She said, "We were given a lot of runaround." But in November 2016, she and Getachew demanded a meeting with Elliott.

{¶ 53} Indale explained that the November 2016 meeting was the first time they "heard the seller telling us that he [was] 51 percent owner, he's not going to give up the management of [the company], and he was not owning up to what we thought we agreed upon." She said there "was a lot of argument." They demanded that Elliott put them on the "deposit account * * * to make sure that payments were made because [they] realized that [they] paid him up front what the value of the property was." They had "everything to lose at that point," and they could not refinance if anything went "wrong."

{¶ 54} Indale and Getachew had a discussion after that November 2016 meeting. She said that according to the agreements, they were originally supposed to refinance "around August 2019," but they decided "to start looking for a broker or other lenders" to "refinance[,] and [they] were willing to pay the prepayment penalty at that time versus losing the $3.7 million that [they had] already invested."

{¶ 55} Section 1.4 of the fourth purchase agreement states:

> Second Closing Default by Buyer. If Buyer defaults under this Agreement with respect to the obligations required for the Second Closing, and such default shall continue for a period of thirty (30) business days after receipt of written notice thereof by Seller, Seller, as its sole and exclusive remedy, shall have the right to repurchase the 49% Membership Interests for the sum of One Dollar, ($1.00) to be paid to Title Company on Buyer's behalf, terminate this Agreement and Buyer shall pay to Seller the sum of One Hundred Thousand and no/100 Dollars ($100,000.00) as and for liquidated damages. Buyer and Seller agree that in the event of a default by Buyer that the damages resulting to Seller as a result of such default as of the date of this Agreement are difficult or impossible to ascertain and the liquidated damages set forth in the preceding sentence constitute Buyer's and Seller's reasonable estimate of such damages.

{¶ 56} Indale explained that this provision meant that if she and Getachew did not close by the second closing date of August 2019, Elliott could take back their 49 percent for one dollar, and they would have to pay him $100,000 in damages. She said that she would have never agreed to that provision if she was not going to obtain management control of the company after the first closing. She and Getachew were worried that Elliott was trying to make this provision happen by not giving them management control. In fact, she stated that Elliott and Getachew had a phone conversation where Elliott threatened them that he could enforce this provision. She explained that was why she and Getachew refinanced a year and a half early.

{¶ 57} Indale testified that after "running the Shoregate account for almost two years," she and Getachew "never had to put any money from * * * any other account to the Shoregate account to make payments." She explained that "the rent is collected on time for the most part and the amount of rent" collected is sufficient

"to cover the biggest expenses, which is mostly the mortgage and the notes." She stated that the "property is self-sustaining." Further, even after paying all the expenses, there was still sufficient cash flow remaining.

{¶ 58} Indale identified transfers out of the Shoregate accounts that did not belong to Shoregate and that she could not identify. She said, "The transfers were alarming." She also said that she saw several checks written to either Elliott or Mark Antebi. She said that she did not expect any cash flow going to Mark or Elliott after February 29, 2016.

{¶ 59} After Getachew and Indale refinanced the loan, the company received a check in the amount of $367,000 from Wells Fargo. Indale stated that it belonged to the company, which Elliott no longer owned. When they negotiated the purchase price of the company, there was approximately $112,000 in the cash reserves, and Indale stated they credited Elliott for this amount as part of the purchase price. The company paid approximately $8,450 into the cash-reserve account every month. Indale therefore disagreed with Elloitt that he was entitled to any of it. She said when they signed the purchase agreements, the tax reserves were almost depleted. Before they filed their lawsuit against the Antebis, Elliott had never asked them for that money.

{¶ 60} Lemma Getachew testified that he was very busy with his pharmacy business in 2016, so he was not directly involved in the negotiations to buy Shoregate Towers. But Getachew said that he met Elliot "several times." He explained that before they entered into the agreements, Elliott, who at the time lived in Brooklyn,

New York, came to Getachew's home in Brooklyn. Elliott told Getachew that he was selling the Shoregate Towers property to them because he was starting a "new venture in Florida and he was tired of traveling back and forth." Elliott told Getachew that "this is a cash cow business, you are making a very good investment." Getachew testified that Elliott "convinced [him] to buy this."

{¶ 61} Getachew explained that when he signed the membership purchase agreements, he believed that he and Indale were buying the company. He said they "up fronted the money," and his understanding was that Elliott would be a silent partner, and they would have "100 percent control of that company."

{¶ 62} Getachew identified the Personal Guaranty that he signed that was attached to the fourth purchase agreement. When he signed it, he said he took "responsibility that if anything happened to that building or that business," it would be his responsibility. He testified that he would have "absolutely not" signed the Personal Guaranty if he knew that he would not have management control of the company. Getachew stated that he was a "business man," and he would have never risked losing $3.7 million.

{¶ 63} Getachew explained that after learning about "issues" with the company and discussing the agreements with independent attorneys, he and Indale decided to close early before the August 2019 date listed in the agreements. He said he also spoke to Elliott on the phone about "cooperating" with him and Indale. Getachew testified that Elliott laughed at him and told him that he did not have to do anything because if Getachew defaulted, Elliott would "get the building at a

nominal fee." Getachew said that Elliot's statement to him "made [him] lose sleep." Getachew testified that he and Indale "paid more than one million dollars in early penalty" fees because they refinanced early.

{¶ 64} Getachew stated that between the first and second closings, they had "several meetings" with Elliot to try to obtain management control from him. Elliott "always came up with an excuse." Elliott also put them in "a blackmail position," where they had "to be nice to him and cooperate with whatever he want[ed] or lose [their] $3.7 million."

{¶ 65} Alexis Lyons testified that she had been working for Getachew and Indale since April 2015. She works for their management company, Central Property Management, and handles a total of 8 properties with a total of 860 units.

{¶ 66} Lyons stated that she obtained control of managing the property at Shoregate Towers on November 20, 2017. After she obtained control, she said "everyone started calling" her. She learned there was "a disconnection notice for the lights" if they did not pay $15,000 to the electric company. There was a "disconnect on the water" if they did not pay $35,600 to the water department. She learned there "was a disconnect on the gas" if they did not pay $19,000. She said that "[b]asically, [she] got inundated with phone calls from vendors," and she learned these bills had been outstanding for quite some time.

{¶ 67} Lyons said that she started talking to vendors, asking them for all of the invoices that were owed. She learned that many of the invoices were for services and products that occurred before March 1, 2016. Defendants stipulated during

Lyons's testimony that the following bills and amounts existed prior to the first closing, but paid from the operating account after March 1, 2016: Dominion Gas, $47,199.64; Illuminating Company, $9,393.39; Schaefer Plumbing, $3,385.27; Ross Elevator, $14,768.09; Pest Control, $2,430; Comet Glass, $3,577; Highland Security, $1,047.59; Precision Compaction Services, $899.05; Erickson Landscaping & Construction, $12,671.17; State Alarm, $158.04; Southgate Lock & Security, $157.21; for a total amount of $209,297.22.

{¶ 68} Lyons testified to capital expenditures as well, including invoices from Danielson Steel for $77,000 and Johnson's Commercial Flooring for $19,514.13. These expenses were paid out of the capital reserves at Wells Fargo Bank.

{¶ 69} Mark Schildhouse testified that he had been an attorney since 1982 and had worked in the real estate business since 1984. For 10 years, he worked for the K&D group, one of the largest, multifamily property managers and owners in Ohio. He then went to work for Getachew and Indale. He now works for a private law firm.

{¶ 70} Schildhouse stated that when he was working for Getachew and Indale, he received a call from Elliott. He said that he had previously known Elliott because he had represented K&D in two previous transactions where they sold large real estate projects to Elliott. He had also represented Elliott in the past. Elliott called Schildhouse and asked him if he knew any buyers who might be interested in purchasing Shoregate Towers. Schildhouse recommended Getachew and Indale.

{¶ 71} Schildhouse stated that after he spoke to Elliott, he called Getachew and Indale. He said that he told them that Elliott was someone he had "done business with before" and was directly involved "in a couple of K&D transactions with him." He told Getachew and Indale that he believed this was a good opportunity for them because he "understood its value."

{¶ 72} Schildhouse stated that he drafted the contract. Schildhouse said that Elliott was not represented in the Shoregate transaction. They included Attorney Sam Gussis on the paperwork simply because he had represented Elliott in the "major financing" of Shoregate. Schildhouse said that he negotiated the contracts on behalf of Getachew and Indale, but he would "bring those accounts" to them and tell them they were important to read. Schildhouse could not recall one instance where Indale was directly involved in negotiating the contracts. He agreed that her testimony was false if she said that she did.

{¶ 73} Schildhouse stated that he was "directly involved in the due diligence process" for the buyers on the property and business. He testified, "We, as a group, did site inspection of the property." Schildhouse reviewed the insurance, surveys of the property, and researched the title. He did not, however, review the financials. He said, "I'm not a CPA. I'm not a financial professional." Schildhouse stated that Indale hired a financial consultant, "Pinnacle Financial Group, who was actively engaged in establishing the viability and feasibility of the economics of the deal." He said they were all "thrilled" when the August 2017 appraisal came in at $33 million, which was prior to the second closing.

{¶ 74} Schildhouse said that no one besides he and Elliott "had any firsthand knowledge about the dealings leading into the contracts." He explained that the representations and warranties in Article III of the first three contracts were limited to one year because they believed that "anything that would turn up would turn up between the first and second closing." He said that Elliott specifically asked for this provision to be included in the contract. He believed that "any claims regarding the warranties need[ed] to be brought within that [one] year."

{¶ 75} Schildhouse testified that he "communicated with Elliott from time to time at the insistence of my employer that we were not seeing the timely financial statements that were promised." But Schildhouse did not believe that was a "material breach" of the contract. Schildhouse also did not believe "there was any intentional effort on the part of [Elliott] to fail to disclose or materially misrepresent anything." Schildhouse explained that they "pressed Elliott consistently about taking over management, to a joint management," and Elliott "did not necessarily agree with it." Elliott would tell him, "[A]s long as I'm on the note, I can't give up management." Schildhouse testified that there was never any dispute over the fact that Elliott was "taking [the] management fee."

{¶ 76} On cross-examination, Schildhouse stated that he represented Elliott in the "Highland Woods transaction" in 2014 or 2015. He began working for Getachew and Indale in January 2016. He never had Getachew and Indale sign a "conflict of interest" waiver. He said that the professional rules of conduct "did not come to mind."

{¶ 77} Schildhouse drafted the management agreement that stated Central Properties, LLC would be the manager of Shoregate Towers but stated that Elliott refused to sign it. He said the buyers could have walked away but they did not. They could have also demanded that Elliott sign it.

{¶ 78} Schildhouse agreed that when he drafted the contracts, the intent of the language in the personal guarantee attached to the fourth agreement — that Getachew would guarantee any acts triggered by the buyer or Central Property that caused a loss — was that Central Property would be the property manager of Shoregate Towers. He also agreed that Section 1.3, Section 1.4, Section 1.9, and the personal guarantee, "clearly contemplate[] that buyers would be in charge of management control." Schildhouse testified, "I'm not going to deny it from day one — ultimately, Central Properties was going to take over management." He agreed that was "because they paid 99.99 percent of the purchase price for the membership interest up front." He could not answer why the buyers never obtained management control. Schildhouse could not answer why he placed his clients, Getachew and Indale, at "extreme[] serious risk" in Section 1.4, because he could not recall. He said that Getachew and Indale's goal was "to get control of this property, 100 percent, as quickly as they could."

{¶ 79} Schildhouse testified that he, Getachew, Indale, and Lyons met at the property and walked through it before the contracts were signed. He stated, "I'm not denying that they were not involved. They had a lot at stake." He said that Getachew and Indale may have met with Elliott "once before it closed." He agreed

there were meetings where all parties were present, but he could not recall "if they were post first closing or not." But there was "no denying" that "they still met in this time frame." He stated, "I can't imagine there were more than three or four over the entire course of time and probably less."

{¶ 80} Schildhouse explained that Getachew and Indale purchased "the membership interest in the company[,] which equate[d] to the equity." He agreed that meant, "when a buyer purchases equity rather than assets, they are purchasing all of the assets of the business and assuming all of the liabilities of the business unless" something is "carve[d] out." He agreed that the consideration for the parties' agreements was the money that Getachew and Indale paid up front: $3,757,666. He also agreed that the refinancing was not the consideration for the deal.

{¶ 81} Schildhouse agreed that there was supposed to be a "true up" meeting within 60 days of the first closing and that it never happened. He could not say why it did not happen.

{¶ 82} Schildhouse agreed that Elliott never asked him for any of the escrow money that Shoregate Towers received when the buyers refinanced the loan.

{¶ 83} Schildhouse agreed that he sued Getachew and Indale for wrongful termination when they fired him. He dismissed the suit without prejudice.

{¶ 84} Stephen Freireich testified as if on cross-examination that he is the chief financial officer of RHM Real Estate ("RHM"), which handled the "bookkeeping" for Shoregate Towers.

{¶ 85} Freireich stated that security deposits were part of Shoregate Towers's liabilities. At the end of 2016, he listed the liabilities from security deposits as $203,347.92. At the end of 2017, they were $203,660.58. When asked where he got those numbers, he replied, "Those numbers came from — I believe they came from Elliott through his system. * * * We did not keep track of that."

{¶ 86} Freireich stated that he would receive invoices and bank statements and look at them to record income and reconcile the company's books. Freireich stated that when reviewing the deposit records, he did not know what was rent versus other kinds of deposits. He stated that for his purposes, "[i]t didn't matter. It was just income." Freireich agreed that he did not know if deposits were from rent or from "something else." He said if he were unsure about something, he would call Elliott. He never audited the financial statements.

{¶ 87} Freireich agreed that the bank account ending in 4890 was specifically for deposits for the business and 4777 was the operating account that paid the company's bills. Freireich did not call Elliott every time "to go through each statement with him" to determine what was a rent deposit or what was another kind of deposit because he said after a while, he began to "understand what the process was." He admitted that when reviewing the deposits on the bank statements, he "did not know specifically with respect to each one * * * if it was a rent deposit or if it was something else." Freireich agreed that Elliott was wrong when he testified that Freireich would be able to describe what each transaction in the accounts was.

{¶ 88} Freireich agreed that in his report, he found that Elliott infused $288,660 into the company between the first and second closings that he did not get back. He also stated that Ellemark Management received a property management fee of $70,086 but was still owed $105,777.26. Freireich also agreed that he believed Elliott was owed $270,830 from the capital reserves, for a total of $665,267.61.

{¶ 89} Freireich agreed that Elliott used several accounts, including accounts ending in 4890 (deposit account), 4777 (operating account), 6879 (old Shoregate account), 6815 (the Ellemark Management account), 8810 (Highland Woods account), and 6807 (Highland Woods account). He also agreed that "there was a lot of money moving in and out of a lot of different accounts." When asked how one could independently verify what he said about Elliott putting in $288,660 more than he took out, he said it was the money left over after he completed the bookkeeping "that wasn't accounted for in any other way." That is how he determined it "was from Elliott." When asked how he knew what money was coming in from Elliott, Freireich said that it was "from the bank statements." He then agreed that he would go through the bank statements and "ask Elliott" if this was money he put in the account. He agreed that he never looked at the bank statements for the accounts ending in 6887 and 6879, and because of that, he could not say if money from those accounts went to Elliott. Instead, he would rely on Elliott for that information. Freireich did not include these two accounts on his "balance sheet" either. He looked at only the accounts ending in 4809 and 4777.

{¶ 90} Freireich admitted that he did not know if an expense paid to Media Solutions was an expense of Shoregate Towers. He agreed that he relied on Elliott to tell him what the expense was. He agreed that the $288,660.18 that he reported Shoregate Towers owed Elliott was "to some extent" based on "what Elliott told [him] about money in and money out."

{¶ 91} Freireich agreed that he reported that Elliott was owed $105,777.26 in management fees. But he agreed that RHM received $65,400, which was "roughly 2 percent of the total revenue." He also agreed that Ellemark Management received $50,964, which was approximately 1.5 percent of the total revenue. Freireich agreed that these two amounts added up to 3.5 percent "as the management fee to RHM and asset management fee to Ellemark."

{¶ 92} On redirect-examination, he agreed that he reconciled the bank statements for Shoregate and that everything in the system "tie[d] to original source documentation." He stated that his accounting was not prepared for litigation; it was based on objective numbers.

{¶ 93} Freireich agreed that as a CPA, he could not render an opinion on whether Elliott was entitled to a portion of the $367,344.17 escrow check (even though he did render one in his report and stated that Elliott was entitled to the capital reserves portion, which was $270,830.17).

{¶ 94} David Scott Brown testified for plaintiff. Brown stated that he does tax returns for Central Property as well as quarterly ledgers. Brown testified that one of the things he determined was the cash flow from the company between

February 29, 2016, and November 30, 2017, because the cash flow during that time belonged to Getachew and Indale according to the membership interest agreements. Brown defined "cash flow" as "incoming cash less outgoing cash." He stated that although he used an accrual-based accounting method for tax purposes, he simply determined what cash came into the company and what went out for his expert report.

{¶ 95} Brown stated that he reviewed bank statements from all of the different accounts that Elliott used. He compared the deposits to the "rent rolls" from the company's software program, OneSite. Brown also looked at the check registers and the expenses of the building. Brown determined that in the 21-month period, the total cash flow of the company was $6,018,311.59, and the total cash flow from the company after expenses were taken out was $884,424.69. But because Getachew and Indale had already received $382,374.69, they were still owed a total of $502,050 from the cash flow during that 21-month period.

{¶ 96} Brown testified that there was a lot of money going into and out of the company's bank accounts that he could not account for because he did not have access to those accounts. He also did not account for any payments to Ellemark Management or RHM because the buyers were supposed to be in control of the property management. But he accounted for all other normal expenses of the company.

{¶ 97} Brown also said that he looked at "wire transfers coming" into both the company's operating account (4777) and the deposit account (4890). He said he

did not know what these were or who owned these other bank accounts. Brown acknowledged that there was a source of revenue coming from somewhere outside of the operating and deposit accounts, but he could not identify what it was. Although he did not know, he assumed the unknown accounts belonged to Elliott, such as the 6815, 6807, and 8810 accounts.

{¶ 98} Brown determined that $647,597.17 was transferred into the company's accounts from somewhere other than from rent deposits. He also determined that $1,384,037.62 went out of the company's accounts, for a difference of $736,440.45. He assumed that these money transfers were to and from Elliott's accounts, but he did not have access to them so he could not say for sure. But assuming they were Elliott's accounts and after considering legitimate expenses, Brown determined that Elliott took a total of $60,535.82 of extra "cash flow" from the company that he should not have. Brown also determined that there were unpaid liabilities as of March 1, 2016, of $220,612.70.

{¶ 99} Brown concluded that Elliott owed Getachew and Indale (as owners of the company) $502,050 from the cash flow and $220,612.70 from the unpaid liabilities. Brown also concluded that there should have been $183,507.00 in the operating account for security deposits.

{¶ 100} Brown stated that based on the total revenue the company earned during the 21-month period, three percent of that would have gone to the management fee. He therefore multiplied 0.03 times $6,018,311.59, which equaled $180,549.39. Brown stated RHM received approximately 2 percent of the total

revenue ($105,778.02) and Ellemark received approximately 1.5 percent of the total revenue ($70,086), which approximately equaled the same amount that was due to whoever managed the property.

II. Trial Court's Judgment

{¶ 101} The trial court found that plaintiffs failed to prove their remaining claim of breach of contract against Mark Antebi. It further found that Elliott failed to prove his claims for conversion and breach of contract against plaintiffs and that Ellemark Management failed to prove that it was owed any fees for its management of the property between the first and second closings. The trial court found in favor of plaintiffs on their remaining claims, including breach of contract and breach of fiduciary duty. It awarded a total judgment to plaintiffs in the amount of $894,854.11, including $209,297.22 for expenses that were due and not paid before the first closing, $183,507 for security deposits, and $502,049.89 for cash flow that was owed to them from the company between the first and second closings. It is from this judgment that defendants now appeal and plaintiffs cross-appeal.

III. Contractual Time Limitations to File Suit

{¶ 102} In their first assignment of error, appellants argue that the trial court erred when it failed to dismiss "all of appellees' breach of contractual warranty claims, as they merged out of existence on February 28, 2017," per the express language of the first three agreements and the integration clause of the fourth agreement. Appellants maintain that because of that, appellees "intentionally and

contractually waived any right to bring any of their breach of contractual warranty claims after March 1, 2017."

{¶ 103} R.C. 2305.06 provides that an action "upon an agreement, contract, or promise in writing shall be brought within six years after the cause of action accrued." Under Ohio law, however, parties can agree by contract to shorten the applicable statute of limitations to bring an action if the time limit is reasonable and the contract language is clear and unambiguous. *Angel v. Reed*, 119 Ohio St.3d 73, 2008-Ohio-3193, 891 N.E.2d 1179, ¶ 11; *see also R.E. Holland Excavating v. Bd. of Cty. Commrs.*, 133 Ohio App.3d 837, 842, 729 N.E.2d 1255 (2d Dist.1999) ("Parties to a contract may shorten the period set forth in R.C. 2305.06 so long as the time period provided is reasonable."); *Universal Windows & Doors, Inc. v. Eagle Window & Door, Inc.*, 116 Ohio App.3d 692, 689 N.E.2d 56 (1st Dist.1996); *Globe Am. Cas. Co. v. Goodman*, 41 Ohio App.2d 231, 237, 325 N.E.2d 257 (8th Dist.1974). ("It is well established that in the absence of a controlling statute to the contrary, a provision in a contract may validly limit, between the parties, the time for bringing an action on such contract to a period less than that prescribed in a general statute of limitations provided that the shorter period itself shall be a reasonable period.").

{¶ 104} In support of their argument, appellants rely on Section 3.1 of Article III that is included in the first three purchase agreements. This provision states, "The Seller hereby represents and warrants to Buyer, and shall, on the Closing Date, represent and warrant to Buyer, which representations and warranties shall survive closing for a period of one (1) year except as otherwise specifically set forth herein[.]"

The section then lists specific representations and warranties, including, in pertinent part, "Neither the Company nor the Property Owner has any outstanding liabilities, written or oral contracts, debts, unpaid taxes, or other obligations to any persons, entities, or governmental authorities except as set forth in Schedule 3.1(D)."

{¶ 105} The trial court relied on *Arcade Co., Ltd. v. Arcade, LLC*, 105 Fed. Appx. 808 (6th Cir.2004), in support of its conclusion that the contract language at issue in Section 3.1 of Article III does "not purport to limit the time to bring suit."

{¶ 106} The parties in *Arcade Co.* included the following language in their contract: "Survival. The representations, warranties, obligations, covenants, agreements, undertakings and indemnifications of the parties contained herein and in any instrument acquired to be delivered pursuant hereto shall survive the Closing for a period of one (1) year." The Sixth Circuit noted at the outset that "the plain language of the provision neither mentions nor purports to limit any 'action,' 'lawsuit,' or 'demand.'" *Id.* at 810. The court stated that instead, "[T]he provision explicitly states that the 'representations, warranties, obligations, covenants, agreements, undertakings and indemnifications of the parties * * * survive the closing" for a period of one year rather than language establishing an intent to limit the time to bring an action. *Id.* The court explained:

> [*Miller v. Progressive Cas. Ins. Co.*, 69 Ohio St.3d 619, 635 N.E.2d 317, 321 (1994).] involved a provision in an insurance contract requiring insureds to file a claim for uninsured motorist benefits within one year of the accident. *Miller*, 635 N.E.2d at 320. The actual language of the contract in that case provided that "no suit or action whatsoever * * *

> shall be brought against the company for the recovery of any claim under this coverage unless as a condition precedent thereto, [the action] is commenced within twelve months next after the date of the accident." *Id.* at 319. In [*Universal Windows & Doors, Inc. v. Eagle Window & Door, Inc.*, 116 Ohio App.3d 692, 689 N.E.2d 56, 58-59 (1st Dist.1996)], the contract limitation clause stated that, "the time within which the Dealer may bring an action for breach of this Agreement shall be one (1) year from the date of any such breach." *Universal Windows*, 689 N.E.2d at 58. And in two other cases in which Ohio courts upheld the application of a contractual limitation period, the contracts at issue included specific language of limitation on the time within which to bring lawsuits or claims. *See Globe Am[.] Cas. Co. v. Goodman,* 41 Ohio App.2d 231, 325 N.E.2d 257, 261 (8th Dist.1974) ("No suit or action whatsoever [* * *] shall be brought against the company * * * unless same is commenced within twelve months[.]"); *R.E. Holland Excavating Co. Inc. v. Montgomery County Bd. of Comm.*, 133 Ohio App.3d 837, 729 N.E.2d 1255, 1256 (2d Dist.1999) ("Notice of the amount of the claim with supporting data shall be delivered within sixty (60) days after the start of such occurrence or event."). No such language exists in the Arcade survival clause. In the absence of such language, we will not infer an intent to create a contractual limitation period.

Arcade Co. at 810-811.

{¶ 107} The Sixth Circuit further explained that its decision was supported by "sound policy" reasons, stating:

> Statutes of limitation exist to provide finality for potential litigants. This finality is achieved by extinguishing — after a statutorily prescribed period of time — potentially valid claims. An agreement purporting to affect this finality must be made manifest in clear, unequivocal language. A survival clause such as the one at issue here, which contains no express reference to "actions," "demands," or even to breach of the contract, does not clearly manifest an intent to establish a contractual limitations period.

Id. at 811.

{¶ 108} We agree with the trial court's conclusion and reasoning. The plain language of provision at issue in this case does not purport to limit an action, lawsuit,

or demand. No language like that used in the contracts at issue in *Miller*, *Universal Windows*, *Globe Am.*, or *R.E. Holland* is found here. In the absence of such unequivocal language, we will not infer an intent to create a contractual limitation period.

{¶ 109} We further note that in *Miller*, 69 Ohio St.3d 619, 635 N.E.2d 317, although the Ohio Supreme Court found the language in the contract limiting the time to bring suit unambiguous, it still found the provision unenforceable because it was unreasonable. The Supreme Court explained that the provision violated public policy because it attempted to "dilute or eliminate the rights of the insured to coverage required by statute." *Id.* at 625.

{¶ 110} After examining the record in this case, we also find that limiting the time to bring suit to one year from the first closing would be unreasonable in this case. The parties contemplated two closings: the first on February 29, 2016, and the second when the buyers refinanced the sellers' loan and placed the mortgage in their names (which was supposed to be by August 1, 2019, but occurred on November 30, 2017). In the interim, however, Elliott maintained control of managing the property and the bank accounts. There was no way that Getachew and Indale could know if Elliott paid the expenses as he was required to do, was taking cash flow from the company, which he was not permitted to do, or incurring additional liabilities against the company that were not warranted. It would therefore be unreasonable to limit the action to one year from the date of the initial closing.

{¶ 111} Accordingly, we find that the trial court did not err when it determined that Getachew and Indale's suit was not time barred by the agreements, and we overrule appellants' first assignment of error.

IV. Summary Judgment

{¶ 112} In their second assignment of error, appellants argue that the trial court erred when it did not grant them summary judgment in their favor on all of appellees' claims and on their counterclaims.

{¶ 113} Civ.R. 56(C) specifically provides that before summary judgment may be granted, it must be determined that: (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

{¶ 114} It is well established that the party seeking summary judgment bears the burden of demonstrating that no issues of material fact exist for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1987); *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 115, 526 N.E.2d 798 (1988). Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 604 N.E.2d 138 (1992).

{¶ 115} In *Dresher v. Burt*, 75 Ohio St.3d 280, 662 N.E.2d 264 (1996), the Ohio Supreme Court explained that "the 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 or material element of the nonmoving party's claim." *Id.* at 296. The nonmoving party has a reciprocal burden of specificity and cannot rest on mere allegations or denials in the pleadings. *Id.* at 293. The nonmoving party must set forth "specific facts" by the means listed in Civ.R. 56(C) showing a genuine issue for trial exists. *Id.*

{¶ 116} This court reviews a trial court's granting of summary judgment de novo. *Brown v. Cty. Commrs.*, 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (4th Dist.1993). An appellate court reviewing the grant of summary judgment must follow the standards set forth in Civ.R. 56(C), evaluate the record in a light most favorable to the nonmoving party, and overrule the motion if reasonable minds could find for the party opposing the motion. *Saunders v. McFaul*, 71 Ohio App.3d 46, 50, 593 N.E.2d 24 (8th Dist.1990).

{¶ 117} Appellants contend that appellees "failed to present any Civ.R. 56 permitted evidence to oppose any of the evidence submitted by [a]ppellants in their motion." Appellees submitted four affidavits with their opposition brief to appellants' summary judgment motion: Getachew's, Indale's, Alexis Lyons's (their property manager), and David Scott Brown's (their expert). Appellants spend a great deal of time arguing that the affidavits submitted by appellees could not be considered by the trial court because the affiants contradicted their deposition testimony. However, appellants did not depose Lyons or Brown before they filed their summary judgment motions. Thus, even assuming for the sake of argument

that Getachew's and Indale's affidavits contradicted their deposition testimony, that cannot be true of Lyons or Brown.

{¶ 118} In her affidavit, Lyons averred that she was responsible for the management of all rental properties at Shoregate Towers owned by Getachew and Indale. She stated that after March 1, 2016, she was assigned the task of reviewing the operations of Shoregate Towers. She said that she went to Shoregate Towers to review the books and records for the apartment complex but was never able to gain access to the property until December 1, 2017. When she finally gained access to the books and records of Shoregate Towers, she began examining them and managing the property. Lyons averred that soon after December 1, 2017, she began to receive calls "by persons who had performed services" on behalf of Shoregate Towers "complaining that they had not been paid for services rendered and that they had long-outstanding invoices with respect to the services they had provided."

{¶ 119} According to Lyons's affidavit, she conducted an audit of the outstanding invoices as well as a review of the bank statements for deposit accounts that had been maintained by appellants. She stated:

> 11. From her audit[,] Affiant discovered that Shoregate Towers had, as of March 1, 2016, outstanding liabilities for unpaid invoices in excess of $300,000.00, including, but not limited to, the following: (i) $3,577.00 due to Comet Glass; (ii) $77,000.00 due to Danielson Inc.; (iii) $19,514.13 due to Johnson Commercial Flooring, Inc.; (iv) $156,593.70 due to Lake County Utilities; (v) $2,430.00 due to Porch's Pest Control; (vi) $889.05 due to Precision Compaction; (vii) $3,878.25 due to Rent Path Holdings; (viii) $14,768.09 due to Ross Elevator; (ix) $2,463.00 due to Standard Energy; (x) $158.04 due to State Alarm; (xi) $8,243.75 due to Wayne Erickson; (xii) $398.03 due to West Roofing; and (xiii) $3,610.00 due to Zillow.

> 12. In addition, Affiant discovered that the defendants, Elliot and Mark Antebi, had caused to be written to themselves, between March 1, 2016 and November 30, 2017, cheeks from STNS' deposit accounts totaling $267,000.00.

{¶ 120} Brown averred in his affidavit that he was a certified public accountant engaged in private practice and was the expert witness for Getachew and Indale in the case. Brown attached his expert report to his affidavit, concluding that as of March 1, 2016, Shoregate Towers owed vendors $332,316 for outstanding invoices. Brown further stated that as of December 1, 2017, "the books and records of [the company] reflected a cash shortfall of [$]248,907," which he believed was retained by appellants. Additionally, Brown discovered from the "books and records" that they "reflected a shortfall in cashflow that should have been distributed to" Getachew and Indale in the amount of $502,050. According to Brown, he was unable to reconcile the quarterly financial statements with the actual financial records.

{¶ 121} Lyons's and Brown's affidavits contradicted the evidence submitted by appellants' with their summary judgment motion. Specifically, Lyons and Brown contradicted the testimony of Steve Freireich, appellants' certified public accountant who handled the bookkeeping for Shoregate Towers. Freireich averred that Getachew and Indale owed appellants a total of $665,267.61. Thus, Lyons's and Browns's affidavits created genuine issues of material fact and provided proper Civ.R. 56 evidence to defeat summary judgment on appellees' claims that remained after the trial court granted partial summary judgment to appellants.

{¶ 122} Accordingly, we overrule appellants' second assignment of error.

V. Security Deposits

{¶ 123} We will address appellants' fourth assignment of error before their third assignment of error for ease of discussion. In their fourth assignment of error, appellants argue that the trial court erred when it found that Elliott breached his fiduciary duty to appellees "related to the handling of the property's security deposits." Appellants maintain that the "security deposits were a liability" of the company "that [were] being transferred to Appellees as part of the consideration for the transactions[.]" And because the membership purchase agreements specified that security deposits were not to be prorated, appellants contend that appellees assumed the liabilities upon transfer of ownership.

{¶ 124} The trial court found that Elliott breached the membership purchase agreements relating to the security deposits. It explained:

> The first three membership purchase agreements state that, "[i]t is understood that there shall be no prorations for real estate taxes or security deposits." Tenant security deposits were not kept in a separate accounts [sic] and instead were simply placed in the operating account. Based on the language of the contracts, the Court concludes that tenant security deposits were supposed to remain with the company and were to be treated similarly to the liability for real estate taxes which were paid out of a separate escrow account controlled by Wells Fargo. Plaintiffs expert David Brown testified that at the time of transfer of management control, there should have been $183,507.00 available for tenant security deposits. The Defendants have not presented any evidence that this calculation is incorrect. Brown determined that this amount was not available at the time the Plaintiffs assumed management control. A review of the Deposit and Operating Account bank statements prior to the transfer of management control reveal that those accounts were either negative or had a very low balance. Because the accounts did not contain enough funds to cover the liability

of tenant security deposits, the Court concludes that Elliot breached the contract.

{¶ 125} We note at the outset that neither the appellants nor the appellees cite to proper authority that supports their arguments. Appellants claim that security deposits are governed by R.C. 5321.16(B), which states in relevant part:

> Upon termination of the rental agreement any property or money held by the landlord as a security deposit may be applied to the payment of past due rent and to the payment of the amount of damages that the landlord has suffered by reason of the tenant's noncompliance with section 5321.05 of the Revised Code or the rental agreement. Any deduction from the security deposit shall be itemized and identified by the landlord in a written notice delivered to the tenant together with the amount due, within thirty days after termination of the rental agreement and delivery of possession. The tenant shall provide the landlord in writing with a forwarding address or new address to which the written notice and amount due from the landlord may be sent. If the tenant fails to provide the landlord with the forwarding or new address as required, the tenant shall not be entitled to damages or attorneys fees under division (C) of this section.

{¶ 126} R.C. 5321.16(B) addresses a landlord's obligation to a tenant with respect to security deposits and has nothing to do with whether security deposits are a "contingent liability" upon the sale of property or a business as appellants maintain. Therefore, this provision has no bearing on the issues in this case.

{¶ 127} Appellees claim that there is such a requirement to segregate security deposits, citing only to Ohio Adm.Code 13:5-5, in support of their position. This chapter of the Ohio Administrative Code sets forth "General Provisions for Licensees," specifically, real estate brokers. Section 11 of this chapter requires licensed

> brokerages engaging in the management of property for another * * * to establish and maintain separate trust account(s), to be designated as

> property management trust account(s), for the deposit of security deposits, rents, and money received from the owner(s) or on the owner's(s') behalf for payment of expenses related to the management of property.

Ohio Adm.Code 13:5-5-11(A). This section requires brokerages that are managing property for others to place security deposits in the same "property management trust account" as rents and other money received. *Id.* Therefore, this section does not support appellees' claims that security deposits must be segregated from all other funds.

{¶ 128} Appellees do not point to any other authority in support of their position that property managers or landlords are required to segregate security deposits. We therefore agree with appellants that there is no legal duty to segregate tenants' security deposits by themselves in a separate account. Nonetheless, we do not agree with appellants that this also means that security deposits were "contingent liabilities" that appellees assumed when they purchased the company.

{¶ 129} Appellants do not cite to any other authority (besides R.C. 5321.16) in support of their position that security deposits are "contingent liabilities" that a buyer assumes. The contracts at issue in this case, i.e., the membership purchase agreements, state that the security deposits would not be prorated. Specifically, Section 4.1 of Article IV states:

> The parties agree that all revenue and expenses attributable to the Property shall be prorated as of the closing Date, including without limitation; rents, utilities, but excluding real estate taxes (the "Prorated Items"). Pre-Closing amounts of Prorated Items shall be charged or credited, as the case may be, one hundred percent (100%) to the Company, Expenses not yet known shall be estimated based upon prior

> invoices and shall be trued up within sixty (60) days after Closing. It is understood that there shall be no prorations for real estate taxes or security deposits.

{¶ 130} Appellants maintain that Section 4.1 means that the security deposits were contingent liabilities that ran with the company, just as the real estate taxes were not prorated because they were liabilities that ran with the company. But this section refers to "all revenue and expenses," not just expenses or liabilities. Further, the membership purchase agreements also state that the company's only "outstanding liabilities" were those listed in Schedule 3.1, which was attached to the agreements; the liabilities did not include security deposits. We therefore find that under the contracts at issue, security deposits were not liabilities that appellees assumed upon purchase.

{¶ 131} Assuming for the sake of argument that the contracts were ambiguous with respect to whether security deposits were liabilities that ran with the company, Indale testified that when negotiating the cash purchase price for the property, the parties determined the company's liabilities, which were based solely on its outstanding loans. They then subtracted the liabilities from a 2014 appraised value of the property. If appellees had received credit on the purchase price — that is, a reduction on the purchase price — for the total amount of the security deposits, that would have been reflected in the purchase price, but it was not. We therefore do not agree with appellants that the security deposits were contingent liabilities that ran with the company.

{¶ 132} Appellants further argue that because there is no legal duty to segregate security deposits from general operation funds, there cannot be a fiduciary duty from a seller to a buyer regarding those funds. They further contend that even assuming there could have been a breach of fiduciary duty, it was impossible for the trial court to determine damages on appellees' fiduciary-duty claim because until a tenant separates from the premises, it is unknown how much of the original security deposit will be returned to them, and therefore, any damages would be entirely speculative.

{¶ 133} The trial court concluded the following with respect to Elliott's' breach of fiduciary duty:

> Elliot retained a controlling interest in STP after the First Closing. As a result, he owed a duty to exercise the utmost good faith and honesty in his dealings with STP and the fellow members of STP: Inspiron Shoregate, LLC, S&G Investors LLC, and L&G Lakeshore LLC.
>
> Elliot breached his fiduciary duty to the members of STP by not ensuring that monies for tenant security deposits remained with STNS after the First Closing. As a member of STP he had a duty to ensure that there were not unfunded liabilities that the other members would have to fund after management control switched over. By failing to keep money in the accounts to cover the tenant security deposits, he injured the other members and the company by forcing them to take other cash flow to cover those expenses. Similarly, he breached his duties to them by not ensuring that the pre-closing liabilities were satisfied prior to March 1, 2016, resulting in the new members having to pay those out of cash flow which they would otherwise have received. The Court also concludes that Elliot breached his fiduciary duties to the STP by not ensuring that there was sufficient monies available to satisfy their obligation to Inspirion under the Second Membership Purchase Agreement.

{¶ 134} With respect to the security deposits, the trial court ordered:

> The Court finds that Elliot Antebi breached his contract with Plaintiffs [Inspirion] Shoregate, LLC, L&G Lakeshore LLC, and S&G Investors LLC by prorating the security deposits and failing to keep them with STNS. It finds that Elliot breached his fiduciary duties to the members of STP by the same conduct. It finds that Elliot Antebi is liable to [Inspirion] Shoregate, LLC, L&G Lakeshore LLC, and S&G investors LLC, and STP for $183,507.00.

{¶ 135} An Ohio limited liability company is neither a corporation nor a partnership, but hybrid containing attributes of each. *Dexxon Digital Storage, Inc. v. Haenszel*, 161 Ohio App.3d 747, 2005-Ohio-3187, 832 N.E.2d 62, ¶ 64 (5th Dist.). Ownership of the L.L.C. rests not in partners or shareholders, but with members. A "member" is statutorily defined as one whose name appears on the records of the L.L.C. as an owner of a membership interest in the company. R.C. 1705.01(G). A "membership interest" in an L.L.C. is a member's share of the profits and losses of the company and the right to receive distributions from that company. R.C. 1705.01(H). Each member has a statutory right to obtain, inter alia, "[t]rue and full information regarding the status of the business and the financial condition of the company." R.C. 1705.22(A)(1)(a).

{¶ 136} A fiduciary has been defined as a person having a duty, created by his or her undertaking, to act primarily for the benefit of another in matters connected with such undertaking. *Strock v. Pressnell*, 38 Ohio St.3d 207, 216, 527 N.E.2d 1235 (1988). R.C. 1705.281 defines the fiduciary duties of loyalty and care a "member" owes to a limited liability company, including discharging "duties to the limited liability company and the other members pursuant to this chapter or under the

operating agreement and exercis[ing] any rights consistent with the obligation of good faith and fair dealing." R.C. 1705.281(D).

{¶ 137} A claim for breach of a fiduciary duty is essentially a claim for negligence that involves a higher standard of care. *McConnell v. Hunt Sports Ent.*, 132 Ohio App. 3d 657, 687, 725 N.E.2d 1193 (10th Dist.1999). To recover on a claim for breach of fiduciary duty, a plaintiff must prove the existence of the duty, its breach, and damages proximately caused by the breach. *Id.*

{¶ 138} After review, we find no error on the part of the trial court. Again, we find no merit to appellants' argument that because there is no requirement to segregate security deposits, there can be no breach of fiduciary duty when the security deposits were not in the company's bank accounts. Elliott owed the other members of the company a fiduciary duty to ensure that there were sufficient funds in the company's bank accounts to pay the security deposits. We further find that the damages were not speculative just because it was possible that a tenant who was ending his or her lease may not be entitled to the entire amount or any of the original security deposit.

{¶ 139} Accordingly, we overrule appellants' fourth assignment of error.

VI. Purported "Undisputed" Matters

{¶ 140} In their third assignment of error, appellants maintain that the trial court erred when it failed to award damages to Elliot "for matters not in dispute," including (1) the portion of the escrow refund and the overpayment of personal monies to the company for operating expenses, (2) assessing contingent liability for

tenant security deposits to Elliott instead of Ellemark, and (3) permitting appellees' breach of contract claims to proceed when they were time barred.

{¶ 141} The "matters" that appellants point to, which they claim were not in dispute, were in fact matters that were not stipulated to and were in dispute. Indeed, in their pretrial statement, plaintiffs informed the trial court that there were no stipulations. And the only stipulation that appellants listed that was not a "proposed" stipulation was that the contracts were genuine. All other matters listed by appellants were in dispute.

{¶ 142} We already addressed appellants' arguments regarding his second and third issues and found no merit to them: the trial court properly assessed liability against Elliott for breach of fiduciary duty regarding the security deposits and permitted appellees' claims to proceed because they were not time barred. We will therefore not address these issues a second time.

{¶ 143} With respect to appellants' third issue, that $212,770 of the $367,344.17 escrow check amounted to a refund for "excess tax reserves" that post-dated February 29, 2016, and should have been awarded to Elliott, we disagree.

{¶ 144} With respect to the escrow funds, the trial court concluded:

> Elliot has not demonstrated by a preponderance of the evidence that he owned or had a right to control a portion of the refund check from Wells Fargo to [the company]. The check as a whole was an asset of the [the company], as * * * the check was $367,344.17 from Wells Fargo Commercial Mortgage Servicing to [the company]. The check was paid on December 15, 2017, 15 days after the Second Closing, when [Shoregate Towers Partners] and [the company] were firmly in the control of the Buyers. Elliot admitted on the stand that he "could not point to it either way" when asked for the basis of his claim.

> Furthermore, the testimony of Stephen Freireich did not establish that he was entitled to any portion of those funds because he admitted he relied upon Elliot for his reconciliations and did not have any independent documentation.

{¶ 145} The evidence supports the trial court's decision. The purchase agreements specifically stated that "all revenue and expenses attributable to the Property" shall be prorated as of February 29, 2016 — except for real estate taxes and security deposits. As of February 29, 2016, the tax reserves had been nearly depleted because the bank made a tax payment of over $200,000 in early February 2016. After February 29, 2016, appellees were responsible for paying all other expenses, including the outstanding loan and mortgage amounts that were still in Elliott's name. Therefore, appellees — not Elliot — paid into the company's escrow account at the bank per the agreements for most of 2016 and all of 2017.

{¶ 146} We therefore find no merit to appellants' third assignment of error and overrule it.

VII. Default Judgment

{¶ 147} In their fifth assignment of error, appellants contend that the trial court erred by not awarding default judgment to them because appellees never filed an answer to the counterclaims that appellants filed in response to appellees' amended complaint. Appellants maintain that judgment should have been rendered in their favor on all counts pursuant to Civ.R. 55.

{¶ 148} A trial court's decision to grant or deny a motion for default judgment is reviewed on appeal for an abuse of discretion. *Fitworks Holding L.L.C.*

v. Sciranko, 8th Dist. Cuyahoga No. 90593, 2008-Ohio-4861, ¶ 4, citing *Discover Bank v. Hicks*, 4th Dist. Washington No. 06CA55, 2007-Ohio-4448.

{¶ 149} Civ.R. 55(A) states in relevant part:

> When a party against whom a judgment for affirmative relief has failed to plead or otherwise defend as provided by the rules, the party entitled to a judgment by default shall apply in writing or orally to the court therefore; * * * If the party against whom judgment by default is sought has appeared in the action, he [or she] * * * shall be served with written notice of the application for judgment at least seven days prior to the hearing on such application.

{¶ 150} Civ.R. 55(A) contains two mandatory provisions: (1) the party seeking a default judgment *shall* apply in writing or orally to the court, and (2) the party seeking a default judgment *shall* serve the other party with written notice of the application for default at least seven days before a hearing on the application. Appellants failed on both accounts.

{¶ 151} The Ohio Supreme Court has made clear that default judgment against a party who has appeared in the action is not valid if the party has not received written notice of the other party's application for default at least seven days before a hearing on such application. *AMCA Internatl. Corp. v. Carlton*, 10 Ohio St.3d 88, 461 N.E.2d 1282 (1984). There is no question in this case that appellees "appeared in the action" and were entitled to notice of any motion for default judgment before default judgment would have been entered against them.

{¶ 152} A review of the record before us establishes that appellants never moved or applied for default judgment — either in writing or orally. They therefore did not meet the first requirement of Civ.R. 55(A), which also means that it was not

possible for them to meet the second requirement of Civ.R. 55(A). Appellants therefore waived their right to default judgment.

{¶ 153} In *Melling v. Scott*, 8th Dist. Cuyahoga No. 103007, 2016-Ohio-112, this court addressed a similar situation — except the appellants in that case filed a motion for default judgment. The appellants in *Melling* argued that the trial court should have granted their motion for default judgment because the appellee failed to file an answer to their amended complaint. *Id.* at ¶ 31. This court found that the trial court did not abuse its discretion when it denied appellants' motion for default judgment. We explained:

> The court retains discretion to deny a motion when the situation does not warrant the punitive measure of entering a default judgment. Here, appellants' amended complaint restated the claims alleged against Scott in the initial complaint and added various parties. While [appellee's] failure to respond technically placed him in default, nothing changed from the initial to the amended complaint relative to him.

Id. at 30.

{¶ 154} Here, we certainly cannot say that the trial court abused its discretion when it did not grant default judgment to appellants when appellants did not even move for default judgment. Moreover, "[w]here a party is not clearly entitled to judgment, a default judgment should not be entered." *Id.* at ¶ 31, citing *Streeton v. Roehm*, 83 Ohio App. 148, 81 N.E.2d 133 (1st Dist.1948). The trial court presided over this case for over two years and clearly did not believe default judgment should be entered against appellees.

{¶ 155} Appellants' fifth assignment of error is overruled.

VIII. Mark Antebi's Involvement

{¶ 156} In appellees' sole cross-assignment of error, they contend that the trial court erred when it found that "the Plaintiffs failed to prove by a preponderance of the evidence any of their claims against Defendant Mark Antebi." They contend that because Mark Antebi signed one of the first three membership purchase agreements, he made the same promises as Elliott did and should be jointly and severally liable for $209,297.22, which was the amount the trial court found Elliott owed appellees for breach of contract with respect to expenses that were not paid before the first closing.

{¶ 157} In the membership purchase agreement that Mark executed, he sold his 19 percent membership interest in the company to L&G Lakeshore, LLC for $600,000. This transaction closed on February 29, 2016, and Mark no longer held any membership interest in the company after that date.

{¶ 158} A review of the record establishes that appellees failed to present any evidence of Mark Antebi's wrongdoing. They did not call him to testify in the case. They do not point to any place in the transcript that demonstrates where the trial court got it wrong and establishes that they proved by a preponderance of the evidence that Mark failed to perform under the contract that he executed.

{¶ 159} Appellees point to Elliott's testimony that proves the "true up" meeting never occurred. But they do not establish that Mark Antebi had anything to do with managing the company, or that they ever attempted to contact Mark

Antebi about a "true up" meeting. Accordingly, the trial court did not err when it determined that plaintiffs failed to prove that Mark Antebi breached the contract.

{¶ 160} We overrule appellees' sole cross-assignment of error.

{¶ 161} Judgment affirmed.

It is ordered that appellees/cross-appellants recover from appellants/cross-appellees the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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

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

____
MARY J. BOYLE, ADMINISTRATIVE JUDGE

ANITA LASTER MAYS, J., and
MICHELLE J. SHEEHAN, J., CONCUR