[Cite as *Lewis Potts, Ltd. v. Zordich*, 2018-Ohio-5341.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

LEWIS POTTS, LTD.,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2018-T-0028**
- vs -	:	
GEORGE ZORDICH, et al.,	:	
Defendants-Appellants.	:	

Civil Appeal from the Trumbull County Court of Common Pleas.
Case No. 2016 CV 01286.

Judgment: Affirmed in part and reversed in part; remanded.

Thomas C. Nader, Nader & Nader, 5000 East Market Street, Suite 33, Warren, OH 44484 (For Plaintiff-Appellee).

Albert A. Palombaro, 4822 Market Street, Suite 301, Boardman, OH 44512 (For Defendants-Appellants).

TIMOTHY P. CANNON, J.

{¶1} Appellants, George Zordich and Michael Durkin, appeal from the February 26, 2018 judgment entry of the Trumbull County Court of Common Pleas, granting summary judgment in favor of appellee, Lewis Potts, Ltd. The trial court's judgment, for the reasons that follow, is affirmed in part and reversed in part, and the matter is remanded.

{¶2} On July 18, 2016, appellee filed a complaint against appellants for breach of contract. Appellee alleged it had entered into a lease agreement with appellants on September 11, 2007, for certain premises in Youngstown, Ohio; the lease agreement had been twice amended; and the lease term, as amended, was until November 30, 2017. Appellee alleged appellants failed to pay the monthly rent due of $3,051.00, which included common area and maintenance charges ("CAM charges"), and had abandoned the premises. Appellee demanded approximately $21,344.10[1] in delinquent rental payments and CAM charges that accrued prior to appellants abandoning the premises, and $42,800.00 for the balance of rental payments and CAM charges under the remaining term of the lease, plus attorney fees.

{¶3} A document titled "Tenant Ledger" was attached to the complaint, which describes the Tenant as "BELLASOLE Bella Sole, LLC." Appellants' names are not stated anywhere on the document. A copy of the lease agreement and amendments was not attached to the complaint; appellee stated, by way of explanation, that "[e]ach party has a copy of the Lease Agreement and Amendments which are voluminous and therefore not attached to this complaint."[2]

{¶4} Appellants jointly answered the complaint on April 7, 2017. They admitted appellee is a limited liability company with its principal office in Warren, Ohio, and that

1. There is a discrepancy in the body of the complaint between the amount in words and the amount in numbers, to wit: "Twenty One Thousand Three Hundred Forty Four and 10/100 Dollars ($23,344.00)." The "Tenant Ledger" attached to the complaint indicates the delinquent rental payments amounted to $21,344.76.

2. Civ.R. 10(D)(1) provides that when a claim is founded on a written instrument, a copy of the written instrument must be attached; if not, the reason for the omission must be stated in the complaint. Any objection to the failure to attach the required copy is properly addressed by a motion for more definite statement, pursuant to Civ.R. 12(E). *See Fletcher v. Univ. Hosps. of Cleveland*, 120 Ohio St.3d 167, 2008-Ohio-5379, ¶11. Appellants did not so move and thereby waived any objection.

"[t]he lease term, as amended, was until November 30, 2017." All other allegations were denied.

{¶5} A status conference was held on July 11, 2017. By notice sent on August 7, 2017, the magistrate ordered any motion for summary judgment to be filed by September 15, 2017, and any replies to be filed by October 13, 2017. The motion(s) would be heard by the court, by memorandum only, on November 3, 2017. Neither party moved for summary judgment within that time. Another status conference was held on November 16, 2017. The case was set for trial to the magistrate with a trial date of April 10, 2018.

{¶6} On November 29, 2017, appellee filed a motion for summary judgment, requesting judgment against appellants, jointly and severally, in the amount of $68,123.83. The entirety of appellee's motion reads as follows:

> On September 11, 2007, Plaintiff, as Landlord, and George Zordich and Michael Durkin, as tenants, entered into a Leasing Agreement for the premises known as 945 Boardman Canfield Rd., Unit 7, Youngstown, Ohio. See Affidavit of Dennis Lewis, Jr., and Copy of Lease attached as Exhibit A. The Lease term would terminate on November 30, 2017. Id. Defendants have failed to pay the monthly rental of $3,051.00 since September 1, 2016 for a total delinquency of $68,123.83. Id.
>
> Under the lease the Defendants are obligated to pay costs of collections including attorney's fees. Plaintiff has incurred $1,750.00 in attorney's fees and costs in this matter.
>
> Because there are no issues of material fact in dispute, Plaintiffs are entitled to a judgment in the amount of $68,123.83 for delinquent rent and $1,750.00 for attorney's fees.

{¶7} A copy of the lease was not, in fact, attached to the motion as an exhibit. The attached affidavit of Dennis Lewis, Jr. averred, in its entirety, the following:

> Now comes Dennis Lewis, Jr. first being duly sworn and states as follows:
>
> 1. Defendant is a member and Manager of Lewis Potts, Ltd.
>
> 2. On September 11, 2007, Plaintiff, as Landlord, and George Zordich and Michael Durkin, as tenants, entered into a Leasing Agreement for the premises known as 945 Boardman Canfield Rd., Unit 7, Youngstown, Ohio.
>
> 3. A copy of the statement is attached as Exhibit A.
>
> 4. The Lease term terminates on November 30, 2017.
>
> 5. Defendants have failed to pay the monthly rental of $3,051.00 since September 1, 2016 for a total delinquency of $68,123.83.
>
> 6. Under the lease the Defendants are obligated to pay costs of collections including attorney's fees. Plaintiff has incurred $1,750.00 in attorney's fees.
>
> Further Affiant Sayeth Naught.

{¶8} The "Open Item Statement" attached to the affidavit does not reference Appellant George Zordich, Appellee Lewis Potts, Ltd., or Affiant Dennis Lewis, Jr. It identifies the account as "BELLASOLE"; it provides that the statement, dated "11-27-2017," is for "Bella Sole, Lease Charges for Suite 7, 945 Boardman Canfield Road, Youngstown OH 44512"; it is addressed to "Bella Sole, Mike Durkin, 945 Boardman-Canfield Rd, Suite 7, Boardman, OH 44512"; and it instructs that checks be made payable to "945 Parkside, Ltd., 8031 East Market Street, Warren, OH 44484." Thereafter is a list of monthly rent charges, CAM charges, and property tax charges for "Unit 7" from and including January 2016 through and including November 2017, resulting in a balance of $68,123.83.

{¶9} On January 8, 2018, appellants filed a motion to strike the summary judgment motion as untimely under Civ.R. 56(A). In the alternative, appellants requested

the court grant them ten additional days to respond to appellee's motion. In the meantime, on January 11, 2018, appellants filed an initial response.

{¶10} The trial court denied the motion to strike on January 12, 2018, and granted appellants until January 26, 2018, to file a response in opposition to the summary judgment motion. This entry is the subject of appellants' first assignment of error on appeal:

{¶11} "The court erred when it denied defendant's motion to strike plaintiff's motion for summary judgment."

{¶12} We review a trial court's decision to deny a motion to strike for an abuse of discretion, i.e., a judgment that "fails to comport with either reason or the record." *Johnsonite, Inc. v. Welch*, 11th Dist. Geauga No. 2011-G-3012, 2011-Ohio-6858, ¶21 (citations omitted). *See also State v. Beechler*, 2d Dist. Clark No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting *Black's Law Dictionary* 11 (8th Ed.2004) (defining abuse of discretion as "'[a]n adjudicator's failure to exercise sound, reasonable, and legal decision-making'").

{¶13} Civ.R. 56(A) provides, in part: "If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court." Appellee asserts it was granted leave of court at the November 16, 2017 status conference. Appellants disagree, and there is no court order or docket entry in the record that reflects such leave was granted. "But a court may, in its sound discretion, consider a motion for summary judgment that has been filed, without express leave of the court, after the action has been set for trial." *Lachman v. Wietmarschen*, 1st Dist. Hamilton No. C-020208, 2002-Ohio-6656, ¶6 (footnote omitted); *see also Indermill v. United Sav.*, 5 Ohio App.3d 243, 244 (9th Dist.1982). "Furthermore, where the acceptance of a motion occurs by the grace of

the court, the decision to accept is itself 'by leave of court.'" *Lachman*, *supra*, at ¶6 (footnote omitted). Accordingly, even if appellee did not obtain leave prior to filing its motion, the trial court's decision not to strike the motion impliedly granted such leave. We cannot conclude that doing so was an abuse of the trial court's discretion. Appellee moved for summary judgment well in advance of the scheduled trial date, and appellants responded; appellants were also permitted additional time to file a more complete response in opposition. *See, e.g.*, *Stewart v. Cleveland Clinic Found.*, 136 Ohio App.3d 244, 254 (8th Dist.1999).

{¶14} Appellants' first assignment of error is not well taken.

{¶15} In their initial January 11, 2018 response, appellants argued summary judgment cannot be granted in favor of appellee, as it had not produced a copy of the lease agreement and amendments upon which its complaint was based. Appellants asserted:

> The Defendants denied the allegations as alleged in Paragraph 2 denying that each party has a lease agreement. No signed lease agreement has been attached to the Complaint or Plaintiff's Motion for Summary Judgment or furnished to the undersigned counsel after repeated request made of the Defendant for an executed copy of the agreement and amendments. Clearly, there remains issues of material fact as to whether or not an executed and valid lease agreement and amendments exists and whether or not the damages sought are legitimate and result of a breach of an agreement. [sic.]

{¶16} This argument was restated in appellants' amended response, which was filed on January 25, 2018. Appellants also argued that summary judgment is precluded by appellee's failure to comply with Ohio's Statute of Frauds (R.C. 1335.04) and Statute of Conveyances (R.C. 5301.01 and R.C. 5301.08), which together require commercial leases for greater than three years to be in writing, signed by the parties, and

acknowledged before a notary public or other specified official. They argued that without a properly executed and written lease, which appellee had failed to produce, "a periodic tenancy will be implied to exist regardless of the stated duration."

{¶17} Appellants stated they took possession of the premises; paid rent monthly, including CAM charges and property taxes; and vacated the premises on May 30, 2016. Therefore, referring to the "Tenant Ledger" attached to appellee's complaint, appellants assert they owe only $15,240.88 in unpaid rent to appellee.

{¶18} Appellee filed a reply on February 6, 2018. For the first time, it attached copies of three documents: "Lease Agreement between Lewis Potts, LTD and George Zordich and Michael Durkin dba Bronze Sun, LLC"; "First Amendment to Lease"; and "Second Amendment to Lease." Appellee also attached three affidavits: Dennis Lewis, as a member of appellee, averring he "was personally involved in the negotiation and execution of the Lease Agreement between Lewis Potts and George Zordich and Michael Durkin"; Davene M. Williams, a notary public, averring appellants appeared before her on September 11, 2007, and signed the written lease; and Kevin Wyndham, an employee of Dennis Lewis, averring he witnessed Michael Durkin sign the Second Amendment on March 22, 2012.

{¶19} In the body of its reply, appellee asserts that "Michael Durkin *and* George Zordich executed the Second Lease Amendment" and that "Kevin Wyndham witnessed George Zordich *and* Michael Durkin initial each page of the Lease Amendment and sign the Second Lease Amendment." (Emphasis added.) It is apparent, however, that only Michael Durkin executed the Second Amendment; only Michael Durkin initialed each

page of either amendment; and Kevin Wyndham only witnessed Michael Durkin sign the Second Amendment.

{¶20} The Lease Agreement provides that the "Landlord" is "Lewis Potts, LTD," and the "Tenant" is "George Zordich and Michael Durkin dba Bronze Sun, LLC;" it also provides that George Zordich and Michael Durkin are "Guarantors." The Lease Agreement was signed, on September 11, 2007, by both Michael Durkin and George Zordich (dba Bronze Sun, LLC) as the Tenant, and also signed by both George Zordich and Michael Durkin as individual Guarantors. On September 14, 2007, Dennis B. Lewis, for Lewis Potts, LTD, signed as the Landlord. Each signature was witnessed and acknowledged before a notary public.

{¶21} The "Term" of the Lease Agreement is defined in Section 2.3 as follows: "Five (5) Lease Years, the 'Initial Term,' beginning December 1, 2007 the 'Commencement Date' and ending November 30, 2012, the 'Expiration Date'[.] * * * The Term includes the Initial Term, each Renewal Term and Holdover Term under Article 28." As stated again in Section 4, "The term shall begin on the Commencement Date and continue until the Expiration Date, unless it is sooner terminated, as provided in Article 22 [Eminent Domain] or Article 26 [Default] or extended in accordance with the provisions in Article 35 [Renewal Options].

{¶22} The Lease Agreement provided for only one option of renewal for another five-year term following the Expiration Date, in Section 35.1:

> If Tenant is not in default and is in full operation during the entire final year of the Term, Tenant, at its option, shall be entitled to renew this Lease for One (1) additional term(s) of Five (5) year(s) (each) by giving a written notice of its intention to do so to the Landlord not less than six (6) months prior to the Expiration Date, or six (6) months before the end of the next prior renewal period, if it has been

> exercised. Said renewal(s) shall be upon all the terms and provisions of this Lease, except that the Base Rent in effect for the last year of the Term shall be adjusted in accordance with the CPI Increase Formula as of the first day of each Renewal Term (but in no event shall the Base Rent during the renewal period be less than the Base Rent for the last year of the Term).

{¶23} The First Amendment to Lease provided for the postponement of the January 2009 monthly payment until January 2010 and amended the monthly base rent charges for the remaining time under the lease, through November 30, 2012. It was initialed and signed by Dennis B. Lewis, for Landlord. The typed signature block for Tenant was the same as the Lease Agreement: "George Zordich and Michael Durkin dba Bronze Sun, LLC"; however, only Michael Durkin signed and initialed; George Zordich's line was left blank, and his initials do not appear on the document.

{¶24} The Second Amendment to Lease provides for an extension of the Lease Agreement, to wit: "Section 2.3 is amended to provide for an extension of the lease Term through November 30, 2017 (the 'Extended Term')." The document also states it is an amendment to a lease agreement between "George Zordich and Michael Durkin dba Bronze Sun, LLC," and "945 Parkside, Ltd., successor to Lewis Potts, Ltd." George Zordich's initials do not appear on the document nor did he sign the document; his name does not appear typed on any signature block. Michael Durkin's name is typed in the signature block, and he signed as the Tenant (again stated as George Zordich and Michael Durkin dba Bronze Sun, LLC). There is no name typed in the signature block for the Landlord (945 Parkside, Ltd.), and the signature is illegible. Kevin Wyndham witnessed both signatures on March 22, 2012, but they were not acknowledged before a notary public.

{¶25} Finally, the Second Amendment provides that, "[e]xcept as herein specifically modified, supplemented and amended, all the terms, covenants and conditions of the Lease as previously modified by the Amendment shall remain in full force and effect * * *." Specifically relevant to this action are those terms, covenants, and conditions in the Lease Agreement that pertain to tenant default and the individual guaranty.

{¶26} Section 26 provides that "[t[he occurrence of any of the following shall constitute a default and breach of this Lease by Tenant:

> 26.2 If Tenant shall fail, neglect or refuse to pay any installment of Rent at the time and in the amount required, or to pay any other monies agreed by it to be paid promptly when and as the same shall become due and payable, and if any such default should continue for a period of more than ten (10) days; or if
>
> 26.3 Tenant shall abandon or vacate the Premises or shall fail, neglect or refuse to keep and perform any of the other covenants, conditions, stipulations or agreements herein contained, and in the event any such default shall continue for a period of more than ten (10) days after notice thereof is given in writing to Tenant by Landlord * * *.

{¶27} Section 26.5 provides that, "[i]n the event of any such default or breach of this Lease by Tenant, Landlord shall have the rights and option to declare the entire Base Rent or Renewal Rent due and CAM Charges for the balance of the term hereof immediately due and payable by Tenant, and shall have any or all of the remedies hereinafter set forth * * *."

{¶28} Signing as individual guarantors of the Lease Agreement, appellants agreed to the following:

> 38.1 In consideration of the execution of the Lease to the Tenant and at its request, the persons named as the Guarantors in Section 2.19 covenant and agree with the Landlord, that if at any time default shall

> be made by the Tenant in the payment of Rent, or in the performance of the provisions of the Lease (or any amendments or modifications) during the Term on the part of the Tenant to be performed, the Guarantors agree to pay to the Landlord such sum or sums of money as will be sufficient to make up such deficiency of Rent and all damages that may accrue by reason of the violation or non-performance of any of the provisions of the Lease without requiring demand of payment or notice of any such default.
>
> 38.2 This Guaranty is absolute and unconditional and shall be a continuing one, without in any way being affected by the bankruptcy or insolvency of Tenant, its successors or assigns, or by the disaffirmance or abandonment by a trustee or receiver of Tenant, its successors or assigns. Demand and notice of non-payment or non-performance, diligence in collection and notice of acceptance of this Guaranty are hereby expressly waived.
>
> 38.3 There shall be no duty on the part of the Landlord under the Lease to mitigate damages; and this unconditional and absolute guarantee shall not be affected by the failure of Landlord to take action pursuant to the Lease, or any action taken, or by any extensions, indulgences or modifications of the Lease, or defaults by Landlord in enforcing any of the provisions thereof.
>
> 38.4 The Guarantors agree that the Guarantors may be joined in any action against the Tenant in connection with the Lease, and that recovery may be had against the Guarantors in such action or in any independent action or proceeding against them, without first exhausting any remedy or claim against Tenant.

{¶29} On February 26, 2018, the trial court granted appellee's motion for summary judgment. The trial court's final entry reads as follows:

> This matter comes before the Court on the Motion for Summary Judgment filed by the Plaintiff. Having reviewed the evidence, the Court finds that reasonable minds can only come to one conclusion, and having weighed matters in a light most favorable to the Defendant, the Court finds that Summary Judgment in Plaintiff's favor is appropriate.
>
> The Plaintiff's Motion for Summary Judgment is hereby GRANTED. Judgment is entered in favor of the Plaintiff in the amount of $68,123.83 for rent since September 1, 2016 and $1,750.00 in attorney's fees, per the lease agreement, plus statutory interest. Costs to the Defendant.

SO ORDERED.

{¶30} Appellants challenge this final entry in their second assignment of error:

{¶31} "The court erred as a matter of law in granting summary judgment for plaintiff."

{¶32} The trial court did not provide any analysis or explanation as to how it concluded appellee was entitled to summary judgment. Additionally, the trial court incorrectly stated it had "weighed matters." In considering a motion for summary judgment, however, a trial court does not weigh the evidence, judge the credibility of witnesses, or determine the truth of the matter. *Straus v. Doe*, 11th Dist. Lake No. 2003-L-082, 2004-Ohio-5316, ¶24; *Schmeltzer Excavating Co. v. State Sav. Bank*, 11th Dist. Portage No. 91-P-2302, 1991 WL 216982, *2 (Oct. 25, 1991). "The purpose of such an endeavor is not to try issues of fact, but rather to determine whether triable issues of fact exist." *Noll v. Nezbeth*, 63 Ohio App.3d 46, 52 (11th Dist.1989), citing *Viock v. Stowe-Woodward Co.*, 13 Ohio App.3d 7, 15 (6th Dist.1983).

{¶33} The trial court's misstatement in this regard does not thwart our review on appeal, however, as a trial court's decision to grant summary judgment is reviewed by an appellate court under a de novo standard of review, i.e., "independently and without deference to the trial court's determination." *Brown v. Cty. Commrs. of Scioto Cty.*, 87 Ohio App.3d 704, 711 (4th Dist.1993) (citation omitted); *see also Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996).

{¶34} "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.

Temple v. Wean United, Inc., 50 Ohio St.2d 317, 327 (1977); *see also Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 359 (1992) (citation omitted) ("Doubts must be resolved in favor of the non-moving party.").

{¶35} To prevail on a motion for summary judgment, the moving party has the initial burden to affirmatively demonstrate that no genuine issue of material fact exists to be resolved in the case. *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). If this initial burden is met, the nonmoving party then bears the reciprocal burden to set forth specific facts demonstrating the existence of a genuine issue of fact to be litigated. *Id.* at 293, citing Civ.R. 56(E). If the moving party's burden is not met in the first instance, the burden never shifts to the nonmoving party, and the motion for summary judgment must be denied. *Id.*

{¶36} The moving party must rely on evidence in the record as permitted by rule, to wit: "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action[.]" Civ.R. 56(C). "No evidence or stipulation may be considered except as stated in this rule." *Id.*

{¶37} Affidavits that are offered in support of the motion "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the

affidavit. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit." Civ.R. 56(E).

{¶38} The "personal knowledge" requirement may be satisfied by the affiant's mere assertion of personal knowledge only "'if the nature of the facts in the affidavit combined with the identity of the affiant creates a reasonable inference that the affiant has personal knowledge of the facts in the affidavit.'" *Green Tree Servicing, LLC v. Luce*, 11th Dist. Ashtabula No. 2015-A-0022, 2016-Ohio-1011, ¶24, quoting *Nationstar Mtge. LLC v. Hayhurst*, 11th Dist. Trumbull No. 2014-T-0102, 2015-Ohio-2900, ¶26; *see also State ex rel. Corrigan v. Seminatore*, 66 Ohio St.2d 459, 467 (1981).

{¶39} The requirement that all documents referred to in an affidavit be "sworn or certified copies" may also be satisfied by attaching the documents "'coupled with a statement therein that such copies are true copies and reproductions.'" *Green Tree*, *supra*, at ¶26, quoting *Corrigan*, *supra*, at 467; *see also Rilley v. Twp. of Brimfield*, 11th Dist. Portage No. 2009-P-0036, 2010-Ohio-5181, ¶66 (documents must be sworn, certified, or authenticated by affidavit to be considered by the trial court).

{¶40} Appellee attached to its motion for summary judgment the affidavit of Dennis Lewis, Jr., and the referenced "Open Item Statement." In pertinent part, the affiant states he "is a member and Manager of Lewis Potts, Ltd." and "[a] copy of the statement is attached." This affidavit does not satisfy the "personal knowledge" requirement, as the affiant did not assert personal knowledge nor can it be reasonably inferred from the document that the affiant has personal knowledge: his name does not appear anywhere on the Open Item Statement nor does the name of the company of which he avers he is

a member and manager. Further, the statement is not sworn or certified nor is it authenticated, as the affiant does not anywhere aver it is a "true" copy or reproduction.

{¶41} Nevertheless, as no objection was made to the affidavit or attached document, the trial court was free to consider the improper summary judgment evidence. *See Millstone Condos. Unit Owners Assn. v. 270 Main St.*, 11th Dist. Lake No. 2011-L-078, 2012-Ohio-2562, ¶62; *Martin v. Cent. Ohio Transit Auth.*, 70 Ohio App.3d 83, 89 (10th Dist.1990) (citation omitted) ("If there is no objection, then the court in its discretion may consider the material.").

{¶42} The only other evidence offered in support are the copies of the Lease Agreement and Amendments, which were attached to appellee's reply to appellants' response in opposition.[3] "Civ.R. 56 does not permit a party to obtain summary judgment 'by ambush,' i.e., by introducing new arguments and evidence for the first time in a reply brief." *Ohio Receivables, LLC v. Williams*, 2d Dist. Montgomery No. 25427, 2013-Ohio-960, ¶25, fn.3, citing *HSBC Bank USA v. Beirne*, 9th Dist. Medina No. 10CA0113-M, 2012-Ohio-1386, ¶18. Appellants, however, did not move to strike the evidence nor did they seek leave to file a surreply. In these circumstances, we conclude any objection to the trial court considering such evidence has been waived. *See*, *e.g.*, *Carrico v. Bower Home Inspection, LLC*, 5th Dist. Knox No. 16CA21, 2017-Ohio-4057, ¶18.

{¶43} Considering this evidence de novo, we conclude there are genuine issues of material fact that remain to be litigated.

3. It is not clear why appellee did not attach the Lease Agreement and Amendments to its complaint, provide them to appellants upon request, or incorporate them into its motion for summary judgment. Although the complaint indicates the reason is that the documents were too "voluminous," they only comprise a total of 28 pages.

{¶44} First, there is an issue of fact as to whom is liable for a breach of the Second Amendment, which extended the Initial Term of the Lease by five years. Appellee asserts on appeal that there "is no issue of fact that 'Bronze Sun, LLC' was only a 'dba' because 'Bronze Sun, LLC was never registered as an Ohio Limited Liability Company." Appellee did not make this assertion in its complaint or in its motion for summary judgment, nor was the same admitted by appellants, and there is no evidence in the record that establishes Bronze Sun, LLC is a general partnership comprised of Michael Durkin and George Zordich or that it is any other type of legal entity.

{¶45} With regard to a general partnership, it is true, pursuant to R.C. 1776.31(A), that

> [a]n act of a partner, including the execution of an instrument in the partnership name, for apparently carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership binds the partnership, unless the partner had no authority to act for the partnership in the particular matter *and* the person with whom the partner was dealing knew or had received a notification that the partner lacked authority. [Emphasis added.]

It is also true, however, that "[a]n act of a partner that is *not* apparently for carrying on in the ordinary course the partnership business or business of the kind the partnership carries on binds the partnership *only* if the act was authorized by the other partners." R.C. 1776.31(B) (emphasis added). *See also* R.C. 1776.01(M) (defining "partnership" as "an association of two or more persons to carry on as co-owners a business for-profit formed under section 1776.22 of the Revised Code, a predecessor law, or a comparable law of another jurisdiction").

{¶46} Therefore, if the evidentiary material established George Zordich and Michael Durkin had a partnership or were members of an LLC and that Michael Durkin

agreed to extend the Lease by executing the Second Amendment on behalf of that entity, George Zordich and Michael Durkin may both be individually liable for a breach under the terms of the continuing Guaranty (see provisions in the Lease Agreement above). *See, e.g.*, *Yearling Properties, Inc. v. Tedder*, 53 Ohio App.3d 52 (10th Dist.1988) (whether a guarantor of rent payments is liable for such payments beyond the original term of the lease depends on whether the lease agreement clearly and unambiguously expresses the intention of the parties to create a continuing guaranty); *see also Chase Bank of Ohio v. Brookstone Ohio Partnership*, 12th Dist. Clermont No. CA89-07-065, 1990 WL 20104, *3 (Mar. 5, 1990) ("The consent to the extension of time may be granted in the contract of guaranty.").

{¶47} In this regard, however, the documents provided by appellee, itself, demonstrate an issue of fact: on one hand, the Second Amendment indicates that Michael Durkin signed the lease extension on behalf of "dba Bronze Sun, LLC"; on the other hand, the Open Item Statement indicates the $68,123.83 balance is owed by a person or entity known as "Bella Sole." Again, the document does not reference Appellant George Zordich, Appellee Lewis Potts, Ltd., or Affiant Dennis Lewis, Jr. nor does it reference Bronze Sun, LLC; it identifies the account as "BELLASOLE"; it provides that the statement is for "Bella Sole, Lease Charges for Suite 7, 945 Boardman Canfield Road, Youngstown OH 44512"; and it is addressed to "Bella Sole, Mike Durkin, 945 Boardman-Canfield Rd, Suite 7, Boardman, OH 44512." There is no explanation in the record as to how "Bella Sole" is affiliated with either Bronze Sun, LLC or George Zordich.

{¶48} As noted, nothing in this record establishes that "Bronze Sun, LLC" is a legal entity. Additionally, nothing in this record establishes that Michael Durkin had authority

to bind George Zordich to the five-year extension under the Second Amendment. Accordingly, George Zordich may not be liable for that extension, as it was signed only by Michael Durkin. The personal guaranty of Zordich would bind him to obligations of an entity in a situation where he would otherwise not be bound. For Zordich to be liable for the Second Amendment lease extension under the personal guaranty provision, the entity must have validly executed the extension. While the Lease Agreement appears clear that the two individuals are the intended Tenants, regardless of their partnership or LLC status, various documents raise significant issues of fact regarding whether George Zordich is liable for the indebtedness accrued under the five-year extension in the Second Amendment.

{¶49} Appellee, as the moving party, failed to meet its burden of demonstrating an absence of genuine issue of material fact. The trial court erred in granting summary judgment in favor of appellee.

{¶50} Finally, there is an issue of fact as to the extent of recoverable damages. Appellants argue that the Second Amendment was defectively executed under Ohio's Statute of Conveyances, which provides, in relevant part:

> A * * * lease of any interest in real property * * * shall be signed by the * * * lessor in the case of a * * * lease * * *. The signing shall be acknowledged by the * * * lessor * * * before a judge or clerk of a court of record in this state, or a county auditor, county engineer, notary public, or mayor, who shall certify the acknowledgement and subscribe the official's name to the certificate of the acknowledgement.

R.C. 5301.01(A); *see also* the exemption found in R.C. 5301.08 (the statute does not affect the validity of a lease for any term not exceeding three years or require that lease to be acknowledged or recorded). "This section is mandatory in nature and sets forth

clearly the legal requisites necessary to create a valid lease." *Delfino v. Paul Davies Chevrolet, Inc.*, 2 Ohio St.2d 282, 284 (1965). "[A] defectively executed lease is invalid and does not operate to convey the estate or create the term of leasehold sought to be created thereby." *Id.* (citation omitted).

{¶51} "'A defectively executed lease for a term of five years upon monthly rental creates a tenancy in the lessee from month to month; and, where the tenant occupying under such lease vacates the premises at the end of a month, after fully prepaying the rentals then due, he is not liable to the lessor for the rental installments accruing after such vacation, in an action at law based upon such defectively executed lease.'" *Id.* at 285, quoting *Wineburgh v. Toledo Corp.*, 125 Ohio St. 219 (1932), paragraph one of the syllabus; *see also Burger v. Buck*, 11th Dist. Portage No. 2008-P-0041, 2008-Ohio-6061, ¶36.

{¶52} Here, the Second Amendment to Lease, which created a five-year extension of the Lease Agreement, was not acknowledged before a notary public or other specified official. It has been held, however, that where a lease contains an option to renew, the act of accepting an option to renew does not require a second formal execution. *R.C.T., Inc. v. Consol. Mgt., Inc.*, 11th Dist. Lake No. 99-L-191, 2001 WL 735771, *4 (June 29, 2001), citing *67 Corp. v. Elias*, 3 Ohio App.2d 411, 415 (10th Dist.1965); *see also W.A. Inc. v. Romocean*, 9th Dist. Summit No. 10358, 1982 WL 4930, *2 (Mar. 24, 1982). Therefore, because the Lease Agreement contained an option to renew, the Second Amendment did not require compliance with the formalities of R.C. 5301.01 if it was extended on behalf of the Tenants. If, however, it was not extended on behalf of the Tenants and was entered on behalf of Michael Durkin individually or another

entity, it might be a new lease; if so, the Second Amendment would be subject to the formalities of R.C. 5301.01. This is another issue that can only be resolved by determining the question of fact regarding liability outlined above.

{¶53} Appellee, as the moving party, failed to meet its burden of demonstrating an absence of genuine issues of material fact. Issues of fact remain as to (1) whether George Zordich can be held liable for the lease extension under the Second Amendment and (2) the extent of recoverable damages as against Michael Durkin.

{¶54} Appellants' second assignment of error has merit to the extent indicated.

{¶55} The judgment of the Trumbull County Court of Common Pleas is affirmed in part and reversed in part, and the matter is remanded for further proceedings consistent with this opinion.

CYNTHIA WESTCOTT RICE, J., concurs,

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

{¶56} I respectfully dissent and would affirm the decision of the court below with respect to the granting of summary judgment in favor of Lewis Potts, Ltd.

{¶57} At issue is the breach of a commercial lease. Contrary to the majority's position, the material facts regarding George Zordich's liability are not in dispute.

{¶58} The majority claims "there is an issue of fact as to whom is liable for a breach of the Second Amendment, which extended the Initial Term of the Lease by five years." *Supra* at ¶ 44.

{¶59} The Lease Agreement at issue expressly identifies the "Tenant" as "George Zordich and Michael Durkin dba Bronze Sun, LLC." The Lease Agreement contains the following guaranty provision:

> In consideration of the execution of the Lease to the Tenant and at its request, the persons named as the Guarantors [George Zordich and Michael Durkin] * * * covenant and agree with the Landlord, that if at any time default shall be made by the Tenant in the payment of Rent, or in the performance of the provisions of the Lease (***or any amendments or modifications***), * * * the Guarantors agree to pay to the Landlord such sum or sums of money as will be sufficient to make up such deficiency of Rent * * *.
>
> * * *
>
> The Guarantors agree that the Guarantors may be joined in any action against the Tenant in connection with the Lease, and that recovery may be had against the Guarantors in such action * * *.

(Emphasis added.)

{¶60} This Agreement and Guaranty was signed by both George Zordich and Michael Durkin "dba Bronze Sun, LLC."

{¶61} Thus, there is no issue regarding who is liable for breach of the Lease. Both Zordich and Durkin signed the Lease as tenants liable thereunder and executed personal guaranties for breach of the Lease including any amendments thereto. Both Zordich and Durkin admitted in their Answer to the Complaint that "[t]he lease term, as amended, was until November 30, 2017." Therefore, both Zordich and Durkin are liable under the Lease and its Second Amendment.

{¶62} The majority asserts that "there is no evidence in the record that establishes Bronze Sun, LLC is a general partnership comprised of Michael Durkin and George Zordich or that it is any other type of legal entity." *Supra* at ¶ 44. This is wholly irrelevant. "The designation [dba] means 'doing business as' but is merely descriptive of the person or corporation who does business under some other name," and "does not create an entity distinct from the person operating the business." (Citation omitted.) *LexisNexis, a Division of RELX, Inc. v. Moreau-Davila*, 2017-Ohio-6998, 95 N.E.3d 674, ¶ 57 (2d Dist.). Thus, "[w]hen 'd.b.a.' (doing business as) is used, there is no legal distinction between the individual and the business entity since it is merely a descriptive of the person who does business under some other name." *Herschell v. Rudolph*, 11th Dist. Lake No. 2001-L-069, 2002 WL 549980, *6 (Apr. 12, 2002).

{¶63} The majority also finds an issue with the fact that "the Open Item Statement indicates the $68,123.83 balance is owed by a person or entity known as 'Bella Sole.'" *Supra* at ¶ 47. The majority's consternation with the use of "Bella Sole" as an account name does not create a genuine issue of material fact as to what is being charged in the statement. The statement provides: "for * * * Lease Charges for Suite 7, 945 Boardman Canfield Road, Youngstown OH 44512." The Lease Agreement defines the "Premises" as "Unit No. 7" of "Parkside Place located at 945 Boardman-Canfield Road in the Township of Boardman." The affidavit of George Zordich states that "in December of 2007 he and Michael Durkin both dba Bronze Sun, LLC took possession of Unit No. 7, located at property owned by Lewis Potts, Ltd[.], 945 Boardman-Canfield Rd. Boardman, Ohio." The statement charges are unquestionably "Rent Charge[s]" for the premises identified in the Lease Agreement.

{¶64} In sum, Zordich is bound, as a matter of law, by the guaranty he signed "to make up such deficiency of Rent" if "default shall be made by the Tenant in the payment of Rent" under "the provisions of the Lease," including "any amendments or modifications." The Lease in question was in effect at the time of breach, as both Zordich and Durkin conceded in their Answer. Durkin was a Tenant under the Lease. Zordich is bound to make up the deficiency of Rent regardless of whether he signed the amendment or is primarily liable for rent under the extension – the guaranty is not conditioned upon the guarantor also being a tenant under the Lease. This is not a factual issue dependent upon the resolution of conflicting evidence. It is the plain and ordinary meaning of the documentary evidence in the record.

{¶65} For the foregoing reasons, I respectfully dissent and would affirm the decision of the trial court.