**[Cite as *Ewbank v. Galaszewski*, 2009-Ohio-5916.]**

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

BARBARA EWBANK

Plaintiff-Appellee

-vs-

JOSEPH GALASZEWSKI

Defendant-Appellant

JUDGES:
Hon. William B. Hoffman, P. J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

Case No. 09 COA 007

O P I N I O N

CHARACTER OF PROCEEDING: Civil Appeal from the Ashland Municipal Court, Case No. 08-CV-F-1024

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: November 6, 2009

APPEARANCES:

For Plaintiff-Appellee

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*Wise, J.*

**{¶1}** Appellant Joseph Galaszewski appeals the decision of the Ashland Municipal Court, which granted summary judgment in a contract dispute in favor of Appellee Barbara Ewbank, appellant's former fiancée. The relevant facts leading to this appeal are as follows.

**{¶2}** During the fall of 2006, appellant and appellee were involved in a cohabitating romantic relationship and were engaged to be married. On October 9, 2006, appellant and appellee signed a written document stating as follows:

**{¶3}** "I, Joseph Galaszewski, got $5,400.00 from Barbara Ewbank. It will be repaid if we split.

**{¶4}** "10/9/06

**{¶5}** "/s/ Barbara A. Ewbank

**{¶6}** "/s/ Joseph Galaszewski"

**{¶7}** The validity of the signatures of each party was not disputed. However, at some point in late 2007, appellant and appellee ended their romantic relationship. On June 19, 2008, appellee filed a complaint against appellant, based on the aforesaid document, in the Ashland Municipal Court. Appellant answered and filed a counterclaim on July 11, 2008, although appellant withdrew the counterclaim on July 31, 2008.

**{¶8}** On December 10, 2008, the trial court granted summary judgment in favor of appellee in the amount of $3,166.38, plus interest. However, upon appellant's Civ.R. 60(B) motion, the trial court set the December 10, 2008 judgment aside, and allowed appellant to respond to appellee's motion for summary judgment.

**{¶9}** On January 22, 2009, the trial court issued a judgment entry in favor of appellee in the amount of $2,400.00, plus interest from October 6, 2006.

**{¶10}** Appellant filed a notice of appeal on February 20, 2009, and herein raises the following sole Assignment of Error:

**{¶11}** "I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN GRANTING SUMMARY JUDGMENT TO PLAINTIFF."

I.

**{¶12}** In his sole Assignment of Error, appellant argues the trial court erred in granting summary judgment in favor of appellee. We disagree.

**{¶13}** Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc*. (1987), 30 Ohio St.3d 35, 36, 506 N.E.2d 212. As such, we must refer to Civ.R. 56 which provides, in pertinent part: "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * * A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor."

**{¶14}** Pursuant to the above rule, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, 674 N.E.2d 1164, citing *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 662 N.E.2d 264.

**{¶15}** The elements of a contract include the following: an offer, an acceptance, contractual capacity, consideration (the bargained-for legal benefit or detriment), a manifestation of mutual assent, and legality of object and of consideration. *Altek Environmental Serv. Co. v. Harris*, Stark App.No. 2008CA00138, 2009-Ohio-2011, ¶ 19, citing *Kostelnik v. Helper,* 96 Ohio St.3d 1, 770 N.E.2d 58, 2002-Ohio-2985, ¶ 16. In order to present a claim for breach of contract, the movant must present evidence on several elements. Those elements include the existence of a contract, performance by the plaintiff, breach by the defendant, and damage or loss to the plaintiff. *Dodson v. Moore*, Muskingum App.No. 2007-0052, 2008-Ohio-5333, ¶ 30, citing *Doner v. Snapp* (1994), 98 Ohio App.3d 597, 600, 649 N.E.2d 42.

**{¶16}** Appellant essentially presents two challenges to the trial court's enforcement of the parties' document of October 6, 2006, which he concedes is a

simple contract for the payment of money. See Appellant's Brief at 7. First, although not raised before the trial court, he asserts that the document must fail as a promissory note, on the grounds that it is unenforceable because it contains a condition, i.e., that the parties must first "split" (terminate their romantic relationship). See, e.g., 71 O Jur.3d 90. However, it is well established that a party cannot raise any new issues or legal theories for the first time on appeal. *Godwin v. Erb*, 167 Ohio App.3d 645, 650, 856 N.E.2d 321, 2002-Ohio-2440, citing *Dolan v. Dolan,* Trumbull App.Nos. 2000-T-0154 & 2001-T-0003, 2002-Ohio-2440, ¶ 7. Secondly, appellant maintains that the document should be treated as evidence of a bailment of monies, asserting that appellee had him hold the cash for her to avoid creditors. He argues he should be entitled to show that he, as alleged bailee, disbursed the money as appellee purportedly directed prior to their break-up. Appellant's Brief at 8.

**{¶17}** In *Blosser v. Enderlin* (1925), 113 Ohio St. 121, 134, 148 N.E. 393, the Ohio Supreme Court held that "except where the reformation of a written contract is sought in equity, evidence cannot be introduced to show an agreement between the parties materially different from that expressed by the clear and unambiguous language of the instrument." In the case sub judice, we find no ambiguity in the contractual document at issue: the parties simply mutually promised that the $5,400.00 appellant had received from appellee would be returned to her if the parties' relationship were to end. No mention of a bailment or indication of appellant holding the money to protect it from creditors is present, and it appears undisputed that the trial court duly gave appellant credit for the $3,000.00 he repaid to appellee, leaving a balance due of $2,400.00.

**{¶18}** We therefore find summary judgment in favor of appellee in the amount of $2,400.00 was not erroneous as a matter of law.

**{¶19}** Appellant's sole Assignment of Error is overruled.

**{¶20}** For the reasons stated in the foregoing opinion, the decision of the Ashland Municipal Court, Ashland County, Ohio is hereby affirmed.

By: Wise, J.

Hoffman, P. J., and

Delaney, J., concur.

/S/ JOHN W. WISE_____

/S/ WILLIAM B. HOFFMAN_____

/S/ PATRICIA A. DELANEY_____

JUDGES

JWW/d 10/14

IN THE COURT OF APPEALS FOR ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

| | | |
|---|---|---|
| BARBARA EWBANK | : | |
| | : | |
| Plaintiff-Appellee | : | |
| | : | |
| -vs- | : | JUDGMENT ENTRY |
| | : | |
| JOSEPH GALASZEWSKI | : | |
| | : | |
| Defendant-Appellant | : | Case No. 09 COA 007 |

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Ashland Municipal Court of Ashland County, Ohio, is affirmed.

Costs assessed to appellant.

/S/ JOHN W. WISE_____

/S/ WILLIAM B. HOFFMAN_____

/S/ PATRICIA A. DELANEY_____

JUDGES