[Cite as *Culler v. Culler,* 2010-Ohio-5095.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
DARIN HARRISON CULLER	:	Julie A. Edwards, P.J.
	:	William B. Hoffman, J.
Plaintiff-Appellant	:	John W. Wise, J.
	:	
-vs-	:	Case No. 2010 CA 0042
	:	
	:	
DARYL EVAN CULLER	:	O P I N I O N
Defendant-Appellee		

CHARACTER OF PROCEEDING:	Civil Appeal from Richland County Court of Common Pleas Case No. 07-CV-1098H
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	October 5, 2010

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
THOMAS L. MASON Mason, Mason & Kearns 153 West Main Street P.O. Box 345 Ashland, Ohio 44805	WAYNE A. ZACOUR Taggart Law Firm, L.P.A. 140 West Liberty Street P.O. Box 218 Wooster, Ohio 44691

Edwards, P.J.

{¶1} Plaintiff-appellant, Darin Harrison Culler, appeals from the March 1, 2010, Judgment Entry of the Richland County Court of Common Pleas granting defendant-appellee Daryl Evan Culler's Motion for Summary Judgment as to Count One of plaintiff-appellant's Amended Complaint.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellee was the owner of a one-half interest in a farm.[1] In February of 2003, appellee traveled abroad to do missionary work. Prior to his departure, appellee and appellant, who is appellee's son, entered into an oral agreement. Pursuant to the terms of the same, appellant agreed to take care of appellee's sheep while appellee was gone. The sheep were housed on appellee's property. The agreement also provided that, in turn, appellant and his wife were entitled to reside in appellee's residence rent-free while appellee was gone and to keep the proceeds of any lambs that were born.

{¶3} Before he left, appellee added appellant's name to a United States savings bond with a cash surrender value of approximately $2,200.00. The two agreed that such bonds were only to be cashed in the case of an emergency.

{¶4} Appellant and his wife lived rent-free at appellee's residence for approximately six months. During such time, a number of sheep died while under appellants's care. Upon his return from abroad, appellee evicted appellant and his wife.

{¶5} On December 3, 2007, appellant filed an amended complaint against appellee and Noel F. Culler and Judith P. Culler, Trustees Under the Culler Family Trust. Appellant, in the amended complaint, alleged, in Count One, that appellee had

[1] The property was sold in 2008.

breached the parties' agreement. In Count Two, appellant alleged that appellee intended to sell the family farm and use the sale proceeds for illegal purposes. Appellant, in Count Three, alleged as follows**:**

{¶6} "9. Defendant Noel F. Culler and Judith P. Culler, Trustees of the Culler Family Trust, may claim an ownership interest in the subject real estate.

{¶7} "10. Defendant Daryl Evan Culler transferred his interest in the real estate to Daryl Evan Culler, Trustee, although the deed does not specify of what he is the Trustee.

{¶8} "11. The purpose of the Culler Family Trust and the rights and responsibilities of the Trustees is unknown absent any trust document.

{¶9} "12. The Plaintiff has no other adequate remedy at law."

{¶10} In addition to seeking judgment against appellee in the amount of $600,000.00, appellant sought injunctive relief preventing the sale or transfer of the subject real estate for "any illegal purposes or any purposes not in conformance with the Culler Family Trust."

{¶11} Thereafter, on December 13, 2007, appellee and the trustees filed a Motion to Dismiss Counts Two and Three of the Amended Complaint pursuant to Civ.R. 12(B)(1) for lack of jurisdiction over the subject matter and Civ.R. 12(B)(6) for failure to state a claim. The trial court, as memorialized in a Judgment Entry filed on January 22, 2008, granted such motion.

{¶12} On December 23, 2009, appellee filed a Motion for Summary Judgment with respect to Count One of the Amended Complaint. Appellant filed a memorandum

in opposition to the same on January 21, 2010. Pursuant to a Judgment Entry filed on March 1, 2010, the trial court granted such motion.

{¶13} Appellant now raises the following assignments of error on appeal:

{¶14} "I. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY DISMISSING COUNTS TWO AND THREE OF THE APPELLANT'S COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY GRANTED.

{¶15} "II. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY GRANTING THE APPELLEE'S MOTION FOR SUMMARY JUDGMENT WHERE THERE WERE DISPUTED ISSUES OF FACT AND LAW."

I

{¶16} Appellant, in his first assignment of error, argues that the trial court erred by dismissing Counts Two and Three of the Amended Complaint for failure to state a claim upon which relief could be granted. We disagree.

{¶17} The trial court, in its January 22, 2008, Judgment Entry, appears to have dismissed Count Three of the Amended Complaint pursuant to Civ.R. 12(B)(6) for lack of standing and to have dismissed Count Two pursuant to both Civ.R. 12(B)(6) for lack of standing and Civ.R. 12(B)(1) for lack of jurisdiction. We note that appellant has only challenged the trial court's dismissal for failure to state a claim upon which relief can be granted pursuant to Civ.R. 12(B)(6). Because the court gave an alternative reason for dismissing Count Two and, because appellant has not assigned as error the trial court's dismissal of Count Two for lack of jurisdiction, whether or not the trial court erred in dismissing Count Two for failure to state a claim is moot. Moreover, we note that while appellant, in Count Two, sought to prevent the sale of the farm on the basis that

appellee intended to use the proceeds for illegal purposes, “a claim that rests upon future events that may not occur at all, or may not occur as anticipated, is not considered ripe for review.” *State ex rel. Keller v. Columbus* (2005), 164 Ohio App.3d 648, 656, 843 N.E.2d 838.

{¶18} Thus, the only issue is whether the trial court erred in dismissing Count Three of the Amended Complaint for lack of standing. A party may use a Civ.R. 12(B)(6) motion to dismiss to raise the defense of lack of standing. See, *Woods v. Oak Hill Community Med. Ctr., Inc.* (1999), 134 Ohio App.3d 261, 267, 730 N.E.2d 1037. A Motion to dismiss is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545, 548, 605 N.E.2d 378. Thus, the court will look only to the complaint to determine whether the allegations are legally sufficient to state a claim. Id. The court cannot look to any facts or circumstances outside of the pleadings. See *State ex. Rel. Baran v. Fuerst* (1990), 55 Ohio St.3d 94, 563 N.E.2d 713.

{¶19} In order to dismiss a complaint pursuant to Civ.R. 12(B)(6), the court must find beyond a doubt that the plaintiff can prove no set of facts that would support his claim for relief. *O'Brien v. Univ. Community Tenants Union* (1975), 42 Ohio St.2d 242, 327 N.E.2d 753. In so doing, we must accept all factual allegations in the complaint as true and all reasonable inferences must be drawn in favor of the nonmoving party. *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 60, 565 N.E.2d 584. Our standard of review on a Civ.R. 12(B)(6) motion to dismiss is de novo. *Greeley v. Miami Valley Maintenance Contrs., Inc.* (1990), 49 Ohio St.3d 228, 229, 551 N.E.2d 981.

{¶20} Appellant, in Count Three of his complaint, specifically stated as follows:

{¶21} "9. Defendant Noel F. Culler and Judith P. Culler, Trustees of the Culler Family Trust, may claim an ownership interest in the subject real estate.

{¶22} "10. Defendant Daryl Evan Culler transferred his interest in the real estate to Daryl Evan Culler, Trustee, although the deed does not specify of what he is the Trustee.

{¶23} "11. The purpose of the Culler Family Trust and the rights and responsibilities of the Trustees is unknown absent any trust document.

{¶24} "12. The Plaintiff has no other adequate remedy at law."

{¶25} While appellant did not set forth any claim in Count Three, in his prayer for relief, he asked for injunctive relief to prevent any sale or transfer of the real estate for "any purpose not in conformance with the Culler Family Trust."

{¶26} In order to have standing to obtain injunctive relief, a person must have a personal stake in the injunction sought. *Woods v. Oak Hill Community Med. Ctr., Inc.* (1999), 134 Ohio App.3d 261, 270. Nowhere in the Amended Complaint does appellant allege that he has an ownership interest or right in the subject property or that he is/was a beneficiary of any trust. We find, therefore, that the trial court did not err in finding that appellant had no standing to prevent a potential sale of the property.

{¶27} Based on the foregoing, appellant's first assignment of error is, therefore, overruled.

II

{¶28} Appellant, in his second assignment of error, argues that the trial court erred in granting appellee's Motion for Summary Judgment with respect to Count One of

the Amended Complaint. As is stated above, in such count, appellant alleged that appellee had breached the parties' contract.

{¶29} 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. Civ.R. 56(C) provides, in pertinent part:

{¶30} "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 such evidence or stipulation and only therefrom, 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, such party being entitled to have the evidence or stipulation construed most strongly in his favor."

{¶31} Pursuant to the above rule, a trial court may not enter a 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,* 77 Ohio St.3d 421, 429, 1997-Ohio-259, 674 N.E.2d 1164, citing *Dresher v. Burt,* 75 Ohio St.3d 280, 1996-Ohio-107, 662 N.E.2d 264.

{¶32} "[A] breach of contract occurs when a party demonstrates the existence of a binding contract or agreement; the nonbreaching party performed its contractual obligations; the other party failed to fulfill its contractual obligations without legal excuse; and the nonbreaching party suffered damages as a result of the breach." *Garofalo v. Chicago Title Ins. Co.* (1995), 104 Ohio App.3d 95, 108, 661 N.E.2d 218.

{¶33} In the case sub judice, appellant alleged in Count One of the Amended Complaint as follows:

{¶34} "COUNT ONE:

{¶35} "1. The Plaintiff and Defendant Daryl Evan Culler entered into an agreement within the last six years whereby the Plaintiff and Defendant Daryl Culler would engage in a business raising sheep for sale as food.

{¶36} "2. Pursuant to the aforesaid agreement, the Plaintiff expended funds and forewent other business and employment opportunities.

{¶37} "3. The aforesaid business was conducted on the Culler family farm at 2657 Pleasant Valley Road, Lucas, Ohio 44843-9744, which has been in the Culler family for more than 183 years.

{¶38} "4. Defendant Daryl Culler breached the aforesaid agreement, proximately causing monetary damage and emotional damage to the Plaintiff."

{¶39} Appellee, in his affidavit in support of his Motion for Summary Judgment, stated, in relevant part, as follows:

{¶40} "3. In February 2003, I traveled to the Ukraine for a short-term mission trip.

{¶41} "4. Prior to my departure, I entered into an oral agreement with Plaintiff whereby Plaintiff agreed to care for my flock of sheep (approximately 150 in number) which were housed on the above-referenced real estate.

{¶42} "5. During the time I was overseas, Plaintiff was entitled to sell, and keep the proceeds, thereof, of any lambs born into the flock. I would continue to own and control the sale of all the ewes.

{¶43} "6. In addition to the proceeds from the sales of lambs, Plaintiff and his spouse were entitled to stay in my residence on a rent-free basis.

{¶44} "7. While I was oversees on my missions (sic) trip, Plaintiff resided at 2657 Pleasant Valley Road, Lucas, Ohio 44843 and cared for said flock of sheep for a period of approximately six months.

{¶45} "8. During the time I was away, I advanced Plaintiff a total of $8,200.00 for the care and operation of the flock of sheep. I also made sure that ample feed for my flock had been purchased and paid for prior to my departure.

{¶46} "9. Upon my return from overseas, I was required to pay outstanding fee invoices at Town and County ($1,392.99) and Loudonville Equity ($1,743.25). Plaintiff contributed no funds toward the payment of any of these bills.

{¶47} "10. When I returned from the Ukraine, I discovered that plaintiff had failed to exercise adequate care for the sheep, in that an unusual number of the flock had perished during my absence.

{¶48} "11. My sheep busines (sic) evidenced a loss of $3,439.50 during calendar year 2003. Plaintiff expended no funds to assist in covering that loss.

{¶49} "12. In addition, while residing at 2657 Pleasant Valley Road, Plaintiff cashed approximately $2,100.00 of United States Savings Bonds for his own personal use without my authorization or consent.

{¶50} "13. As a result of all these actions, I was forced to evict Plaintiff from the homestead in early September of 2003, and terminate our business arrangement."

{¶51} In turn, appellant, in his affidavit attached in support of his memorandum in opposition to appellee's Motion for Summary Judgment, stated, in pertinent part, as follows:

{¶52} "3. In February of 2003 Daryl Culler left the farm and stated that he would probably be back in July.

{¶53} "4. In March of 2002 I entered into an agreement with Daryl Culler whereby I would care for the sheep on the farm and would be able to reside on the farm and that I would be entitled to the proceeds of the sale of any sheep, regardless of the gender of the sheep.

{¶54} "5. Additionally, in May of 2003, while Daryl Culler was still away, Daryl Culler promised me and my wife that we would eventually inherit the farm. (Exhibit A).

{¶55} "6. Daryl Culler advance (sic) $5,000.00 during his absence for the care of the sheep, but $3,200.00 was to be used at his direction to pay his personal bills. (Exhibit B).

{¶56} "7. The outstanding fee invoices were required to pay for feed for the sheep. Daryl Culler had given a Power of Attorney to a Susan Sipes, but would not authorize the expense for the needed feed.

{¶57} "8. I exercised proper care of the sheep flock during Daryl Culler's absence. I had to erect fencing on the farm because, when Daryl Culler left, there was no containment of the flock, so I corrected the problems by creating fencing with access to the barn so that they could stay warm after I placed straw in the barn for the sheep.

{¶58} "9. The savings bonds were issued to me and Daryl Culler. Daryl Culler had cashed bonds previously without consent.

{¶59} "10. Daryl Culler was not forced to evict me and terminate our business arrangement. I was not living there rent free as we took care of the farm and had been told that I would inherit it."

{¶60} Appellant, in his affidavit, does not contradict appellee's assertion that the contract covered the period while appellee was gone and appellee's assertions that appellant lived rent free during such time.

{¶61} Based on the foregoing, we concur with the trial court that the undisputed facts are that the parties had an oral agreement pursuant to which appellant would care for the sheep while appellee was overseas and would stay during such time rent-free at appellee's house, that appellant and his wife did in fact stay rent-free at appellee's house while appellee was gone, and that a number of sheep died while appellee was gone. We further concur that appellant has "failed to offer any specific act by [appellee] constituting a breach of their oral agreement, nor has he alleged any additional terms to the oral agreement."[2] Finally, we note that while appellant, in his amended complaint, alleged that he suffered monetary and emotional damage, he failed to set forth specific

[2] We note that appellant, in his affidavit, alleged that he was told that he would inherit the farm. However, in his Amended Complaint, he did not allege that appellee breached such alleged agreement.

evidence of the type listed in Rule 56(C), or any evidence, which demonstrated that a genuine issue of material fact existed with regard to whether he suffered damages.

{¶62} Appellant's second assignment of error is, therefore, overruled.

{¶63} Accordingly, the judgment of the Richland County Court of Common Pleas is affirmed.

By: Edwards, P.J.

Hoffman, J. and

Wise, J. concur

s/Julie A. Edwards

s/William B. Hoffman

s/John W. Wise

JUDGES

JAE/d0715

[Cite as *Culler v. Culler,* 2010-Ohio-5095.]

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

DARIN HARRISON CULLER	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
DARYL EVAN CULLER	:	
Defendant-Appellee	:	CASE NO. 2010 CA 0042

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Richland County Court of Common Pleas is affirmed. Costs assessed to appellant.

s/Julie A. Edwards

s/William B. Hoffman

s/John W. Wise

JUDGES