[Cite as *Rejas Invests. v. Natl. City Bank*, 2010-Ohio-5163.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

REJAS INVESTMENTS, et al.

Plaintiff-Appellant/Cross-Appellee

v.

NATIONAL CITY BANK

Defendant-Appellee/Cross-Appellant

Appellate Case No. 23349

Trial Court Case No. 2001-CV-07175

(Civil Appeal from
Common Pleas Court)

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O P I N I O N

Rendered on the 22nd day of October, 2010.

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BROGAN, J.

{¶ 1} Rejas Investments leased industrial land to Counselor Material Processing, Inc., and National City Bank made a sizeable loan to Counselor, obtaining a security interest in Counselor's property. After Counselor filed for bankruptcy and defaulted on the loan, National City took possession of the collateral. In writing, National City agreed to pay Rejas storage fees while the collateral remained on the property pending sale at auction. After the auction, Rejas demanded that National City continue to pay storage fees for a kiln and bag house that remained. National City disclaimed these items and refused to pay. Rejas filed an action for breach of contract, which went to trial. National City was not permitted to present parol evidence concerning the parties' intentions in the agreement. The trial court found for Rejas, and National City appealed. We determined that parol evidence should have been admitted, so we reversed and remanded. See *Rejas Invests. v. Natl. City Bank*, Montgomery App. No. 21243, 2006-Ohio-5586, (*Rejas I*).

{¶ 2} Meanwhile, National City removed the kiln and bag house, so on remand it filed a supplemental pleading claiming that removal unjustly enriched Rejas. After the parties so moved, the trial court granted summary judgment for National City on the breach-of-contract claim and for Rejas on the unjust-enrichment claim. The trial court's decision was based on our decision in *Rejas I* wherein, said the trial court, we determined that National City had rightfully abandoned its security interest in the two items and owed Rejas nothing.

{¶ 3} We disagree. In *Rejas I* we reversed because parol evidence was improperly excluded, and we "remanded for a new trial." *Rejas*, at ¶101. We do so again here.

I. Facts[1] and Procedural History

{¶ 4} Rejas is an informal partnership founded on an oral agreement between Norma Kaplan and Barbara Katz, who died in February 2008. Before selling it in 2006, Rejas owned roughly 75 acres of industrial land in West Carrollton, Ohio.[2] Early on, Rejas leased the land to a company that processed scrap into coal briquettes. Among the equipment used in the this process was a kiln (a large dryer) and bag house (where dust created by the kiln was collected). Later, Counselor Material Processing, Inc. purchased all the equipment, including the kiln and bag house, and began to lease the land. National City Bank loaned Counselor $1.5 million and extended it a $500,000 line of credit. The parties entered into a security agreement as part of the loan transaction, under which National City obtained, as collateral, a security interest in Counselor's property. In 2001, Counselor filed for bankruptcy and defaulted on the loan, so National City took legal possession of the collateral. National City asked Rejas if it could hold an auction on the land to sell off the collateral. Rejas allowed this, provided that National City pay Rejas storage fees while the collateral remained on its land. National City agreed, and their storage-fees agreement was reduced to writing. On October 12, 2001, after the auction, National City sent Rejas a letter stating that all items of collateral had

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[1]We state here only those facts pertinent to this appeal. For a full account of the underlying facts see our opinion in *Rejas I*.

[2]Evidence has been presented since that the land is actually titled to Barbara and Norma, not Rejas. This does not necessarily mean that the property was not partnership property. Nevertheless, the actual owner of the property is irrelevant to the issues in this appeal.

been removed. Rejas sent National City a letter pointing out that certain items, including the kiln and bag house, were still there, and Rejas demanded that National City continue to pay storage fees under the Agreement. National City replied that it had no obligation to pay after October 12, 2001, since any items that remained, including the kiln and bag house, were not collateral, and even if they were, National City had abandoned them to Rejas.

{¶ 5} On December 21, 2001, Rejas filed suit against National City claiming breach of the storage-fees agreement. After National City moved for summary judgment, the case was referred to a magistrate, who, in June 2003, denied the motion. The magistrate held a trial, and, in November 2004, the magistrate found for Rejas and said that Rejas was entitled to recover $290.32 per day beginning on October 1, 2001, the date of breach. The trial court, overruling National City's objections, adopted the magistrate's decision. National City then filed a motion for new trial, which the court also overruled. National City appealed. On October 26, 2006, we reversed the trial court's judgment and remanded the case.

{¶ 6} Meanwhile, in May 2005, National City paid $90,458.08 to have the kiln and bag house removed from the property. And, in June 2006, Rejas sold the property for $1.3 million. On August 15, 2007, National City filed a supplemental pleading claiming that Rejas was unjustly enriched by the kiln and bag house having been removed. On August 22, 2007, Rejas filed an amended complaint for breach of the agreement seeking storage fees only until the date the kiln and bag house were removed. National City moved for summary judgment on both the breach claim and the unjust enrichment claim. Rejas moved for summary judgment on only the unjust

enrichment claim. The trial court granted summary judgment for National City on the breach claim, and granted summary judgment for Rejas on the unjust-enrichment claim.

{¶ 7} Rejas appealed, National City cross-appealed.

II. Analysis

{¶ 8} In its appeal, Rejas assigns two errors to the trial court; in its cross appeal, National City assigns three errors. We first consider Rejas's appeal.

A. Rejas's appeal

{¶ 9} Rejas assigns two errors to the decision granting summary judgment for National City on the breach-of-contract claim.

First Assignment of Error

{¶ 10} "The Trial Court erred in *sua sponte* granting summary judgment in favor of Appellant [sic], National City Bank based on issues not raised by National City Bank in its motion for summary judgment."

{¶ 11} The trial court granted summary judgment in favor of National City based on its finding that in *Rejas I* we determined that National City had a right to abandon its interest in the kiln and bag house, did abandon that interest, and paid all the storage fees it owed to Rejas under the agreement. But, while National City had moved for summary judgment based on determinations that it alleges we made in *Rejas I*, it had

not raised the issue of abandonment.[3] Rather, National City contended that it was entitled to summary judgment based only on our determination that Rejas failed to mitigate its damages. The trial court, as Rejas asserts, did grant summary judgment based on an issue not raised in National City's summary-judgment motion. The question is whether by doing so the court erred.

{¶ 12} All motions are required by rule to state the grounds on which they are based. The rationale for the rule is simple fairness to the opposing party–fair notice and a fair opportunity to dispute the basis. National City's motion for summary judgment did state the ground on which it was based (failure to mitigate). The trial court, though, granted the motion on other grounds (abandonment). Was this unfair to Rejas? We don't think so, for two reasons. First, Rejas did address the issue of abandonment in its memorandum opposing summary judgment. And, second, arguments on the issue would not have helped since the trial court's grounds for granting the motion were, it believed, part of the "law of the case" established in *Rejas I*.

{¶ 13} Based on Civil Rule 7, the Ohio Supreme Court has explained that "[a] party seeking summary judgment must specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond." *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, at the syllabus; see Civ.R. 7(B)(1) ("A motion * * * shall state with particularity the grounds therefor."). For this reason, we have said that "'[i]f a party files a motion based upon some, but not all, issues in a case, the trial court should restrict its ruling to those matters raised.'"

[3]Thus the trial court did not render summary judgment sua sponte, as Rejas alleges. A court acts sua sponte when it acts on its own motion rather than at the

Kooyman v. Staffco Const., Inc., Clark App. No. 2009 CA 27, 2010-Ohio-2268, at ¶25, quoting *Brown v. Vaniman* (Oct. 20, 2000), Montgomery App. No. 18139. The specific issue here is whether Rejas had a "meaningful opportunity" to address the issue of abandonment on which the trial court based its decision.

{¶ 14} As National City points out, and contrary to Rejas's assertion, Rejas did address the issue of abandonment in its memorandum opposing summary judgment on its claim. In its opposition, Rejas cited evidence that National City has claimed the kiln and bag house as its collateral. And Rejas cited evidence that National City never explicitly told Rejas that it had abandoned the remaining collateral. Rejas then concluded that, while National City claims to have abandoned these collateral items, whether it in fact did so is a question of fact for the fact finder. Rejas, therefore, has not been deprived of an opportunity to address the abandonment issue. See *Hunter v. Wal-Mart Stores, Inc.*, Clinton App. No. CA2001-10-035, 2002-Ohio-2604, at ¶14 (concluding that appellant had not been deprived of a meaningful opportunity to address the issue on which the trial court rendered summary judgment even though the issue had not been raised in the motion for summary judgment where appellant had addressed the issue in her opposition memorandum).

{¶ 15} More importantly, the real issue, as National City suggests, is what was established in *Rejas I* concerning the issue of abandonment, which is the focus of the next assignment of error. The trial court believed that summary judgment in favor of National City was demanded by what the court found to be the "law of the case" on the abandonment issue established in *Rejas I*. In other words, the trial court did not render

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request of a party. But the trial court here acted in response to National City's motion.

summary judgment based on its own determination but did so, rather, based on a determination (allegedly) made by us. Therefore any argument on the abandonment issue per se would not have swayed the trial court.

{¶ 16} While, as we will see, the trial court did misread *Rejas I* on the issue of abandonment, and did ultimately err, the court's error was not in granting summary judgment based on an issue unraised in National City's summary-judgment motion.

{¶ 17} The first assignment of error is overruled.

Second Assignment of Error

{¶ 18} "The Trial Court erred in granting summary judgment in Favor of Appellant [sic], National City Bank based upon the erroneous assumption that the Court of Appeals has already 'determined' factual issues in favor of National City Bank."

{¶ 19} The trial court concluded that our decision in *Rejas I* "effectively determined" the law of this case such that summary judgment in favor of National City was proper on the issue of abandonment of collateral. "In that decision," the trial court continued,

{¶ 20} "the Court of Appeals held that the agreement was not a simple agreement for payment of storage fees as this Court held, but rather a 'short term' agreement entered into as part of what the parties intended as a secured party transaction.

{¶ 21} "The Court of Appeals further held–and it logically follows–that, if a breach by Defendant of this 'short term' lease were to be established at trial, the Plaintiff was required to mitigate its damages by removing the kiln and baghouse, and further found

the evidence clearly indicates that Rejas made no attempt to mitigate damages. The Court of Appeals also made the following findings: 1.) the contract in question is ambiguous and parol evidence and evidence of Article 9 custom and practice should have been permitted at trial, 2.) the parties entered into the agreement in order to facilitate a secured party sale, 3.) the parties contracted with awareness of a secured party's right to abandon its interest in collateral, though 'abandonment' is not an affirmative defense in this case, 4.) Defendant's intent to abandon has been established in this case, 5.) whether the kiln and bag house were 'collateral' is irrelevant and not an issue for trial, and 6.) Defendant is not liable to Plaintiff in damages for storage costs." March 4, 2009 Decision and Entry Sustaining Defendant's Motion for Summary Judgment and Sustaining Plaintiff's Cross-Motion for Summary Judgment, pp.9-11 (Internal citations omitted).

{¶ 22} Based on its reading of *Rejas I*, the trial court found that

{¶ 23} "the Court of Appeals has essentially determined that the agreement in question is a short-term agreement made to facilitate a secured party transaction, that Defendant was a secured party with the right to abandon its interest in the collateral, and that Defendant effectively abandoned its interest in the collateral on or about the time through which Defendant paid its obligations under the agreement to Plaintiff. It is this Court's determination based on the foregoing findings, that issues concerning the validity and enforceability of the agreement, at least in considering such as anything more than a short-term agreement made to facilitate a secured party transaction, are rendered moot." Id. at p.11 (Internal citations omitted.). The trial court misread our decision.

{¶ 24} In *Rejas I* we first determined that the agreement is ambiguous, specifically, that the meaning of the word "collateral" is ambiguous. For this reason, we said that parol evidence should have been admitted concerning whether the parties intended "collateral" to include the kiln and bag house. Then, finding that the parties did intend to incorporate the customs and practices of secured-party sales, we said that evidence of these customs and practices also should have been admitted. But we did not resolve the ambiguity. While the construction of a written contract is an issue of law determined by courts, "[i]t is generally the role of the finder of fact to resolve ambiguity." *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, at ¶13; see *Indiana Ins. Co. v. Carnegie Constr., Inc.* (1995), 104 Ohio App.3d 219, 222 ("The interpretation of a written agreement is a matter of law for the court, and need not be submitted to a finder of fact unless the terms of the written agreement are ambiguous.") (Citation omitted). Accordingly, we remanded the case so that parol evidence could be admitted and the ambiguity resolved–by the fact finder.

{¶ 25} We did go on to address other issues raised by parties, but those discussions must be read in light of our initial parol-evidence determination. In particular, on the issue of abandonment, we said that secured parties ordinarily can abandon their interest in collateral, and we said that the evidence admitted at trial established "unequivocally" that National City intended to abandon its interest in the kiln and bag house. But we did not determine whether National City could abandon its interest *under the agreement*, that is, whether it was the parties' intent in the agreement that abandonment would relieve National City of its obligation to pay storage fees. Indeed, we could not have determined this because National City's evidence regarding

this custom and practice was not actually admitted but only proffered for purposes of appeal. Based on the proffer, we said that National City's conduct appeared to conform to custom and practice. But there was no testimony supporting National City's understanding of the custom and practice. Moreover, Rejas did not have the opportunity to cross examine National City's understanding or present its own evidence. Accordingly, we remanded the case also so that parol evidence on the custom-and-practice issue could be admitted and the issue resolved–again, by the fact finder.

{¶ 26} Because neither of these two issues was determined, we reject National City's contention that even if the trial court erred by rendering summary judgment on the abandonment issue, summary judgment was nevertheless proper on the issue of mitigation. National City contends that *Rejas I* established, as the "law of the case," that Rejas did not attempt to mitigate its damages. While we did say that there was no evidence that Rejas attempted to mitigate, we did not determine that this fact precluded any liability that National City may have to Rejas under the agreement. We could not have made such a determination because the issues of collateral and abandonment had not been determined. So it was not clear whether National City had even breached the agreement. Only if there were a breach would Rejas potentially have damages to mitigate.

{¶ 27} The second assignment of error is sustained.

B. National City's cross appeal

{¶ 28} National City assigns three errors to the trial court: one to the decision that

granted summary judgment for Rejas on the unjust-enrichment claim, one alleging that Rejas does not have the legal capacity to appeal or pursue its claim, and one to the decision that overruled National City's motion to strike Rejas's post-remand jury demand.

First Cross-Assignment of Error

{¶ 29} "The Trial Court erred in concluding that the Defendant voluntarily acted to remove the items remaining on the property, when in fact, it was compelled to do so based upon the economic reality of the erroneous interpretation of the parties' Storage Agreement by the Trial Court."

{¶ 30} The trial court granted summary judgment for Rejas on National City's counterclaim for unjust enrichment, finding that National City could not recover because it removed the kiln and bag house voluntarily. But, since it has not yet been determined whether National City breached the agreement, it cannot yet be determined whether Rejas has been unjustly enriched by National City's removal of the items. On the one hand, if National City did breach the agreement, its claim likely fails because, by removing the items, National City was simply removing its own property to end its obligation under the agreement. But, on the other hand, if National City did not breach the agreement, it is possible that Rejas was unjustly enriched by those items being removed. Therefore summary judgment on the claim is, at best, premature until the fact finder has resolved the ambiguities of the agreement.

{¶ 31} The first cross-assignment of error is sustained.

Second Cross-Assignment of Error

{¶ 32} "Rejas had no standing and capacity to maintain the lower court proceedings after the demise of Barbara Katz, and Rejas does not have standing and capacity to bring this appeal."

{¶ 33} National City contends that summary judgment is proper on the alternative ground that Rejas lacks the legal capacity to pursue its claim. Rejas is a partnership in dissolution, says National City, and there is no one with the authority to speak for it in order to wind up its affairs, which includes prosecution of Rejas's claim in this case. We disagree. Jay Kaplan, Norma Kaplan's son, has the statutory authority to wind up Rejas's affairs.

{¶ 34} When Barbara Katz died Rejas went into dissolution by operation of law. See R.C. 1775.30(D). This does not mean that the partnership terminated. See R.C. 1775.29. Rather, Rejas will continue to exist until its affairs are wound up. See id. According to the pertinent statute, "[u]nless otherwise agreed, the partners who have not wrongfully dissolved the partnership or the legal representatives of the last surviving partner, not bankrupt, has the right to wind up partnership affairs." R.C. 1775.36. There is no relevant agreement here, and Norma Kaplan is the last surviving partner (and is not bankrupt). Under a power of attorney executed by Norma Kaplan, Jay Kaplan is her attorney in fact, her legal representative. Norma granted to her attorney in fact "a general power of attorney with full authority and power to do any and every act for me and in my name, place and stead as fully as I could if I were present and acting,

including, but not limited to the following:

{¶ 35} "(a) To demand, to sue for, to enforce payment of, and to receipt for all monies, securities, debts, chattels and other personal property now belonging to me or hereafter belonging to me or to which I may be entitled in any accounting;

{¶ 36} "(b) To settle and compromise all accounts, claims, disputes and differences which I may have with any other person, corporation or fiduciary;

{¶ 37} "(c) To execute all instruments and do all things in regard to all of my matters or properties;

{¶ 38} "* * *

{¶ 39} "(q) To appear for me as Attorney-in-Fact in any action or proceedings to which I may be a party and to receive and waive service of legal process."

{¶ 40} As Norma Kaplan's legal representative, Jay Kaplan can speak for Rejas and pursue its claim against National City.

{¶ 41} But National City contends that even if Jay Kaplan can speak for Rejas neither he nor anyone else followed the statutory procedure for winding up a partnership when dissolution is caused by the death of a partner. We agree that there is no evidence of this, but we disagree that this fact affects Rejas's legal capacity.

{¶ 42} The same statute that grants a legal representative the right to wind up also states that "[i]n the case of the death of a partner, the right of the survivors to wind up is subject to sections 1779.01 to 1779.08, inclusive, of the Revised Code." R.C. 1775.36. These sections lay out a procedure for dealing with a deceased partner's interest in the partnership. The surviving partner is to ask a probate court to appoint people who will create an inventory and appraise the assets and identify the liabilities of

the partnership. See R.C. 1779.01. The surviving partner may then purchase the deceased partner's interest in the partnership from the deceased's estate, see R.C. 1779.04, or the probate court must appoint a receiver to wind up the partnership and dispose of its assets, see R.C. 1779.06. Here, there is no evidence that these statutory procedures have been followed since Barbara Katz's death. But we do not see how this affects Rejas's legal capacity to pursue its claim in this case. In particular, we see no statutory provision that prescribes a period of time in which the procedures must be completed. Also, the "chose in action" for breach of contract against National City is partnership property–the only such property that remains–and its value is not yet known. It would seem to make eminent sense, then, if not be necessary, to appraise Rejas's assets after this case has been resolved.

{¶ 43} The second cross-assignment of error is overruled.

Third Cross-Assignment of Error

{¶ 44} "The Trial Court erred in granting Plaintiff's jury demand after remand."

{¶ 45} After *Rejas I*, Rejas filed an amended complaint in which it demanded trial by jury, which it had not requested in its original complaint. National City moved to strike the jury demand, but in a November 1, 2007 decision the trial court overruled the motion. National City later renewed the motion to strike, but in a July 31, 2008 decision the trial court overruled that motion too.

{¶ 46} As a threshold matter, Rejas contends that we lack jurisdiction to consider this assignment of error because in its notice of cross appeal National City did not state

its intent to appeal from either of these decisions. While Rejas is correct that neither decision is explicitly stated in the notice, we do not agree that this fact leaves us without jurisdiction. "Interlocutory orders, such as most discovery orders, are merged into the final judgment. Thus, an appeal from the final judgment includes all interlocutory orders merged with it." *Grover v. Bartsch*, 170 Ohio App.3d 188, 2006-Ohio-6115, at ¶9 (finding jurisdiction over appeal of an interlocutory order even though the order was not identified in notice of appeal). The trial court's decision on National City's motion to strike is interlocutory in nature, i.e., it did not dispose of all the claims between the parties and did not expressly determine that there was not just reason for delay. See Civ.R. 54(B). Therefore, the decision, having merged into the final judgment, did not need to be separately identified in the notice of appeal. See *Shaffer v. Ohio Health Corp.*, Franklin App. No. 04AP-236, 2004-Ohio-6523, at ¶12 (saying that interlocutory order merged with final judgment so it did not need to be separately identified). We have, then, jurisdiction to consider National City's appeal of the decision. Upon doing so, we conclude that Rejas properly exercised its right to a jury trial under Civil Rule 38.

{¶ 47} While a party has a constitutional right to trial by jury, see Section 5, Article I, Ohio Constitution, and the Seventh Amendment to the United States Constitution, the law requires the party to affirmatively exercise that right by requesting a jury trial. Civil Rule 38 states that "[a]ny party may demand a trial by jury on any issue triable of right by a jury by serving upon the other parties a demand therefor at any time after the commencement of the action and not later than fourteen days after the service of the last pleading directed to such issue. Such demand shall be in writing and may be indorsed upon a pleading of the party." Civ.R. 38(A). Civil Rule 38 further states that

"[i]n his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable." Civ.R. 38(C). This means that "if a general jury demand is made without specifying particular issues, it will be interpreted as a demand for a jury trial on all issues triable by a jury," including those raised by counterclaims. *Soler v. Evans, St. Clair & Kelsey* (2002), 94 Ohio St.3d 432, 437-438 (Citation omitted.). On August 15, 2007, National City filed a supplemental pleading that contains a new counterclaim for unjust enrichment and a counterclaim (really more of a request for declaratory judgment) for joint and several liability as between Barbara Katz and Norma Kaplan for partnership debts. Seven days later, on August 22, 2007, Rejas filed an amended complaint indorsed with a demand for trial by jury. Following the supplemental pleading, then, Rejas timely served a general jury demand on National City that effectively demands a jury trial on all the issues in this case raised by all the claims–Rejas's and National City's. The trial court here did not "grant" Rejas's demand for a jury trial, as National City alleges in the statement of error. Only when a party fails to demand trial by jury under Civil Rule 38 may a court in its discretion grant a trial by jury. See Civ.R. 39(B). Here, Rejas simply exercised its right under Civil Rule 38.

{¶ 48} The third cross-assignment of error is overruled.

III. Conclusion

{¶ 49} We have overruled Rejas's first assignment of error and National City's second and third cross-assignments of error, but we have sustained Rejas's second assignment of error and National City's first cross-assignment of error. Therefore the

judgment of the trial court is Reversed, and this case is Remanded for further proceedings.

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FAIN and GRADY, JJ., concur.

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