[Cite as *Manshadi v. Bleggi*, 2019-Ohio-1228.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

DR. JAVAD D. MANSHADI, et al.,

Plaintiffs-Appellants,

v.

ALBERT BLEGGI, M.D., et al.,

Defendants-Appellees.

OPINION AND JUDGMENT ENTRY
Case No. 18 MA 0016

Civil Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2016 CV 320

BEFORE:
Cheryl L. Waite, Carol Ann Robb, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed in part. Reversed and Remanded in part.

Atty. Stephen P. Hanudel, 124 Middle Avenue, Suite 900, Elyria, Ohio 44035, for Plaintiffs-Appellants

Atty. Andrew R. Zellers, *Atty. Richard G. Zellers*, Richard G. Zellers & Associates, Inc., 3810 Starrs Centre Dr., Canfield, Ohio 44406, for Defendants-Appellees.

Dated: March 19, 2019

WAITE, P.J.

{¶1} This timely appeal arises from the January 23, 2018, decision of the Mahoning County Court of Common Pleas to grant summary judgment in favor of Appellees after concluding that Appellants' claims for fraud, conversion and declaratory judgment are either moot or could not succeed in a trial on the merits. Appellants contest only the trial court's decision regarding Counts 1 and 4 of their multi-count complaint.

{¶2} Based on the following, we reverse the judgment of the trial court only regarding Count 1 of the complaint, as the Article 9 sale failed to conform with the Uniform Commercial Code ("UCC") requirement that reasonable notice be given to a debtor prior to a sale of collateralized assets. Therefore, the judgment of the trial court is affirmed in part and partially reversed and remanded to the trial court.

Factual and Procedural History

{¶3} The following facts are derived from the record. On or about September 15, 1997, Appellee, Albert Bleggi ("Bleggi"), a physician, formed Medical Imaging Network, Inc. ("MIN"). Bleggi was the sole shareholder of MIN and MIN is also an Appellee. Appellees owned radiology equipment and operated a radiology practice. On June 20, 2005, MIN filed for Chapter 11 bankruptcy protection in the United States Bankruptcy Court for the Northern District of Ohio. On August 17, 2005, Bleggi filed for bankruptcy protection in the same jurisdiction. On January 30, 2006, Lyon Financial Services, Inc. ("Lyon"), a secured creditor in Bleggi's bankruptcy, filed a complaint in the bankruptcy court objecting to Bleggi's request for a discharge of his debts in his Chapter 7 bankruptcy.

{¶4} On May 4, 2007, the parties in MIN's bankruptcy filed a joint Chapter 11 plan of liquidation. In this plan, Lyon, Bleggi and MIN agreed that Bleggi would form a new entity to which Lyon would lend approximately $3.2 million dollars in exchange for a

cognovit note guaranteed by Bleggi. On May 27, 2007, Bleggi formed Medical Imaging Diagnostics, LLC ("MID") as a single member limited liability company, with Bleggi as the sole member. After MIN's Chapter 11 plan was confirmed, Lyon and Bleggi reached an agreement to dismiss Lyon's complaint against Bleggi's bankruptcy filing, because Lyon was to receive its relief through operation of the MIN Chapter 11 plan.

{¶5} Sometime in early 2008, Bleggi and MID defaulted on the Lyon cognovit note. On April 2, 2008, Lyon sued Bleggi, Bleggi's wife, his realty company and MID in Mahoning County Common Pleas Court for default on the cognovit note. (Mahoning County Case No. 08CV1376). Lyon obtained judgment on the note on April 7, 2008.

{¶6} On June 4, 2008, Lyon filed a motion asking that a receiver be appointed over MID. This receiver was appointed on June 16, 2008. On November 7, 2008, the trial court ordered the sale of all of MID's assets. In late 2008 or early 2009 Appellant Javad Manshadi ("Manshadi"), learned of the opportunity to purchase MID's assets through his father-in-law, George Alexander. Alexander was a long-time friend of Bleggi. On March 12, 2009, Manshadi formed Galexco, LLC, a single member limited liability company with Manshadi as the only member, for the sole purpose of purchasing MID's assets (Manshadi and Galexco are hereinafter referred to collectively as "Appellants"). On April 2, 2009, Galexco entered an appearance in the trial court as a potential buyer of MID's assets. On August 31, 2009, Galexco was approved for a Small Business Administration ("SBA") loan from Excel National Bank ("Excel") for $1.18 million in order to purchase MID's assets. Manshadi executed a personal guarantee on the loan.

{¶7} On October 2, 2009, the court approved an agreed order for the sale of MID's assets to Galexco for $1.3 million. Galexco purchased all rights, title and interest

in MID's assets, including tangibles and certain intangibles. This included radiology equipment, x-ray machines, MRI machines and CT scan machines which had been owned by MID. The terms provided that Galexco advance $75,000 to the receiver and then pay $1.225 million directly to Lyon. The $1.225 million to Lyon was to satisfy the judgment against Bleggi. On January 8, 2010, Galexco tendered payment according to the terms of this agreement and the court approved the final distribution and closed the case.

{¶8} The crux of this matter involves an alleged oral agreement between Appellants and Appellees. Manshadi contends that in early 2010, the parties agreed that Galexco would maintain ownership of the equipment, but that MID would be permitted to utilize this equipment to operate MID's Boardman and Liberty locations, where the equipment had remained ever since it was purchased by Appellees. Manshadi contends that in the oral agreement with Appellees, in exchange for use of the equipment, Appellees agreed to pay Appellants a one-time sum of $350,000. According to the terms of Manshadi's SBA loan with Excel, Galexco was required to maintain ownership of the equipment. Also according to the terms of the SBA loan, however, Galexco was required to operate the equipment and bill insurance providers under its own medical provider identification number and maintain insurance on the subject equipment. Manshadi alleges that the parties agreed that their arrangement allowing MID to operate was intended to last less than a year, because the parties were looking for a buyer of Appellees' practice and were hoping it would sell within that time. Further, Manshadi asserts that Appellees agreed to pay the monthly payment that Manshadi owed to Excel on the SBA loan, and in exchange Appellees would keep all other profits from the

radiology practice. Manshadi admits that shortly after entering into the oral agreement, Bleggi informed him that he would not be able to secure the funds necessary to make the one-time lump sum payment. Hence, Appellees began making additional monthly payments of between $3,000 to $4,000 per month, commencing sometime in early 2010. These payments continued for approximately three years. MID continued to pay the monthly Excel SBA loan payment for approximately one year. The record contains no copies of cancelled checks or other evidence in support of the amount or duration of any of these payments.

{¶9} The parties attempted to find a buyer for Appellees' practice and engaged in negotiations with St. Elizabeth's Hospital for a short time, but a sale of the practice was never achieved. On April 11, 2013, Excel notified Galexco that it was in default on the loan, because services utilizing the equipment were being provided under MID's provider number, rather than a provider number obtained by Galexco. Manshadi contends that he had been telling Bleggi that he needed his own provider number, but that Bleggi had dissuaded him, assuring him the practice would be sold in the intervening time period.

{¶10} Since Galexco had not insured the equipment, on April 12, 2013, Appellees obtained two Travelers Insurance policies covering the Galexco equipment: the first was a commercial general liability policy and a business owner policy, naming Galexco as an additional insured. The second policy was only in MID's name but was to insure the equipment owned by Galexco.

{¶11} Manshadi contends that he met with his attorney, who had been representing him throughout his dealings with Appellees, on May 16, 2013 to discuss the technical default issue and that Bleggi was present. We note that the record reflects this

attorney was a long-time friend of Bleggi's. Bleggi contends he was not present for any such discussions regarding technical default on the loan. Manshadi alleges that his lawyer and Bleggi urged him to sign a document transferring 50% ownership of Galexco to Bleggi, as well as giving Bleggi the power to cast any tie-breaking vote in Galexco. Manshadi contends he was told by both that this would result in making Bleggi liable for one-half of the Excel loan and would solve the technical default issue. Manshadi claims his lawyer told him the lawyer had spoken with Excel and received approval for the transaction. On this basis, Manshadi contends he signed a document transferring ownership. No such document was ever produced and is not a part of the record. However, Manshadi claims he contacted Excel after the transfer of Galexco to confirm what had transpired. Excel indicated that it did not approve the transaction and that any change in management of Galexco without prior approval would result in violation of the loan agreement.

{¶12} Manshadi contends that a short time later, Bleggi stopped making monthly payments on both the outstanding $350,000 lump sum debt and on the monthly Excel loan payment. Manshadi also alleges that Bleggi assumed control of Galexco's financial documents and prevented Manshadi from having access to any of Galexco's records. Manshadi says he attempted to obtain the records by going to MIN's Boardman location but that Bleggi refused access and called the police to escort Manshadi off of the property. On June 18, 2013, Manshadi sent an email to his lawyer and to Bleggi stating that he was voiding the controlling interest agreement he had signed. There was no response to the email.

{¶13} On July 8, 2013, Manshadi, in his individual capacity, filed an action against Bleggi, MID, and Galexco for refusal to allow Manshadi access to records and for conversion, fraud, and breach of contract. (Mahoning County Case No. 13CV1822).

{¶14} On September 10, 2013, Excel sent Galexco, via Manshadi, a notice of default on the loan and a demand for full payment of the principal balance. The total amount due at the time was $838,357.65.

{¶15} In this 2013 action, Manshadi filed for a temporary restraining order seeking to enjoin Appellees from dissipating, hiding, or compromising the assets of Galexco while the matter was pending. A hearing was held on the temporary restraining order on September 19, 2013. Several individuals testified, including both Bleggi and Manshadi. Transcripts from the hearing in that action have been filed in this matter and are part of the record for review. During his testimony, Bleggi admitted that he had been paying the Excel loan monthly stating, "[t]he agreement with me and Galexco is to make sure the bank note gets paid for the equipment." (9/19/13 Tr., p. 190.) Regarding the lump sum payment from MID to Galexco, Bleggi testified, "$300,000 we agreed to pay him." (9/19/13 Tr., p. 200.) Bleggi testified that there was no written document for this agreement and "[h]e's been paid 165- so far, so he's owed another 135,000. And I've kept up my word. That's 300,000." (9/19/13 Tr., p. 201.) Bleggi also answered in the affirmative when asked if he was required to pay the Excel loan and whether it was delinquent at that time. (9/19/13 Tr., p. 201.)

{¶16} While these matters were pending, due to below normal temperatures in January of 2014, water pipes froze and ruptured at MIN's Boardman location where some of Galexco's equipment was located. Shortly afterward, Appellees submitted a claim to

Travelers, alleging the subject equipment suffered total damage and loss due to the flooding. Over the next several months, Travelers made several payments to Appellees pursuant to its policies of insurance, totaling over $1 million.

{¶17} On July 23, 2014, Excel entered into a voluntary surrender and release (VSRA) Article 9 sale agreement with Appellees. The VSRA acknowledged that Appellants owned the equipment in which Excel had a security interest, that Appellants were in default, and that $875,000 remained due and owing on the loan. Despite this, Appellants were never made a party to the agreement. The VSRA also acknowledged that Appellees had obtained insurance on the subject equipment and that Travelers had issued two checks made payable to MID and Excel in the amounts of $610,216.32 and $34,619.60 for equipment damage or loss. The VSRA further indicated that MID was in possession and control of the secured assets and that MID intended to purchase the assets from Excel in a private sale pursuant to R.C. 1309.101. Finally, the VSRA had as an attachment an exhibit listing all of the Galexco equipment in which Excel had a secured interest, totaling $465,000. This exhibit does not separate or separately value undamaged equipment from the Liberty location from damaged equipment located in Boardman. It also does not include any equipment owned by MID or any specific valuations of this property. This exhibit also stated that MID was to retain the remaining $179,835.92 of the insurance proceeds to cover the loss of equipment owned by MID which was damaged or destroyed when the pipes burst. The VSRA provided Excel's release to Appellees from further liability, but specifically stated that Excel was preserving its deficiency claims against Appellants. The VSRA was executed by Excel and Appellees.

{¶18} Due to issues with substitution of counsel and the requirement of additional time to prepare for trial, on September 10, 2014 Manshadi filed a notice dismissing the 2013 lawsuit without prejudice pursuant to Civ.R. 41(A).

{¶19} On January 29, 2016, Manshadi filed the instant suit, alleging similar claims of fraud, conversion, and breach of contract. This suit was filed by him, individually, and on behalf of Galexco. In this suit, Appellants requested a declaratory judgment that Manshadi be deemed the sole owner of Galexco and an order that the May 2013 transfer agreement be invalidated. On January 29, 2016, Appellants filed a motion for a restraining order in this action, again seeking to enjoin Appellees from disposing of any assets, including, money and property that allegedly belonging to Galexco. On March 3, 2016, Appellees filed a motion to dismiss and for sanctions. They alleged that the one-year saving statute, R.C. 2305.19, had run in this matter, barring Appellants from raising these claims. As Bleggi alleged that his counsel informed counsel for Manshadi that the savings statute no longer applied prior to refiling, sanctions were sought. Manshadi contended that because his breach of contract claim had a six or eight year statute of limitations, the savings statute did not apply and as the claims were refiled within this statute of limitations the case should not be dismissed. In a judgment entry dated July 7, 2016, the trial court denied the motion to dismiss.

{¶20} On June 30, 2017, Appellants filed a motion for summary judgment seeking judgment for damages against all defendants jointly and severally in the amount of $457,000 and for the court to find that Bleggi had no interest in Galexco because Galexco was wholly owned by Manshadi. Several exhibits were attached, including: (1) an affidavit from Manshadi setting forth evidence of his ownership in Galexco; (2) a copy of the VSRA

between Appellees and Excel with the itemized list of the equipment subject to the VSRA; (3) a statement of loss issued by Travelers Insurance reflecting insurance payments made to MID and a schedule of the equipment subject to the insurance payments; (4) a spreadsheet listing of all the equipment that was owned by Appellees; (5) a notification of disposition of collateral sent to Appellants from Excel, showing that the subject equipment was scheduled to be sold at a private sale; (6) a secured party bill of sale from Excel to MID, reflecting that MID purchased all of Galexco's equipment for $465,000 pursuant to R.C. 1309.101; (7) a copy of the endorsed check from Travelers Insurance to MID and Excel in the amount of $610,216.32; (8) a copy of the personal guarantee executed by Manshadi for the Excel SBA loan in 2009; (9) a copy of the loan agreement executed by Manshadi, acting on behalf of Galexco, and Excel in 2009; (10) a copy of the note for the Galexco SBA loan; (11) a copy of the security agreement between Excel and Galexco with an attached schedule of the collateralized equipment; (12) a copy of the standby creditor's agreement listing Bleggi, individually, as the standby creditor and Galexco as the standby borrower; (13) a promissory note executed by Galexco to Bleggi, individually, for $155,000 for the first balloon payment on the subject equipment; (14) a statement of the Excel SBA loan showing payments made on the loan from September 2009 through December of 2014, including the lump sum payment from the private purchase by MID, and having an outstanding balance of $363,123.81; (15) articles of organization for Galexco filed with the Ohio Secretary of State in 2009; and (16) a copy of the agreed order approving the sale of the Galexco equipment from the receiver to Appellees.

{¶21} On July 26, 2017, Appellees also filed a motion for summary judgment. In their motion they argued that they were entitled to judgment for several reasons. First,

they argued Counts 2 and 3 of the complaint, which raised claims for conversion and fraud in the transfer of Galexco's ownership, were moot. They argued that since there was never any transfer of Galexco stock, there was never a document produced to evidence that Manshadi signed over 50% ownership. They also argued that Manshadi's tax returns showed him as the sole owner of Galexco, retaining all of Galexco's profits and losses.

{¶22} Next, Appellees claimed that Count 1, alleging the conversion of the medical equipment, was not supported by the facts as alleged by Manshadi. Appellees proceeded to outline multiple facts which allegedly showed that Bleggi never received any proceeds relative to Galexco equipment. Appellees claimed that neither Manshadi nor Galexco ever obtained insurance on the subject equipment as required by the Excel loan, so Appellants were in breach of their loan agreement from the beginning. Ultimately, Appellees obtained this insurance. Payments made by Travelers for the damaged Galexco equipment were negotiated between Travelers, counsel for MID and Excel. The burst water pipe damaged both Galexco and MID property: all of this property was covered by Travelers Insurance. Excel received payment from Travelers for the damaged Galexco equipment. The value for that equipment was determined by the insurance adjusters and Excel. Since the loan agreement provided that Excel had a security interest in all of the equipment, Appellants had no remaining interest in the equipment once Excel asserted its rights as a secured creditor. Based on these alleged facts, Appellees suggested in their motion for summary judgment that Appellants should seek recourse against Excel, rather than Appellees, claiming that Appellants were informed of the pending sale of the collateral by Excel, which sent Appellants a notice of disposition of

collateral, and that Excel rightfully exercised their claim over the collateral pursuant to the VSRA agreement.

{¶23} Regarding Count 4 of the complaint, alleging breach of contract, Appellees argued that any contract that existed between the parties was oral, and admittedly consisted of payments made by MID to Galexco on a monthly basis over several years as opposed to a one-time lump sum payment. Pursuant to R.C. 2305.07, an action on an oral contract must be brought within six years after the cause accrued. As the oral promise alleged by Manshadi began when payments were made in October or November of 2009 and their action was not filed until January 29, 2016, these claims are outside the statute of limitations.

{¶24} Attached to Bleggi's motion was an affidavit stating that he did not remember signing any document transferring 50% ownership of Galexco and that he made several payments to Manshadi reflecting both profits from the business and for payment of the Excel loan. He averred that he never promised to pay $300,000 in a lump sum. He stated that he did not retain insurance proceeds from the subject equipment. A copy of the security agreement between Galexco and Excel was attached to the motion. Appellees also attached the statement of loss from Travelers Insurance and the notice of disposition of collateral from Excel to Appellants.

{¶25} In a judgment entry dated January 23, 2018, the trial court overruled Appellants' motion and granted Appellees' summary judgment motion. The trial court reached the following conclusions based on the pleadings, documents filed and the transcript of the hearings held in the previous action. Regarding the dispute over

ownership of Galexco, the alleged transaction transferring 50% ownership never took place, and all claims in this regard were moot.

{¶26} Regarding the conversion of the medical equipment claims, the trial court found that Appellants were seeking $179,825.92 of the insurance proceeds, claiming Appellees improperly kept that amount when it should have gone to Excel as the secured creditor, in payment on the equipment. The trial court held that because Appellants never obtained insurance on the equipment, they had no claim to any of the insurance proceeds. Moreover, Appellees bought and owned certain equipment insured with Travelers that was also damaged and Appellees were paid only for this equipment from the insurance proceeds. Regarding Galexco's equipment, the court found that it was appraised and its value adjusted, and Excel was paid for the value of this equipment as the secured creditor of the loan between Galexco and Excel because the loan was in default. Appellants were given notice that Excel was disposing of the remaining viable Galexco equipment by selling it to MID, and so given an opportunity to object or request a specific accounting, but did not. Hence, Galexco waived that right. As Appellants are not entitled to recover any of the insurance proceeds, they were unable to recover on their conversion claims.

{¶27} Regarding breach of contract claims, Appellants failed to produce a written contract demonstrating the alleged 50% transfer of ownership of Galexco to Bleggi, and the record did not show that such transfer ever took place. As to the alleged agreement to pay Appellants either $350,000 or $300,000, the trial court also concluded that any contract for payment that is not to be performed within one year must be in writing pursuant to R.C. 1335.05. Appellants acknowledged in their motion for summary judgment that a lump sum payment was not made. Instead, payments were made by

Appellees at the rate of $3,000 to $4,000 per month beginning in 2009 with the agreement of Appellants. The complaint in the action was filed January 29, 2016. Any promise to pay, according to Appellants' own motion for summary judgment, began in October or November of 2009. As there was no one-time payment but a series of installments that continued over several years, in the absence of a written contract Appellants were precluded from bringing this breach of contract claim by the statute of frauds.

{¶28} This judgment forms the basis of Appellants' timely appeal.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT TO APPELLEES ON COUNT ONE OF APPELLANTS' COMPLAINT.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ERRED BY NOT GRANTING SUMMARY JUDGMENT TO APPELLANTS ON COUNT ONE OF APPELLANTS' COMPLAINT.

ASSIGNMENT OF ERROR NO. 3

THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT TO APPELLEES ON COUNT FOUR OF APPELLANTS' COMPLAINT.

ASSIGNMENT OF ERROR NO. 4

THE TRIAL COURT ERRED BY NOT GRANTING SUMMARY JUDGMENT TO APPELLANTS ON COUNT FOUR OF APPELLANTS' COMPLAINT.

{¶29} Appellants' assignments of error all challenge the trial court's decision to grant summary judgment to Appellees and to deny Appellants' motion for summary judgment. Due to the related nature of the assigned errors, they will be addressed contemporaneously.

{¶30} We note at the outset that Appellants' second and fourth assignments of error allege the trial court erred in failing to grant summary judgment in their favor. "It is well-established that an order must be final before it can be reviewed by an appellate court. If an order is not final, then an appellate court has no jurisdiction." *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.*, 44 Ohio St.3d 17, 20, 540 N.E.2d 266 (1989); R.C. 2505.02; Civ.R. 54(B). It is axiomatic that denial of summary judgment is not a final, appealable order. *Hubbell v. City of Xenia,* 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, ¶ 9. Therefore, Appellants' second and fourth assignments of error are not properly before us and will not be addressed.

{¶31} An appellate court conducts a *de novo* review of a trial court's decision to grant summary judgment, using the same standards as the trial court set forth in Civ.R. 56(C). *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Before summary judgment can be granted, the trial court must determine 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, (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most favorably in favor of the party against whom the motion for summary judgment is made, the conclusion is adverse to that party. *Temple v. Wean United, Inc.,* 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). Whether a fact is "material" depends on the substantive law of the claim being litigated. *Hoyt, Inc. v. Gordon & Assoc., Inc*., 104 Ohio App.3d 598, 603, 662 N.E.2d 1088 (8th Dist.1995).

{¶32} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate

the absence of a genuine issue of fact on a material element of the nonmoving party's claim." (Emphasis deleted.) *Dresher v. Burt*, 75 Ohio St.3d 280, 296, 662 N.E. 2d 264 (1996). If the moving party carries its burden, the nonmoving party has a reciprocal burden of setting forth specific facts showing that there is a genuine issue for trial. *Id.* at 293. In other words, when presented with a properly supported motion for summary judgment, the nonmoving party must produce some evidence to suggest that a reasonable factfinder could rule in that party's favor. *Brewer v. Cleveland Bd. of Edn.,* 122 Ohio App.3d 378, 386, 701 N.E.2d 1023 (8th Dist.1997).

{¶33} The evidentiary materials to support a motion for summary judgment are listed in Civ.R. 56(C) and include the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact that have been filed in the case. In resolving the motion, the court views the evidence in a light most favorable to the nonmoving party. *Temple*, 50 Ohio St.2d at 327.

{¶34} Appellants alleged in Count 1 of their complaint that Appellees converted medical equipment owned by Appellants by improperly collecting the insurance proceeds on Appellants' equipment and subsequently utilizing those funds to purchase the equipment. In granting summary judgment to Appellees on Appellants' conversion claim the trial court reasoned:

> The document attached to Plaintiffs' Motion for Summary Judgment suggests that although $465,000 was actually turned over to [Excel] for the collateralized equipment, Dr. Bleggi kept $179,835.92. The Court finds that was separate items, not collateral of [Excel]. The equipment Dr. Manshadi bought in 2007 and 2008 was all secured by [Excel] in the loan to Dr.

> Manshadi. The equipment was destroyed and [Excel] was paid for all of the equipment that was listed on their security agreement, which was essentially all of the equipment. In addition, as can be seen by Exhibits C and D in the Motions that were filed, Dr. Manshadi and Galexco were given notice and requested to object to the sale or request an accounting, or waive same. They did nothing, and thus, once again they should not be allowed to proceed as a result of their actions.

(1/28/18 J.E.)

{¶35} Conversion is "the wrongful exercise of dominion over property to the exclusion of the rights of the owner, or withholding it from his possession under a claim inconsistent with his rights." *Joyce v. Gen. Motors Corp.*, 49 Ohio St.3d 93, 96, 551 N.E.2d 172 (1990); *Union Sav. Bank & White Family Cos., Inc.,* 167 Ohio App.3d 51, 853 N.E.2d 1182, 2006-Ohio-2629, ¶ 26 (2d Dist.). "The elements of a conversion cause of action are: (1) plaintiff's ownership or right to possession of the property at the time of the conversion; (2) defendant's conversion by a wrongful act or disposition of plaintiff's property rights; and (3) damages." *Haul Transport of VA, Inc. v. Morgan*, 2d Dist. No. 14859, 1995 WL 328995, *3 (June 2, 1995). An action alleging the conversion of money will only lie "where the money is specifically identifiable." *Wiltberger v. Davis,* 110 Ohio App.3d 46, 55, 673 N.E.2d 628 (10th Dist.1996).

{¶36} In granting summary judgment to Appellees, the trial court determined that the funds relative to the Galexco equipment, owned by Appellants, were identified. The trial court noted that the insurance proceeds paid for this equipment amounted to $465,000. These specific funds were disbursed to Excel because, while Galexco owned

the equipment, Galexco had defaulted on the loan agreement with Excel and the equipment served as collateral for the loan. As Excel was owed more than the amount paid by Travelers, this payment was appropriate. The trial court determined the remaining $179,835.92 represented the value of other equipment, equipment owned only by Appellees, that had also been damaged in the frozen water pipe incident. In its judgment entry it stated that while Appellants were seeking these insurance proceeds totaling $179,835.92, the documents attached to both motions for summary judgment showed that those funds were in payment for equipment belonging to Appellants, and not to Galexco or Manshadi. However, the trial court appears to have mischaracterized both the documents and Appellants' motion for summary judgment. A review of Appellants' motion reveals that Appellants claimed that four pieces of equipment that belonged to Galexco were listed on the schedule attached to the VSRA. Appellants assert that equipment was appraised and valued at $322,500 by the insurance adjuster. Excel sold all of Galexco's equipment outright to Appellees for $465,000. Hence, Appellants' argument is that at least $322,500 that was owed to them for damaged equipment was used by Appellees to purchase all of the subject equipment. Therefore, in their motion for summary judgment, Appellants sought judgment that Appellees had converted $322,500 in monies belonging to Appellants. They did not directly dispute the $179,835.92 insurance payment to Appellees as set out in the trial court's judgment entry.

{¶37} Notwithstanding the trial court's error in assessing Appellants' claim, the issue before the trial court on summary judgment and in our *de novo* review is whether reasonable minds could differ as to the bona fide nature of Appellees' conduct in accepting the insurance proceeds and using those proceeds to purchase the Appellants'

equipment. Under common law conversion, Appellants need not demonstrate that Appellees acted in bad faith. *Busch v. Premier Integrated Med. Assoc., Ltd.,* 2d Dist. No. 19364, 2003-Ohio-4709, ¶ 98. "[N]either motive nor mistake is a defense to a claim of conversion." *Id.* However, a party may not "rely on a common law action to avoid the clear mandates of the UCC." *Olympic Title Ins. Co. v. Fifth Third Bank of W. Ohio,* 2d Dist. No. 20145, 2004-Ohio-4795, ¶ 31, quoting *Amzee Corp. v. Comerica Bank-Midwest,* 10th Dist. No. 01AP-465, 2002-Ohio-3084, ¶ 10. The question in the instant matter is whether Appellants have raised questions of material fact regarding conversion.

{¶38} Although the trial court and the parties have addressed the conversion claim under common law, all of the subject equipment at issue, both damaged and undamaged, was used as collateral for Appellants' SBA loan. Excel, the holder of the loan, had taken a security interest in the equipment as the secured creditor. Therefore, any disposition of the collateralized equipment must adhere to the requirements of the UCC regarding secured transactions. Excel was a secured creditor exercising its rights under the UCC to dispose of Appellants' collateral, collateral that was then purchased by Appellees in the VSRA Article 9 sale. Thus, provisions of the UCC apply. R.C. 1309.611 is derived from Section 9-611 of the UCC. Under R.C. 1309.611, a "secured party who disposes of collateral under section 1309.610 of the Revised Code shall send a reasonable authenticated notification of disposition to the [debtor]." R.C. 1309.611(B).

{¶39} The Official Comment to the statute defines reasonable notification:

> This section requires a secured party who wishes to dispose of collateral under Section 9-610 to send "a reasonable authenticated notification of disposition" to specified interested persons, subject to certain exceptions.

> The notification must be reasonable as to the manner in which it is sent, its timeliness (i.e., a reasonable time before the disposition is to take place), and its content.

R.C. 1309.611, Comment 2.

{¶40} On review, we must first determine whether the underlying Article 9 sale of the collateralized equipment belonging to Appellants was valid under the UCC. Certain relevant facts are not in dispute. Galexco purchased the subject equipment with a SBA loan funded through Excel. Excel took a security interest in the equipment as collateral on the loan. Manshadi executed a personal guarantee for the loan. Prior to the incident with the frozen water pipe which damaged some of the equipment, Galexco had defaulted on the loan and had been notified by Excel that the principal balance on the loan was due. Appellants had not obtained insurance on the equipment as they were required. However, Appellees did obtain insurance on the equipment, despite the fact that it was owned by Galexco, as well as on Appellees' own equipment. All of the equipment was housed in either MID's Boardman or Liberty locations. After the water pipe incident at the Boardman location, negotiations began with Travelers Insurance, Appellees and Excel regarding the damaged collateralized equipment, but it is clear that negotiations with Appellees and Excel also took place regarding Galexco's undamaged equipment, as well. Appellants, as owners, were not included in any of these negotiations. Those negotiations lasted for approximately one year and culminated in the VRSA, an Article 9 sale. All parties to this dispute attached a copy of the VRSA to their motions for summary judgment. The VRSA is dated July 23, 2014. The agreement refers to Appellants' loan with the SBA and that the subject equipment was collateral for Excel's secured interest in

the loan. It also notes the existence of a deficiency balance on Appellants' loan after the sale of all of the collateral to Appellees. Hence, while the VRSA stated that the sale operated to extinguish Excel's security interest in the equipment, it also expressly stated that a remaining balance on the loan was due from Manshadi and preserved the right for Excel to pursue that deficiency against Manshadi. At no time were Appellants party to the VRSA.

{¶41} Pursuant to R.C. 1309.611, Excel sent a notification of disposition of collateral to both Appellants. It is undisputed by both parties that Appellants received the notifications. It is not clear the exact date that the notifications were issued or were received. However, both notifications read:

> Please be advised that EH National Bank f/k/a Excel National Bank will sell all the medical equipment of Galexco, LLC, listed on Exhibit A, privately, sometime after August 3, 2014.
>
> You are entitled to an accounting of the unpaid indebtedness secured by the property that we intend to sell. You may request an accounting by contacting Terry Tarrant at (951) 491-6535.

{¶42} The Supreme Court of Ohio has held, "[i]t is well-established law in Ohio that '[a] secured creditor can * * * satisfy the notice requirements * * * merely by sending notice to the debtor. Actual receipt of the notice is not required and need not be proven." *Ford Motor Credit Co. v. Potts*, 47 Ohio St.3d 97, 99, 548 N.E.2d 223 (1989). Although receipt need not be proven, the demands of the statute and the UCC require that the notice be "reasonable." The trial court relied on the fact that Appellants had received notice of the pending sale of the collateral and had waived the opportunity for an

accounting of the unpaid indebtedness. However, the notices clearly state that the sale of the assets by private sale would occur "after August 3, 2014." It is also undisputed that the Article 9 sale of the assets to Appellees was executed on July 23, 2014, as written on the first page of the VRSA. As this sale predates the notification of sale date by nearly two weeks, on its face the notification does not provide reasonable notice of the disposition of Appellants' collateral and violates the mandates of the UCC. This is especially evident because Appellants were not involved in negotiations for, or party to, the contract of sale from Excel to Appellees. Although this argument was not raised by either party, this is a genuine issue of material fact regarding the validity of the disposition of all of the collateralized equipment, both damaged and undamaged, that forms the basis of Appellants' conversion claim. No accounting was asked for, or done, because the property subject to the accounting had already been sold. This record does not show the separate values for the undamaged equipment or that this amount was paid directly to Excel by the Travelers' insurance proceeds. The record does not show the specific values of the undamaged equipment. And the record does not show what amounts Appellees paid for each of these groups of equipment or the specific source of the revenues used in the purchase. Reasonable minds could differ, after review of this record, on the issue of whether insurance proceeds due and owing solely for damaged equipment was instead converted by Appellees and used towards the purchase of other, undamaged Galexco equipment. Reasonable minds could differ as to whether the disposition of the equipment by Excel through a purported Article 9 sale to Appellees, who admit they had agreed to pay Appellants' loan with Excel and that the loan was allowed to default, amounted to a sale to a bona fide purchaser. Because these questions of fact exist there are outstanding

matters for trial in this matter and summary judgment was not appropriate with regard to Appellants' conversion claim.

{¶43} Appellants' first assignment of error has merit and is sustained.

{¶44} In their third assignment of error Appellants contend the trial court erred in granting Appellees' motion for summary judgment relative to Count 4 of their complaint. In Count 4 Appellants alleged that Appellees made an oral promise to pay Appellants $350,000 as part of the agreement to allow Appellees to utilize Appellants' medical equipment. Appellants allege when Appellees stopped paying pursuant to the oral contract, a breach occurred, and that they are owed the balance remaining in this oral contract. At the hearing held during the first lawsuit in this matter on September 19, 2013, Bleggi testified that he agreed to pay Appellants $300,000, not $350,000 and that he still owed $135,000. In its judgment entry in this matter, the trial court concluded:

> Through the two and a half days of hearings previously on this matter, the documentation and evidence attached to all of the Motions the Court is dealing with today, there has never been provided a written contract, and both parties have acknowledged there was no written contract. For that reason, this Court finds that Section [sic] 2305.07 and 1335.05 clearly establish that the Plaintiffs' claims are outside the statute of limitations.

(1/28/18 J.E.)

{¶45} The trial court also concluded that since the oral contract provided for payments to be made in excess of one year, this resulted in a violation of the statute of frauds due to the parties' failure to reduce this agreement to writing.

{¶46} R.C. 2305.07 applies to contracts not reduced to writing. It reads:

> Except as provided in sections 126.301 and 1302.98 of the Revised Code, an action upon a contract not in writing, express or implied, or upon a liability created by statute other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued.

{¶47} Appellants contend the statute of limitations for this oral contract did not begin until Appellees failed in their monthly payment, pursuant to its terms. Appellants cite an Eighth District case, *Hibler v. Viking Properties, Ltd.,* 8th Dist. No. 71284, 1997 WL 156686, (April 3, 1997) in support of their contention that the statute of limitations on an oral breach of contract claim accrues when the party discovers the omission to perform as agreed. *Id.* at *3. In *Hibler*, plaintiff brought an action for breach of an oral contract for purchase of a townhouse, contending the statute of limitations accrued on the date on which the parties agreed was the deadline for plaintiff to decide to purchase the property. The Eighth District concluded that, as the complaint indicated that the defendant was given full possession of the property months earlier, the statute of limitations accrued not at the agreed deadline, but at the time, months before, when plaintiff informed the property owner he was not buying and defendant was given possession of the property. *Id.*

{¶48} We have held that if there is a date set for repayment, an action for breach of an oral contract accrues on the date a party fails to make payment. *Catz Ent., Inc. v. Valdes,* 7th Dist. Nos. 07 MA 201, 07 MA 202, 08 MA 68, 2009-Ohio-4962, ¶ 27.

{¶49} Appellants contend that Appellees stopped paying "sometime in 2013." (Appellant's Brf., p. 14.) Appellees assert that the record contains no indication when they stopped making monthly payments. Appellees claim, then, that the date of the

inception of the contract must be used to determine when the statute of limitations began to accrue.

{¶50} In its judgment entry, the trial court held, "[t]he Complaint was filed on January 29, 2016. Any promise according to the facts, and according to Plaintiffs' Motion for Summary Judgment, began in October/November of 2009. The statute of limitations has run on any oral promise or contract." (1/28/18 J.E.)

{¶51} The record reflects that, in both the complaint and in their motion for summary judgment, Appellants asserted that Appellees continued to make payments monthly according to the agreement from "sometime in late 2009 or early 2010" and that they continued "for about the next three years." (6/30/17 Motion for Summary Judgment, p. 3). Construing these dates in a light most favorable to Appellants, it is possible that Appellants' claims were not filed outside the statute of limitations for a breach of contract and that the trial court was in error in granting summary judgment based on these facts.

{¶52} However, the trial court also noted that, notwithstanding the statute of limitations, the alleged agreement that Appellees would pay Appellants either $350,000 or $300,000 as Bleggi testified runs afoul of the statute of frauds. The court held:

> Further, Section 1335.05 states in essence that a contract for payment or debt, or a promise that is not to be performed within one year from making thereof is required to be in writing. Page 3, paragraph 3 of Plaintiffs' Motion for Summary Judgment indicates payments were to be made at the rate of $3,000.00 to $4,000.00 per month beginning in 2009. Thus, there was not a one-time payment, but an agreement in fact to make the payments over a period of time.

(1/28/18 J.E.)

{¶53} R.C. 1335.05 codifies the statute of frauds, reading:

> No action shall be brought whereby to charge the defendant, upon a special promise, to answer for the debt, default, or miscarriage of another person; * * * or upon a contract or sale of lands, tenements, or hereditaments, or interest in or concerning them, or upon an agreement that is not to be performed within one year from the making thereof; unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized.

{¶54} Appellants contend that the original agreement called for one lump-sum payment and that the payment could have been made within one year. On this basis, Appellants claim that the statue of frauds is not implicated in this matter. We do not find this argument persuasive. Although Appellants alleged in their complaint that the original agreement called for a one-time, lump-sum payment, Appellants admit they were told Bleggi could not make a large, one-time payment shortly after they entered into their oral agreement. Appellants then agreed to accept monthly payments ranging from $3,000 to $4,000 per month. Appellants continued to honor this agreement to accept monthly installments from Appellees for approximately the next three years. At no time did Appellants seek the lump sum payment from Appellees within a year of the agreement nor did they allege any breach during that time. This, in effect, modified the original agreement terms providing for a one-time payment to new payment terms, where Appellees would make installment payments spanning several years. This modification

precluded the contract from completion within one year and requires us to apply the statute of frauds. A written instrument in this matter, detailing the terms of the parties' obligations was necessary in this case. No such written contract has been offered and Appellants acknowledge that no written instrument exists. The parties have also not produced canceled checks or any other reliable written instruments evidencing the payments and from which we could infer a written agreement. Therefore, the oral contract between the parties allowing Appellees to utilize Appellants' equipment violates the statute of frauds and is, therefore, unenforceable. We conclude that the trial court did not err in granting Appellees' summary judgment on Count 4 of the complaint.

{¶55} Appellants' third assignment of error is without merit and is overruled.

Conclusion

{¶56} Appellants present four assignments of error. Assignments of error two and four relate to the denial of Appellants' summary judgment motion which are not properly raised in this appeal. As genuine issues of material fact exist regarding the validity of the underlying Article 9 sale of all of the collateralized equipment, Appellant's first assignment of error has merit and is sustained.

{¶57} Regarding Appellants' breach of contract claim, the original oral agreement between the parties required a one-time, lump-sum payment of either $300,000 or $350,000. The payment terms were subsequently modified when Appellees began paying, and Appellants began accepting, monthly installment payments over a number of years. Because the modified payment terms provided for installment payments of the amount for a period of over one year, the statute of frauds requires this contract to be memorialized in writing. As there is no written agreement between the parties, the trial

court did not err in granting summary judgment to Appellees on the breach of contract claim. As such, Appellants' third assignment of error is without merit and is overruled.

{¶58} Therefore, the judgment of the trial court is reversed only as it pertains to Count 1 of Appellants' complaint for conversion of the subject equipment. The remainder of the trial court's judgment is affirmed and the matter is remanded to the trial court for further proceedings according to law.

Robb, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, Appellants' first assignment of error is sustained and their third assignment is overruled. Assignments of error two and four relate to the denial of Appellants' summary judgment motion which are not properly raised in this appeal. It is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed in part and reversed in part. We hereby remand this matter to the trial court for further proceedings according to law and consistent with this Court's Opinion. Costs to be taxed against the Appellees.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.