[Cite as *Ireton v. JTD Realty Invests., L.L.C.*, 2011-Ohio-670.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

ARCHIE IRETON, et al.,	:	
Plaintiffs-Appellants,	:	CASE NO. CA2010-04-023
	:	O P I N I O N
- vs -		2/14/2011
	:	
JTD REALTY INVESTMENTS, LLC, et al.,	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2008CVH0488

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BRESSLER, J.

{¶1} Plaintiffs-appellants, Archie Ireton and Lois Ireton (the "Iretons"), appeal a decision of the Clermont County Court of Common Pleas denying their motions for summary judgment and granting summary judgment in favor of defendants-appellees,

JTD Realty Investments, LLC ("JTD"), Katherine's Ridge Development, LLC ("Katherine's Ridge"), and James S. Arnold in an action for breach of contract. For the reasons that follow, we affirm the judgment of the trial court.

{¶2} The relevant, undisputed facts are as follows. On August 23, 2005, the Iretons and JTD entered into a real estate purchase contract in which the Iretons agreed to sell JTD approximately 55 acres of farm land located on or about Clermontville Laurel Road in Clermont County, Ohio (the "August 2005 contract"). The record indicates that JTD intended to develop the property for residential use.

{¶3} The Iretons also owned two additional parcels of property on nearby Barkley Road (the "Barkley Road property"), and JTD expressed an interest in acquiring the property for development. As a result, the August 2005 contract included a right of first refusal, which provided that if the Iretons received a good faith offer from a third party to purchase the Barkley Road property, they were to notify JTD of the offer. Upon receipt of the notification, JTD had 14 days to exercise its right of first refusal to purchase the property.

{¶4} JTD assigned its rights under the August 2005 contract, including the right of first refusal on the Barkley Road property, to Katherine's Ridge on October 24, 2005, prior to the date of closing on the purchase contract. The record indicates that JTD was a member of Katherine's Ridge.

{¶5} According to the record, after the August 2005 contract was executed, the Iretons purchased approximately 633 acres of real property in the state of Kentucky. The Iretons acquired the Kentucky property as part of a "reverse" like-kind exchange pursuant to Section 1031 of the Internal Revenue Code. According to Archie Ireton, the sale of the Barkley Road property was to be structured as part of the like-kind exchange. He claimed that in order to receive the tax benefits associated with the exchange, the

closing for the sale of the property had to take place on or before May 8, 2006.

{¶6} The instant appeal originates from a series of correspondence exchanged between the parties with regard to the purchase of the Barkley Road property. On November 7, 2005, the Iretons received an offer from Ron Singleton, a local homebuilder and real estate investor. Singleton offered a purchase price of $800,000 and submitted a proposed contract to the Iretons (the "first Singleton offer").

{¶7} In a letter dated December 16, 2005, the Iretons' attorney, John Korfhagen, forwarded a copy of the first Singleton offer to James Arnold, a member and manager of JTD who also served as an attorney for JTD and Katherine's Ridge. In his January 3, 2006 response, Arnold informed Korfhagen that JTD intended to purchase the property pursuant to the terms of the first Singleton offer. In the letter, Arnold requested that the Iretons provide him with a plat of the property and to draft a written agreement for the parties to execute.

{¶8} Following Arnold's January 3 letter, the Iretons received a second, higher offer from Singleton for $1,050,000 (the "second Singleton offer"). In his letter of February 8, 2006, Korfhagen advised Arnold that in light of the second Singleton offer, the Iretons had rejected the first Singleton offer as well as the contract proposal made by JTD in its January 3 letter. Korfhagen's letter further provided that JTD had until 5:00 p.m. on February 16, 2006 to exercise its right of first refusal on the second Singleton offer. The record indicates that the following day, Korfhagen faxed to Arnold two additional contract proposals, one of which purported to mirror the terms of the second Singleton offer. In his February 14 response, Arnold expressed JTD's disagreement with the Iretons' decision to reject JTD's January 3 offer to purchase the Barkley Road property pursuant to the terms of the first Singleton offer, and requested that the Iretons honor JTD's offer.

{¶9} In a letter dated March 7, Arnold indicated to Korfhagen that he had received the additional contract proposal from the Iretons, and that "notwithstanding my previous communications, at this time [JTD] is prepared to pay $800,000 for the [Barkley Road property]."

{¶10} The following month, the Iretons received another offer to purchase the Barkley Road property from a fourth party, Jason Krause. Korfhagen notified Arnold of the new offer in an April 12 letter. The letter provided that JTD had until April 26, 2006 to execute a contract prepared according to the terms of the Krause offer. Arnold did not respond to the April 12 letter and the property was eventually sold to Krause in January of 2007, several months after the expiration of the May 8, 2006 deadline to complete the like-kind exchange.

{¶11} In February 2008, the Iretons initiated an action against JTD, Katherine's Ridge, and Arnold. On March 21, 2008, a first amended complaint was filed raising separate claims for breach of contract and breach of the duty of good faith and fair dealing against JTD and Katherine's Ridge. The Iretons claimed they had entered into a contract with JTD and its assignee, Katherine's Ridge, based on the parties' correspondence of December 15 and January 3. They asserted that JTD and Katherine's Ridge breached the terms of the agreement by refusing to execute a written purchase contract consistent with those terms. The Iretons averred that as a result of the breach, they were unable to close the sale by the May 2006 deadline, thereby suffering a tax loss. They also claimed that they incurred carrying costs and had to finance the sale of the property to Krause.

{¶12} The Iretons further asserted a tortious interference with contract claim against Arnold, alleging that he had interfered with a "new" real estate contract they had entered into with Singleton after JTD and Katherine's Ridge repudiated their contract

with the Iretons.

{¶13} The parties moved for summary judgment on the Iretons' claims. The Iretons also filed a motion to strike two exhibits to Archie Ireton's deposition, as well as approximately 43 pages of his deposition testimony.

{¶14} The court issued a decision on March 8, 2010, granting summary judgment in favor of JTD and Katherine's Ridge on the Iretons' claims for breach of contract. The court also granted summary judgment in favor of Arnold on the Iretons' claim that he had tortiously interfered with the Singleton contract. The trial court denied the Iretons' motion to strike.

{¶15} The Iretons have appealed the court's March 8 decision, raising five assignments of error. To facilitate our review, we have consolidated some assignments of error and will address them out of order.

{¶16} Assignment of Error No. 2:

{¶17} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE PLAINTIFFS/APPELLANTS IN ADMITTING INTO EVIDENCE, OVER THEIR OBJECTIONS, TESTIMONY AND LETTERS THAT WERE HEARSAY, AND FOR WHICH NO PROPER FOUNDATION WAS LAID THAT SUCH LETTERS WERE EVER ACTUALLY SENT TO THE OTHER PARTY."

{¶18} In their second assignment of error, the Iretons contend that the trial court erred in denying their motion to strike exhibits 20 and 22 to Archie Ireton's deposition, as well as approximately 43 pages of his deposition testimony. The exhibits at issue were unsigned letters addressed to Arnold and purportedly written by Korfhagen regarding the purchase of the Barkley Road property.

{¶19} A trial court's decision granting or denying a motion to strike is reviewed on appeal under an abuse of discretion standard. *Madison Cty. Bd. of Commrs. v. Bell,*

Madison App. No. CA2005-09-036, 2007-Ohio-1373, ¶86. An abuse of discretion is more than an error of law or judgment; it requires a finding that the trial court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Decisions concerning the admission or exclusion of evidence are likewise within the discretion of the trial court and will not be reversed on appeal absent a showing that the court abused its discretion and that a party was materially prejudiced as a result. *Silver v. Jewish Home of Cincinnati*, Warren App. No. CA2010-02-015, 2010-Ohio-5314, ¶59.

{¶20} Exhibit 20, dated February 27, 2006, was alleged to have been sent by Korfhagen in response to Arnold's February 14 letter, in which he conveyed JTD's disapproval with the Iretons' decision to reject its January 3 offer. In his February 27 letter, Korfhagen stated, "[w]hile [the Iretons] do not agree that you have the right to close on the Singleton offer, for a variety of reasons, they have decided to proceed on that basis." The letter also purports to enclose a contract executed by the Iretons which reflected the terms of the first Singleton offer. It provided that JTD had until March 6, 2006 to execute the contract and return it to Korfhagen.

{¶21} Exhibit 22, dated March 17, 2006, also purports to be a letter from Korfhagen to Arnold. In the letter, Korfhagen stated that he had reviewed Arnold's March 7 letter, in which JTD expressed that it was prepared to pay $800,000 for the Barkley Road property. The letter further provided, "[b]ased on your letter of March 7, 2006 and your refusal to sign the contract, my clients have entered into the contract with Ron Singleton and will proceed to complete the sale of this property to Mr. Singleton."

{¶22} The parties dispute whether the letters were actually delivered to Arnold, and conflicting testimony was presented on this issue. During his deposition, Archie Ireton testified that he received a copy of both letters, and a notation on the bottom of

each letter indicated that the Iretons were to receive copies. When his counsel asked him whether it was his understanding that Korfhagen sent the February 27 letter to Arnold, Ireton replied, "[y]es, he signed it." However, Ireton also testified that he was not sure whether Arnold received the letter. Arnold testified in his deposition that he "could certainly say with confidence I never got [the February 27, 2006] letter," and that the letter was "not in his file." Arnold was not asked about the March 17, 2006 letter in his deposition.

{¶23} In their motion to strike, the Iretons claimed that Exhibits 20 and 22 were inadmissible as hearsay, and that Archie Ireton did not properly authenticate the exhibits during his testimony. The Iretons also argued that nearly 43 pages of Archie Ireton's deposition should have been stricken as being "corrupted by the use of these hearsay documents."

{¶24} Citing Civ.R. 32(D)(3)(b), the trial court determined that the Iretons waived any error with respect to their foundation claim by failing to object to the form of the questions posed regarding Exhibits 20 and 22. Civ.R. 32 governs the use of depositions in court proceedings and permits objections to be made either at the time of taking the deposition or at the time of receiving the deposition in evidence at trial. However, subdivision (D)(3)(b) of the rule provides, in pertinent part, that "[e]rrors and irregularities occurring at the oral examination * * * in the form of the questions or answers * * * and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless reasonable objection thereto is made at the taking of the deposition."

{¶25} The court further determined that even if it were to find that the Iretons' failure to object for lack of proper authentication was not an objection to the form of the question, under subdivision (D)(3)(b) of Civ.R. 32, the errors claimed by the Iretons could have been obviated, removed, or cured if they had been promptly presented at the

time of the taking of the deposition. The court noted that Archie Ireton's attorney could have asked additional, follow-up questions of his client regarding what was intended by Ireton's testimony that Korfhagen had signed the letters in question.

{¶26} Upon review of the record, we find no abuse of discretion on the part of the trial court in overruling the Iretons' motion to strike. At the outset, we note that in its decision, the trial court referenced an August 6, 2009 hearing on the motion. The record indicates that a hearing was held on that date. However, a transcript of that hearing is not included in the record on appeal. "'Upon appeal of an adverse judgment, it is the duty of the appellant to ensure that the record, or whatever portions thereof are necessary for the determination of the appeal, are filed with the court in which he seeks review.'" *State v. Fields*, Brown App. No. CA2009-05-018, 2009-Ohio-6921, ¶8, quoting *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 19. Without a transcript of the August 6 hearing, we must presume the regularity and validity of the trial court's ruling in the absence of evidence to the contrary. Id. Based on the record before us, we conclude that any issue with regard to whether the letters were actually sent to Arnold is waived, as it could have been cured if Ireton's attorney had raised a foundation issue at the time of the deposition. Issues surrounding the delivery of the letters were discussed at the deposition, and Ireton's attorney should have raised the concern at that time.

{¶27} Furthermore, we do not reach the merits of whether the exhibits and Archie Ireton's accompanying deposition testimony constituted hearsay, because even if we were to find that this evidence was hearsay, it did not affect a substantial right of the Iretons such that reversible error is present. See *Rondy, Inc. v. Goodyear Tire Rubber Co.*, Summit App. No. 21608, 2004-Ohio-835, ¶16. In determining whether a substantial right of a party has been affected, "'the reviewing court must decide whether the trier of fact would have reached the same decision, had the error not occurred.'" *Moore v.*

Vandemark Co., Inc., Clermont App. No. CA2003-07-063, 2004-Ohio-4313, ¶22, quoting *Prakash v. Copley Twp*., Summit App. No. 21057, 2003-Ohio-642, ¶16.

{¶28} In this case, there is no evidence in the record to suggest, and the Iretons have not argued, that their substantial rights were affected by the admission of this evidence. Based on the content of the other correspondence between the parties, the admission of the letters only served to bolster the Iretons' claim that a contract was present. Moreover, the trial court noted in its decision that it would have reached the same conclusion on summary judgment had the exhibits and testimony been excluded. The court found that notwithstanding the additional correspondence, the parties had not memorialized JTD and Katherine's Ridge's January 3, 2006 offer in a formal contract, as was contemplated by the parties prior to being bound to any agreement.

{¶29} Based on the foregoing, the Iretons' second assignment of error is overruled.

{¶30} Assignment of Error No. 1:

{¶31} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE PLAINTIFFS/APPELLANTS IN GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT ON THE BREACH OF CONTRACT CLAIM."

{¶32} Assignment of Error No. 3:

{¶33} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE PLAINTIFFS/APPELLANTS IN OVERRULING THEIR MOTIONS FOR SUMMARY JUDGMENT."

{¶34} In their first and third assignments of error, the Iretons argue that the trial court erred in overruling their motion for summary judgment and in granting summary judgment in favor of JTD and Katherine's Ridge on the Iretons' claim for breach of contract.

{¶35} Summary judgment is a procedural device used to terminate litigation and avoid a formal trial where there are no issues in a case to try. *Burkes v. Stidham* (1995), 107 Ohio App.3d 363, 370, citing *Norris v. Ohio Std. Oil Co*. (1982), 70 Ohio St.2d 1, 2. This court reviews summary judgment decisions de novo, which means that we review the trial court's judgment independently and without deference to its determinations. *Burgess v. Tackas* (1998), 125 Ohio App.3d 294, 296. We utilize the same standard in our review that the trial court should have employed. *Lorain Natl. Bank v. Saratoga Apts*. (1989), 61 Ohio App.3d 127, 129.

{¶36} The Ohio Supreme Court has repeatedly held that summary judgment is appropriate under Civ. R. 56 when "(1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor." *Zivich v. Mentor Soccer Club, Inc*., 82 Ohio St.3d 367, 369-370, 1998-Ohio-389. The party moving for summary judgment has the initial burden of producing some evidence that affirmatively demonstrates the lack of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-93, 1996-Ohio-107. The nonmoving party must then rebut the moving party's evidence with specific facts showing the existence of a genuine triable issue; they may not rest on the mere allegations or denials in their pleadings. Id.; Civ.R. 56(E).

{¶37} The Iretons initially contend that the trial court erred in refusing to find that the parties had entered into an enforceable contract to purchase the Barkley Road property. They claim that an "express written contract" consisted of the first Singleton offer, forwarded to JTD and Katherine's Ridge on December 16, 2005, and Arnold's January 3, 2006 response on behalf of his clients.

{¶38} The existence of an enforceable contract is a prerequisite to a claim for breach of contract. *Garofalo v. Chicago Title Ins. Co.* (1995), 104 Ohio App.3d 95, 108. Essential elements of a contract include "an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration." *Artisan Mechanical, Inc. v. Beiser*, Butler App. No. CA2010-02-039, 2010-Ohio-5427, ¶26, quoting *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, ¶16. For a contract to be enforceable, the parties must have a "meeting of the minds" as to all essential terms. *Episcopal Retirement Homes, Inc. v. Ohio Dept. of Indus. Relations* (1991), 61 Ohio St.3d 366, 369. The parties must possess a "distinct and common intention which is communicated by each party to the other." *Artisan Mechanical* at ¶27, quoting *Champion Gym & Fitness, Inc. v. Crotty*, 178 Ohio App.3d 739, 2008-Ohio-5642, ¶12. When no agreement exists as to all essential terms, no contract exists. *Myers v. Good*, Ross App. No. 06CA2939, 2007-Ohio-5361, ¶8.

{¶39} The right of first refusal in the August 2005 contract provided, in pertinent part, as follows: "The Purchaser shall have the first right of refusal for the purchase of Seller's property located in Clermont County, Ohio * * *. Seller shall notify purchaser * * *, of any good faith offer to purchase the said property by a third party for the sum of any good faith offer made to Seller for the purchase. Purchaser shall have 14 days of receiving notification * * *, to notify Seller of its intention to purchase the property."

{¶40} The record indicates that upon receipt of the first Singleton offer, the Iretons, through Korfhagen, forwarded the offer to Arnold on December 15. In his letter enclosing the offer, Korfhagen requested JTD to "inform my clients whether they intend to purchase the property." Korfhagen further stated, "[i]f no offer to purchase is received by me within 14 days, my clients will proceed accordingly."

{¶41} Thereafter, on January 3, 2006,[1] JTD responded, in relevant part, as follows: "At this time, please take notice that JTD Realty Investments, LLC intends to purchase the property under those terms made in the Ron Singleton proposed Purchase Agreement. Pursuant to those terms, if you would have Mr. and Mrs. Ireton provide the Plat * * * for my review, it would be appreciated. Also, if you would put together a Contract to Purchase incorporating by reference the terms in the Singleton Contract it would be appreciated. Upon executing of that Contract, JTD will provide Mr. and Mrs. Ireton with the earnest money."

{¶42} Upon review, we conclude that the parties' December 16 and January 3 correspondence did not constitute an "express written contract." First, the forwarding of the first Singleton offer to JTD and Katherine's Ridge pursuant to the right of first refusal did not, as a matter of law, constitute an offer. A right of first refusal is a "'promise to present offers to buy property made by third parties to the promisee in order to afford the promisee the opportunity to match the offer.'" *Loeffler v. Crosser* (June 11, 1999), Ottawa App. No. OT-98-034, 1999 WL 375525, 3, quoting *Latina v. Woodpath Dev. Co*. (1991), 57 Ohio St.3d 212, 263. A right of first refusal is not, of itself, an offer. *Leb v. The Hoover Company* (Dec. 28, 1982), Stark App. No. 5717, 1982 WL 5637, 3. In forwarding the first Singleton offer, the Iretons were simply notifying JTD and Katherine's Ridge of the existence of the third-party offer, and inviting it to match the offer within a certain period of time, in this case, 14 days.

{¶43} In addition, while Arnold's January 3, 2006 letter can be construed as an offer to purchase pursuant to the terms of the first Singleton offer, upon review of the additional correspondence between the parties, it does not appear that the Iretons ever

1. The parties have not raised any issue with respect to the fact that JTD's response was delivered more than 14 days after the expiration of the deadline.

accepted this offer. They specifically rejected the offer in Korfhagen's February 8, 2006 letter and presented a counteroffer based on the second Singleton offer. Although in his letter of February 27, Korfhagen indicated that the Iretons had "decided to proceed" on the closing of the first Singleton offer, he also requested that JTD execute a written contract by March 6. He writes, "If I do not receive the signed original by that date, my clients will assume that you do not intend to go forward with this purchase and my clients will enter into this contract with Mr. Singleton and proceed to sell the land to him." Thereafter, in April, Korfhagen forwarded to Arnold a copy of Krause's proposed contract and requested that JTD execute a contract reflecting the terms of that agreement.

{¶44} Nevertheless, even if we were to conclude that the Iretons had accepted JTD and Katherine's Ridge's January 3 offer in a subsequent letter, as the above correspondence establishes, there was no meeting of the minds between the parties to establish an enforceable contract. The totality of the correspondence indicates that the parties did not have a "distinct and common intention" with regard to the terms of the purchase. See *Artisan Mechanical*, 2010-Ohio-5427 at ¶26. In their exchanges, the parties requested that a written contract be executed. Courts must give effect to the manifest intent of the parties when there is clear evidence demonstrating that they did not intend to be bound until the terms of the agreement are formalized in a signed, written document. *Champion*, 2008-Ohio-5642 at ¶15, citing *Richard A. Berjian, D.O., Inc. v. Ohio Bell Tel. Co*. (1978), 54 Ohio St.2d 147, 151. In this case, the parties contemplated throughout their correspondence that a written agreement would need to be executed before the parties would be bound.

{¶45} The Iretons also argue that the trial court ignored several "key" pieces of evidence and disregarded the plain language of the December 16 and January 3

correspondence between the parties. With regard to specific evidence, the Iretons contend that the court "ignored" the following: (1) the fact that a draft contract was sent by Korfagen to Arnold on February 27; (2) that in his February 14 letter, Arnold stated that JTD "match[ed] the terms of the Singleton offer" of December 16, 2005; and (3) notwithstanding the assignment, Arnold improperly referred to JTD as the entity exercising the right of first refusal. We find these assertions lack merit.

{¶46} The trial court issued a 42-page decision in this case, examining the writings exchanged between the parties. Although the Iretons claim that certain correspondence, or specific portions thereof, were not considered, there is no evidence in the record to suggest that the trial court did not review the entirety of the record before it. Moreover, even if the trial court had not considered the evidence articulated by the Iretons as relevant to its decision, any error would be harmless. Since de novo review of summary judgment decisions requires this court's independent analysis of the record and applicable law, based on the arguments advanced by the Iretons, any alleged error on the part of the trial court would not require reversal. *Dayton v. State*, 157 Ohio App.3d 736, 2004-Ohio-3141, ¶129.

{¶47} In light of the foregoing, we conclude that the trial court properly granted summary judgment in favor of JTD and Katherine's Ridge on the Iretons' breach of contract claim, and properly denied the Iretons' motion. The Iretons' first and third assignments of error are therefore overruled.

{¶48} Assignment of Error No. 4:

{¶49} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE PLAINTIFFS/APPELLANTS BY GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING AND BY OVERRULING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON

SUCH A BREACH."

{¶50} In their fourth assignment of error, the Iretons contend that the trial court erred in awarding summary judgment in favor of JTD and Katherine's Ridge on their claim for breach of the duty of good faith and fair dealing. The Iretons' claim that there was sufficient evidence in the record to demonstrate that JTD and Katherine's Ridge acted in bad faith by intentionally misleading the Iretons into believing that they intended to purchase the Barkley Road property.

{¶51} The duty of good faith and fair dealing is integral to any contract. *Krukrubo v. Fifth Third Bank*, Franklin App. No. 07AP-270, 2007-Ohio-7007, ¶19. Outside of the insurance context, the breach of this duty does not exist as a separate cause of action from a breach of contract claim. *Walton v. Residential Fin. Corp*., 151 Ohio Misc.2d 28, 2009-Ohio-1872, ¶10. Rather, the action arises from the implied duty of good faith and fair dealing inherent in every contract. Id. Accordingly, "'an allegation of a breach of the implied covenant of good faith cannot stand alone as a separate cause of action from a breach of contract claim * * *.'" *Krukrubo* at ¶19, quoting *Interstate Gas Supply, Inc. v. Calex Corp*., Franklin App. No. 04AP-980, 2006-Ohio-638, ¶98. See, also, *Tabor Revocable Trust v. WDR Properties, Inc*., Lake App. No. 2009-L-118, 2010-Ohio-2049, ¶29.

{¶52} The Iretons' claim for breach of the implied duty of good faith and fair dealing fails because Ohio law does not recognize a separate claim for breach of this duty in this case. Furthermore, having concluded that no contract existed between the parties, JTD and Katherine's Ridge could not breach any covenant of good faith and fair dealing. As a result, summary judgment in favor of JTD and Katherine's Ridge on the Iretons' claim was properly granted, and the trial court did not err in denying the Iretons' motion.

{¶53} The Iretons' fourth assignment of error is overruled.

{¶54} Assignment of Error No. 5:

{¶55} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE PLAINTIFFS/APPELLANTS BY GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON THE TORTIOUS INTERFERENCE WITH CONTRACT CLAIM."

{¶56} In their fifth assignment of error, the Iretons argue that the trial court erred in granting Arnold's motion for summary judgment on their claim for tortious interference with contract.[2]

{¶57} The tort of interference with contract rights generally occurs when a person, without a privilege to do so, induces or otherwise purposely causes a third person not to perform a contract with another. *Becker Equip., Inc. v. Flynn*, Butler App. No. CA2002-12-313, 2004-Ohio-1190, ¶15. The elements of tortious interference with a contract are as follows: (1) the existence of a contract; (2) the wrongdoer's knowledge of the contract; (3) the wrongdoer's intentional procurement of the contract's breach; (4) lack of justification; and (5) resulting damages. *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St.3d 171, 1999-Ohio-260, paragraph one of the syllabus. In order to prevail on its claim, a party must demonstrate that the wrongdoer "'intentionally and improperly'" interfered with its contractual relations with another. *Becker* at ¶15, quoting *Dryden v. Cincinnati Bell Tel. Co*. (1999), 135 Ohio App.3d 394, 400. In addition, whether the interference is improper depends upon several factors, including the parties' conduct and interests, as well as their relationship. Id.

{¶58} In their complaint, the Iretons alleged that Arnold was aware that they had

2 Although the Iretons also sought summary judgment on their claim for tortious interference, their assignment of error challenges only the trial court's decision to grant Arnold's motion. As our review is limited to the errors assigned, we will not address whether the trial court properly denied the Iretons' motion. See App.R. 12(A)(1)(b); *Guernsey Bank v. Milano Sports Enterprises, L.L.C.*, Franklin App. No. 07AP-382, 2008-Ohio-2420, ¶40.

entered into a "new" real estate purchase contract with Singleton after JTD and Katherine's Ridge had allegedly repudiated the January 3 contract with the Iretons. They further alleged, inter alia, that Arnold knew that time was of the essence in effecting the like-kind exchange prior to the May 8, 2006 deadline, and that despite being aware of this date, Arnold "unreasonably failed to respond to Korfhagen's numerous attempts to contact Arnold via telephone, email and ordinary mail regarding the closing with Singleton on the Barkley Road propert[y]." According to the Iretons, Arnold's silence and lack of cooperation in meeting their demands and completing the like-kind exchange were willful and in bad faith.

{¶59} In his motion for summary judgment, Arnold argued that he was entitled to judgment in his favor because he was immune from liability as attorney for JTD and Katherine's Ridge. In response, the Iretons claimed that he was not acting as attorney, but instead in his capacity as member of JTD and manager of Katherine's Ridge. The trial court was persuaded by Arnold's immunity argument, and granted summary judgment in his favor.

{¶60} On appeal, the Iretons argue that the trial court improperly determined that Arnold was entitled to immunity. Despite the trial court's conclusion that summary judgment was proper on Arnold's immunity defense, as discussed in our resolution of the Iretons' first and third assignments of error, our de novo review requires an independent analysis of the record and applicable law. See *Dayton*, 2004-Ohio-3141 at ¶129. In reviewing Arnold's motion and the record before us, we conclude that we need not determine whether Arnold was entitled to immunity in this case. However, the trial court's judgment on appellant's tortious interference with contract claim was nevertheless correct, albeit for a reason different from that articulated by the court. See *Sprouse v. Eisenman*, Franklin App. No. 04AP-416, 2005-Ohio-463, ¶9.

{¶61} Based upon our independent review, we find that the Iretons' tortious interference with contract claim fails, as a matter of law, because there is no evidence in the record to demonstrate that the Iretons established the first element of their claim, i.e., the existence of a contract between themselves and Singleton. Although the Iretons allege in their complaint and on appeal that they had entered into a "new" contract with Singleton, it is not clear which contract they are referencing. The record contains two proposed purchase contracts dated November 7, 2005 and January 30, 2006. Although both purport to bear Singleton's signature, neither document bears the signature of the Iretons.

{¶62} In his deposition, Archie Ireton was asked about the March 17, 2006 letter, allegedly sent by Korfhagen to Arnold regarding JTD and Katherine's Ridge's exercise of their right of first refusal with regard to the second Singleton offer:

{¶63} "Q. The last paragraph [of the letter] provides, based on your letter of [March 7, 2006], and your refusal to sign the contract, my clients have entered into the contract with Ron Singleton and will proceed to complete the sale of this property to Mr. Singleton. Did I read that correctly, sir?

{¶64} "A. Yes.

{¶65} "Q. Was that a true statement?

{¶66} "A. No, we didn't because Singleton couldn't do the offer then.

{¶67} "Q. Okay. So when Mr. Korfhagen said that the Iretons, quote, have entered into the contract with Ron Singleton, end quote, that was not a true statement?

{¶68} "A. Yeah, that's not true, because we never - - I never signed the contract with Singleton at all."

{¶69} In his affidavit, Singleton averred that he "made several offers to the Iretons to purchase the [Barkley Road property] in late 2005 and early 2006." Singleton

further averred that the Iretons "never actually signed any agreement to sell the [Barkley Road property] to me[.]" He claimed that in early February 2006, he made an offer to purchase another farm in Clermont County, which was accepted by the seller on February 10, 2006.

{¶70} While it may be true that the Iretons had a business relationship and *prospective* contractual relations with Singleton, the Iretons have not demonstrated that they had a contractual relationship. "'The main distinction between tort[i]ous interference with a contractual relationship and tort[i]ous interference with a business relationship is that interference with a business relationship includes intentional interference with prospective contractual relations, not yet reduced to a contract.'" *Marinelli v. Prete*, Erie App. No. E-09-022, 2010-Ohio-2257, ¶40, quoting *Diamond Wine & Spirits, Inc. v. Dayton Heidelberg Distrib. Co., Inc*., 148 Ohio App.3d 596, 2002-Ohio-3932, ¶23. The claim against Arnold falls under the tort of interference with a business relationship. However, this claim was not asserted by the Iretons.

{¶71} In light of the Iretons' failure to establish the existence of a contract with Singleton, it follows that there was no contract with which Arnold could intentionally interfere. Summary judgment was properly entered in his favor. The Iretons' fifth assignment of error is therefore overruled.

{¶72} Judgment affirmed.

YOUNG, P.J., and HENDRICKSON, J., concur.