

**IN THE FRANKLIN COUNTY COURT OF COMMON PLEAS
GENERAL DIVISION**

**JAMES E. ARNOLD &
ASSOCIATES, LPA,**

Plaintiff,

vs.

CARLO M. CROCE, ET AL.,

Defendants.

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Case No. 21CV-47

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Judge Jeffrey M. Brown

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Decision and Entry

This matter is before the Court on Plaintiff James E. Arnold & Associates, LPA’s (“JEAA”) Motion for Partial Summary Judgment, filed on September 3, 2021. Defendant Carlo M. Croce (“Dr. Croce”) filed a Memorandum in Opposition on October 12, 2021. JEAA filed a Reply on October 19, 2021. JEAA moves for summary judgment as to Count One (Breach of Contract), Count Two (Breach of Note), and Count Four (Foreclosure of Mortgage). The matter is now ripe for the Court’s consideration.

STATEMENT OF FACTS

The following facts have been pulled from the parties’ pleadings and supporting exhibits. Dr. Croce engaged JEAA as his counsel on October 18, 2018 to provide legal representation and services in several matters. The first two matters were defamation actions already pending in the United States District Court for the Southern District of Ohio. The third and fourth matters related to an investigation being conducted by The Ohio State University (“OSU”) against Dr. Croce and OSU’s attempt to remove Dr. Croce as Chair of the Department of Cancer Biology and Genetics at OSU. Dr. Croce signed an engagement letter with JEAA for their representation in these matters.

Of note, the law firm of Kegler, Brown, Hill & Ritter was initially representing Dr. Croce in the defamation actions, but they withdrew, alleging that Dr. Croce failed to pay their legal fees and expenses. Kegler, Brown, Hill & Ritter filed an action in the Franklin County Court of Common Pleas, *Kegler, Brown, Hill, & Ritter v. Croce*, 20CV33954.

Dr. Croce began paying his JEAA legal bills in November, 2018 but stopped paying his JEAA legal bills in February, 2019. On August 5, 2019, after receiving no further payments from Dr. Croce, JEAA informed him they would no longer provide legal services to him. In September, 2019, JEAA withdrew from the matters in which they were representing Dr. Croce.

Dr. Croce was then referred to and consulted with another lawyer to represent him in connection with executing a Non-Negotiable Revolving Promissory Note (the "Note") payable to JEAA. To secure payment of the Note, Dr. Croce gave JEAA a Balloon Mortgage, Assignment of Leases and Rents and Security Agreement (the "Mortgage"). Dr. Croce had separate legal representation to review and counsel him before signing the Mortgage. The Mortgage and Note were recorded with the Franklin County Recorder on October 18, 2019, as instrument number 2019101801388891.

JEAA files the instant motion seeking summary judgment on Count One (breach of contract), Count Two (breach of note), and Count Four (foreclosure of mortgage) arguing it is entitled to judgment as a matter of law on each count. Dr. Croce argues that summary judgment is not appropriate as there are issues of material fact as to the reasonableness of the fees and the interest rate, and the request for foreclosure is premature.

LAW AND ANALYSIS

In order to prevail upon a motion for summary judgment, the moving party must inform the court of the basis for the motion and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. In *Dresher v. Burt*, 75 Ohio St. 3d 280, 662 N.E.2d 264 (1996), the Ohio Supreme Court explained:

the movant must be able to point to evidentiary materials of the type listed in Civ.R.56(C) that a court is to consider in rendering summary judgment These evidentiary materials must show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. . . . If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. (emphasis added).

Id. at 292, 293.

Additionally, it is well-established that the party responding to a motion for summary judgment has some burden to provide the Court with evidence as to their reasons for opposition. “A motion for summary judgment forces the nonmoving party to produce evidence on any issue for which that party bears the burden of production at trial.” *Wing v. Anchor Media*, 59 Ohio St. 3d 108, 570 N.E.2d 1095 (1991). “It should be noted that placing the above-mentioned requirements on the moving party does not mean the nonmoving party bears no burden. Requiring that the moving party provide specific reasons and evidence gives rise to a reciprocal burden of specificity for the nonmoving party.” *Harless v. Willis Day Warehousing Co.*, 54 Ohio St. 2d 64, 375 N.E.2d 46 (1978).

A party’s unsupported and self-serving assertions, offered by way of affidavit, standing alone and without corroborating materials under Civ.R. 56, will not be sufficient to determine material issues of fact. *Bell v. Beightler*, 10th Dist. Franklin No. 02AP-569, 2003 Ohio 88, quoted by *White v. Sears, Roebuck & Co.*, 10th Dist. Franklin No. 10AP-294, 2011-Ohio-204 ¶ 33.

In deciding a motion for summary judgment, the trial court is only obligated to evaluate the evidence and arguments specifically set forth before it, and is not required to search the record for potentially relevant evidence or to create arguments for the parties based upon that evidence. *Blount v. Schindler Elevator Corp.*, 10th Dist. Franklin No. 02AP-688, 2003-Ohio-2053, ¶ 40.

“To recover upon a breach of contract claim, a plaintiff must prove the existence of a contract, performance by the plaintiff, breach by the defendant, and damage or loss to the plaintiff.” *Gianetti v. Teakwood, Ltd.*, 10th Dist. No. 15AP-413, 2016-Ohio-213, quoting *Jarupan v. Hanna*, 173 Oho App.3d 284, 2007-Ohio-5081, 18 (10th Dist.). “In order to prove the existence of the contract the parties must be shown to have consented to the terms of the contract, that both parties had a meeting of the minds, and the terms of the contract are definite and certain.” *State Dep’t of Dev. v. Matrix Centennial, LLC*, 10th Dist. No 14AP-47, 2014-Ohio-3241, 2014 Ohio App. LEXIS 3172.

“At common law, a material breach of contract is a party’s failure to perform an element of the contract that is so fundamental to the contract that the single failure to perform defeats the essential purpose of the contract or makes it impossible for the other party to perform.” *Mid Am. Constr., LLC v. Univ. of Akron*, 10th Dist. No. 18AP-846, 2019-Ohio-3863. The determination of materiality requires “an examination of the parties’ injuries, whether and how much the injured parties would or could have been compensated, and whether the parties acted in good faith.” *Id.* “A breach of one of several terms in a contract does not discharge the obligations of the parties to the contract, unless performance of that term is essential to the purpose of the agreement.” *491 N. Park Real Estate LLC v. Spice Partners, LLC*, 10th Dist. No. 14AP-304, 2014-Ohio-5164. “The long and uniformly settled rule as to contracts requires only a substantial performance in order

to recover upon such contract.” *Ohio Farmers’ Ins. Co. v. Cochran*, 104 Ohio St. 427, 135 N.E. 537 (1922), paragraph two of the syllabus.

A valid contract was entered into on or about October 18, 2018 between JEAA and Dr. Croce. A valid promissory note was entered into about October 15, 2019 between JEAA and Dr. Croce. Dr. Croce offers the argument that the reasonableness and necessity of the billed attorney fees creates a genuine dispute of fact as to his liability for the breach of contract claim. He also contends that a discrepancy in the interest rate listed in the engagement agreement and the promissory note has the same effect. These approaches are not well-taken. JEAA has established there is no genuine issue of material fact as to Dr. Croce’s liability by identifying the existence of a contract, performance by JEAA, breach by Dr. Croce, and at least some damages. While the amount of damages may remain genuinely contested, it is clear to the Court based upon the evidence presented there is some amount of damages.

As to Count Four, Dr. Croce contends that a request for foreclosure is premature, primarily because the underlying amount may be uncertain. The Court disagrees. Where the defendant has defaulted on a note, and the note is secured by a mortgage, establishing a right to foreclosure requires proof of four elements: “(1) execution and deliver of a valid note and mortgage, which instruments are now held by plaintiff; (2) the recorded mortgage is a valid lien on the property at issue; (3) the maker of the note and mortgage has defaulted on its obligation under those instruments; (4) resulting in an established amount due.” *Wells Fargo Bank, N.A. v. Favino*, 2011 U.S. Dist. LEXIS 36670 (N.D. Ohio, Mar. 31, 2011), quoting *Citizens Bank v. Cinema Park LLC*, 2010 U.S. Dist. LEXIS 7725, 2010 WL 420019, at *3 (N.D. Ohio Jan. 29, 2010).

Upon reviewing the evidence submitted, the Court finds that JEAA has met the

requirements to foreclose upon the property listed in instrument number 2019101801388891.

CONCLUSION

Accordingly, Plaintiff's Motion for Partial Summary Judgment, filed October 19, 2021, is **GRANTED** and a judgment is hereby entered in favor of Plaintiff as to Count One, Count Two, and Count Four. Having established liability, JEAA must establish the reasonableness of the fees charged, at which point Dr. Croce may assert any claimed basis for the reduction of the award. The parties are to confer with the Court's Staff Attorney to arrange for the damages hearing which will be held before Magistrate Pam Browning.

Further, the Court **ORDERS** that the Mortgage held by JEAA is a valid and subsisting lien on the subject property listed in instrument number 2019101801388891 and Plaintiff is to prepare the appropriate order for the Court's consideration.

IT IS SO ORDERED.

Copies electronically to all counsel.

Franklin County Court of Common Pleas

Date: 07-12-2023
Case Title: JAMES E ARNOLD & ASSOCIATES LPA -VS- CARLO M CROCE
ET AL
Case Number: 21CV000047
Type: ORDER

It Is So Ordered.

A handwritten signature in black ink, appearing to read "Jeffrey M. Brown", is written over a circular, textured seal or stamp.

/s/ Judge Jeffrey M. Brown

Court Disposition

Case Number: 21CV000047

Case Style: JAMES E ARNOLD & ASSOCIATES LPA -VS- CARLO
M CROCE ET AL

Motion Tie Off Information:

1. Motion CMS Document Id: 21CV0000472021-09-0399960000
Document Title: 09-03-2021-MOTION TO AMEND - DEFENDANT:
CARLO M. CROCE
Disposition: MOTION RELEASED TO CLEAR DOCKET

2. Motion CMS Document Id: 21CV0000472021-09-0399980000
Document Title: 09-03-2021-MOTION FOR SUMMARY
JUDGMENT - PLAINTIFF: JAMES E ARNOLD & ASSOCIATES LPA
Disposition: MOTION GRANTED

3. Motion CMS Document Id: 21CV0000472023-06-2299980000
Document Title: 06-22-2023-MOTION - PLAINTIFF: JAMES E
ARNOLD & ASSOCIATES LPA - FOR STATUS CONFERENCE
Disposition: MOTION RELEASED TO CLEAR DOCKET