COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

SAM WHITE, ET AL.	:	
Plaintiffs	:	**CASE NO. 2014 CVH 00754**
vs.	:	**Judge McBride**
BRANCH HILL COFFEE COMPANY INC., ET AL.	:	**DECISION/ENTRY**
Defendants	:	

Gottesman & Associates, LLP, Zachary Gottesman and Stephen R. Ramsey, attorneys for the plaintiffs Sam White, Branch Hill Coffee Company, and White Family Properties, 36 East Seventh Street, Suite 2121, Cincinnati, Ohio 45202

Whitaker Attorneys, LLC, James A. Whitaker and Kristine L. Tammaro, attorneys for the defendants Branch Hill Coffee Company, Inc., Branch Hill Coffee Company, LLC, and Thomas L. Applegate II, 226 Reading Road, Mason, Ohio 45040

This cause is before the court for consideration of the plaintiffs' amended motion for summary judgment which was filed on July 31, 2015 and the defendants' motion to strike the affidavit of Sam White which was filed on July 24, 2015. A case management order was filed on June 26, 2015 which established a briefing/hearing schedule and allowed for both written and oral arguments to be made. At the conclusion of the oral arguments, which took place on October 16, 2016, the court took the issues raised by the motions under advisement.

Upon consideration of the motions, the evidence presented for the court's consideration, the record of the proceeding, the written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

The instant case involves an asset purchase agreement transferring the ownership, assets, and goodwill of Branch Hill Coffee Company.[1]

On March 28, 2014, Patricia White sold Branch Hill Coffee Company to Andrea S. Anusbigian for $50,000 in an Asset Purchase Agreement ("Agreement").[2] Section Three of the Agreement provides:

> "3. Inventory. Buyer will pay Seller on the closing date the purchased cost of saleable goods on hand, including: coffee, cups, scones, containers, napkins, food, condiments, liquid mixes, powders, and sleeves. Buyer will provide receipts for saleable goods on hand to the Buyer at the closing. This amount is over and above the Purchase Price set forth in Section 1."[3]

The buyer, Ms. Anusbigian, avers that the seller, Ms. White, showed her an inventory list of on hand saleable goods on Ms. White's computer screen, which was incomplete and was not printed out for her review or comment.[4] She further claims that she did not receive any invoices or receipts from Ms. White at the time of closing.[5] She further states that she had her checkbook with her and was prepared to pay for the on

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[1] Asset Purchase Agreement, Pls. Ex. A, pg. 1.
[2] White Aff., ¶¶ 2-3, Anusbigian Aff. ¶¶ 3, 9.
[3] Asset Purchase Agreement, Pls. Ex. A, pg. 3.
[4] Anusbigian Aff. ¶ 11.
[5] Anusbigian Aff. ¶ 12.

hand inventory, but she did not because she did not receive a complete or printed inventory list, the receipts, or the invoices.[6]

Ms. Anusbigian avers that she never received an inventory list, but Thomas Applegate, II, who accompanied her at the closing and who helped fund her purchase of Branch Hill Coffee Company, did receive a copy of the list in an April 3, 2014 email from Sam White.[7] She further claims that she did not receive any inventory receipts or invoices until October or November 2014 and states there were multiple items for which receipts were not provided or for which the receipts were undated.[8]

Ms. Anusbigian also claims she inspected the inventory at the store and found that a large number of inventory items were expired or otherwise not in saleable condition.[9] Ms. Anusbigian never took possession of additional scones that were stored in freezers at the White residence, as such off-site storage violated health code regulations.[10]

The seller, Ms. White, avers that she provided the buyer with copies of the inventory on hand on the date of the closing, which showed a total owed of $4,897.40.[11] She further states that the buyer failed to bring a check to pay for the on hand inventory.[12] Following the closing, Ms. White claims that the buyer was notified of an additional $897.69 of inventory that was allegedly on hand at the time of the closing.[13] Ms. White claims that the buyer received documentation of the inventory's costs,

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[6] Anusbigian Aff. ¶¶ 13-14.
[7] Anusbigian Aff. ¶¶ 5, 15; Applegate Aff. ¶¶ 3-4.
[8] Anusbigian Aff. ¶¶ 18-19.
[9] Anusbigian Aff. ¶ 17.
[10] Anusbigian Aff. ¶ 16.
[11] White Aff. ¶ 5.
[12] White Aff. ¶ 6.
[13] White Aff. ¶ 7.

although she does not identify when such documentation was provided.[14] Ms. White further states that the buyer has retained but has failed to pay for the inventory.[15]

On June 5, 2014 the plaintiffs Sam White, Branch Hill Coffee Company, and White Family Properties, brought suit against the defendants Branch Hill Coffee Company, Inc., Branch Hill Coffee Company, L.L.C., and Thomas Applegate, II. The plaintiffs' claims are for breach of contract, unjust enrichment, and a demand that the court reform the contract between parties "to reflect the actual names of the parties thereto and eliminate any confusion about what parties are signatories to which contracts."[16] The defendants answered on July 2, 2014, denying the plaintiffs' claims and bringing counterclaims for breach of contract, promissory estoppel, and inducement by fraud.[17]

The plaintiffs filed their motion for summary judgment and an affidavit of Sam White on June 15, 2015.[18] The defendants responded and concurrently moved for the court to strike Sam White's affidavit on July 24th.[19] On July 31st, the plaintiffs filed an amended motion for summary judgment and an affidavit from Patricia White.[20] This court heard oral argument on these issues on October 16, 2015.

STANDARD OF REVIEW

The court must grant summary judgment, as requested by a moving party when:

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[14] White Aff. ¶ 8.
[15] White Aff. ¶ 9.
[16] Compl., June 5, 2014.
[17] Answer, July, 2, 2014.
[18] Pls. Mot., June 15, 2015.
[19] Defs. Resp., July 24, 2015.
[20] Pls. Am. Mot., July 31, 2015.

> "(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; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to the party opposing the motion."[21]

The court must view the evidence in a light most favorable to the nonmoving party.[22] Even the inferences drawn from the evidence and underlying facts must be construed in favor of the nonmoving party, such as inferences drawn from affidavits, depositions, etc.[23] A fact is material when, under the governing substantive law, the facts "might affect the outcome of the suit."[24]

Whether a genuine issue exists is answered by the following inquiry: Does the evidence present "a sufficient disagreement to require submission to a jury" or is it "so one-sided that the party must prevail as a matter of law"?[25] This threshold inquiry determines whether there are "any genuine factual issues that can properly be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."[26]

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[21] *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). *See Davis v. Loopco Indus., Inc.*, 66 Ohio St.3d 64, 65-66, 609 N.E.2d 144 (1993) (holding same); Civ.R. 56(C).

[22] *Welco Indus. Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 356, 617 N.E.2d 1129 (1993); *Willis v. Frank Hoover Supply*, 26 Ohio St.3d 186, 188, 497 N.E.2d 1118 (1986); *Williams v. First United Church of Christ*, 37 Ohio St.2d 150, 152, 309 N.E.2d 924 (1974).

[23] *Hannah v. Dayton Power & Light Co.*, 82 Ohio St.3d 482, 485, 696 N.E.2d 1044 (1998) citing *Turner v. Turner*, 67 Ohio St.3d 337, 341, 617 N.E.2d 1123 (1993).

[24] *Anderson v. Liberty-Lobby Inc.* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986).

[25] Id. at 251-52.

[26] Id. at 250.

The movant bears the burden to show that no genuine issue exists as to any material fact, and it is entitled to judgment as a matter of law.[27] This burden requires the movant to "specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond."[28] If the movant fails to satisfy its initial burden, the motion for summary judgment must be denied.[29]

However, if the movant satisfies this burden, then the nonmoving party has a "reciprocal burden" to set forth specific facts, beyond the allegations and denials in his pleadings, demonstrating that a "triable issue of fact" remains.[30] The duty of the nonmoving party is more than that of resisting the motion's allegations.[31] Instead, this burden requires the nonmoving party to "produce evidence on any issue for which [the nonmoving] party bears the burden of production at trial."[32] The nonmoving party must present documentary evidence of specific facts showing that there is a genuine issue for trial.[33] It may not rely on the pleadings or unsupported allegations.[34]

Under Civ.R. 56(C), the only evidence that may be considered when ruling on a motion for summary judgment is "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if

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[27] *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990); *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).
[28] *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus.
[29] Id. *See HSBC Mtge. Serve. v. Williams*, 12th Dist. Butler No. CA2013-09-174, 2014-Ohio-3778, ¶ 8 (holding same).
[30] *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996).
[31] *Wells Fargo*, 2013-Ohio-855at ¶ 25.
[32] (Citation omitted.) *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d 108, 570 N.E.2d 1095 (1991), paragraph three of the syllabus; *See Welco Indus., Inc.*, 67 Ohio St.3d at 346 (holding same).
[33] *Williams*, 2014-Ohio-3778 at ¶ 8. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).
[34] Id.

any, timely filed in the action."[35] The trial court maintains the sound discretion to admit or exclude relevant evidence.[36] When a document falls outside the enumerated categories in Civ.R. 56(C), the correct method to introduce the document is to incorporate it by reference into a properly framed affidavit.[37]

Opposing and supporting affidavits must be based on personal knowledge, must set forth facts as would be admissible into evidence, and must affirmatively show that the affiant is competent to testify on the matters in the affidavit.[38] "Personal knowledge" is defined as "[k]nowledge of the truth in regard to a particular fact or allegation, which is original and does not depend on information or hearsay."[39] "Absent evidence to the contrary, an affiant's statement that his affidavit is based on personal knowledge will suffice to meet the requirements of Civ.R. 56(E)."[40] Furthermore, if the affiant does not specifically state that he or she has personal knowledge, "personal knowledge may be inferred from the contents of the affidavit."[41]

By contrast, if certain statements in the affidavit "suggest that it is unlikely that the affiant had personal knowledge" of the facts, then "something more than a conclusory averment that the affiant has personal knowledge would be required."[42]

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[35] *See Wells Fargo*, 2013-Ohio-855at ¶ 15 citing *State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-2010, 2011-Ohio-3904, ¶ 7 ("Civ.R. 56(C) provides an exclusive list of materials that a trial court may consider when deciding a motion for summary judgment.").
[36] *Green Tree Servicing, L.L.C. v. Roberts*, 12th Dist. Butler No. CA2013-03-039, 2013-Ohio-5362, ¶ 18, quoting *U.S. Bank v. Bryant*, 12th Dist. Butler No. CA2012-12-266, 2013-Ohio-3993, ¶ 10.
[37] *Martin v. Central Ohio Transit Auth.*, 70 Ohio App.3d 83, 89, 590 N.E.2d 411 (10th Dist.1990); *Biskupich v. Westbay Manor Nursing Home*, 33 Ohio App.3d 220, 222, 515 N.E.2d 632 (8th Dist.1986).
[38] Civ.R. 56(E); *Wells Fargo v. Smith*, Blue Sky L. Rep. P 75.026, 2013-Ohio-855, ¶ 16 (12th Dist.).
[39] *Wells Fargo*, 2013-Ohio-855 at ¶ 16.
[40] Id., citing *Churchill v. G.M.C.*, 12th Dist. No. CA2002-10-263, 2003-Ohio-4001, ¶ 11.
[41] Id.
[42] Id., quoting *Bank One, N.A. v. Swartz*, 9th Dist. No. 03CA008308, 2004-Ohio-1986, ¶ 14.

Likewise, affidavits that merely set forth legal conclusions or opinions without stating supporting facts are insufficient to satisfy Civ.R. 56(E).[43]

Civ.R. 56(E) provides that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." Thus, documents referenced in the affidavit "must be attached to the affidavit."[44] If the affiant "relies" on documents in the affidavit but fails to attach those documents, "the portions of the affidavit that reference those document[s] must be stricken."[45]

Because summary judgment is a procedural device designed to terminate litigation where there is nothing to try, it must be awarded with caution, and doubts must be resolved in favor of the nonmoving party.[46] Summary judgment is inappropriate when the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.[47]

LEGAL ANALYSIS

The construction of contracts is a matter of law.[48] The court's primary objective when construing a contract is "to ascertain and give effect to the intent of the parties."[49]

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[43] *Stamper v. Middletown Hosp. Assn.*, 65 Ohio App.3d 65, 69, 582 N.E.2d 1040 (12th Dist.1989).
[44] *Wells Fargo*, 2013-Ohio-855 at ¶ 17, citing Civ.R. 56(E).
[45] Id. at ¶ 16, citing *Third Federal S. & L. Assn. of Cleveland v. Farno*, 12th Dist. No. CA2012-04-028, 2012-Ohio-5245, ¶ 10. *See State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-010, 2011-Ohio-3904 (striking portions of affidavit where documents were reviewed and relied upon in drafting affidavit but not attached to the affidavit or served with it).
[46] *Loopco Indus., Inc.*, 66 Ohio St.3d at 66, 609 N.E.2d at 145.
[47] *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150 (1985).
[48] *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146, 7 O.O.3d 403, paragraph one of the syllabus (1978).

When confronted with an issue of contract interpretation, courts give effect to the parties' intent,[50] and examine the contract as a whole.[51] Generally courts presume that the parties' intent resides in the language they chose to employ in the contract.[52]

Courts use the "plain and ordinary meaning" of the language in the contract unless a different meaning "is clearly apparent" from the contract.[53] If the language is clear, then the court is confined to the writing in the contract itself to discern the parties' intent.[54] "As a matter of law, a contract is unambiguous if it can be given a definite legal meaning."[55]

To prevail on a breach of contract claim, the plaintiff must prove: "(1) the existence of a contract, (2) that the plaintiff fulfilled its contractual obligations, (3) that the defendant failed to fulfill its contractual obligations, and (4) that the plaintiff incurred damages as a result."[56] A plaintiff proves that a party has breached a contract by showing the party "did not perform one or more of the terms of the contract."[57] After the

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[49] *Lopez v. Citizens Auto Fin.*, 8th Dist. Cuyahoga No. 91184, 2009-Ohio-1082, ¶ 15, citing *Alternatives Unlimited-Special, Inc. v. Ohio Dep't of Edn.*, 168 Ohio App. 3d 592, 2006-Ohio-4779, 861 N.E.2d 163, ¶ 20 (10th Dist.).

[50] *Pierce Point Cinema 10, L.L.C. v. Perin-Tyler Family Foundation*, 12th Dist. Clermont No. CA2012-02-014, 2012-Ohio-5008, ¶ 11, citing *Sunoco, Inc. v. Toledo Edison Co.*, 129 Ohio St.3d 397, 2011-Ohio-2720, 953 N.E.2d 285, ¶37.

[51] *Toledo Edison Co.*, 2011-Ohio-2720 at ¶ 38.

[52] *Perin-Tyler Family Foundation*, 2012-Ohio-5008 at ¶ 11, citing *Shifrin v. Forest City Ets., Inc.*, 64 Ohio St.3d 635, 638, 597 N.E.2d 499 (1992).

[53] *Toledo Edison Co.*, 2011-Ohio-2720, ¶ 37.

[54] Id.

[55] Id., citing *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 11.

[56] *Lamar Advantage GP Co. v. Patel*, 12th Dist. Warren No. CA2011-10-105, 2012-Ohio-3319, ¶ 25, citing *S & G Invests., L.L.C. v. United Cos. L.L.C.*, 12th Dist. No. CA2010-03-017, 2010-Ohio-3691, ¶ 12.

[57] *Stonehenge Land Co. v. Beazer Homes Invests., L.L.C.*, 117 Ohio App.3d 7, 2008-Ohio-148, 893 N.E.2d 855, ¶ 24 (10th Dist.), quoting *Powell v. Grant Med. Ctr.*, 148 Ohio App.3d 1, 10, 771 N.E.2d 874 (10th Dist. 2002).

plaintiff shows the breach of contract, then the burden shifts to the breaching party to assert a defense."[58]

When a party breaches a portion of a contract, the breach does not "discharge" the parties' obligations "unless the breach is material."[59] A material breach is a "a failure to do something that is so fundamental to a contract that the failure to perform defeats the essential purpose of the contract or makes it impossible for the other party to perform."[60] When the facts are undisputed, it is a question of law as to whether they "constitute performance or a breach of the contract."[61]

"[D]efault by a party who has substantially performed does not relieve the other party from performance."[62] Hence, a contract is not considered breached when a party "substantially performed" its contractual obligations.[63] The doctrine of substantial performance prescribes that " 'if one party's performance is a constructive condition of the other party's duty, only 'substantial' performance is required of the first party before

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[58] *Abruzzi's Inc. v. Abruzzi's Pizza, Inc.*, 8th Dist. Cuyahoga No. 73002, 1998 WL 355846, *3 (July 2, 1998).
[59] *Patel*, 2012-Ohio-3319 at ¶ 26, quoting *Bd. of Commrs. of Clermont Cty., Ohio v. Batavia*, 12th Dist. Clermont No. CA2000-06-039, 2001 WL 185464, *3 (Feb. 26, 2001).
[60] *Patel*, 2012-Ohio-3319 at ¶ 26, quoting *Marion Family YMCA v. Hensel*, 178 Ohio App.3d 140, 2008-Ohio-4413, 897 N.E.2d 184, ¶ 7 (3rd Dist.). Courts use five factors to determine whether a breach is material: "the extent to which the injured party will be deprived of the expected benefit, the extent to which the injured party can be adequately compensated for the lost benefit, the extent to which the breaching party will suffer a forfeiture, the likelihood that the breaching party will cure its breach under the circumstances, and the extent to which the breaching party has acted with good faith and dealt fairly with the injured party. *Batavia*, 2001 WL 185464 at *3, citing *Software Clearing House, Inc. v. Intrak, Inc.*, 66 Ohio App.3d 163, 170-71, 583 N.E.2d 1056 (1st Dist. 1990).
[61] *Stonehenge Land Co*, 2008-Ohio-148 at ¶ 24, quoting *Luhtz v. Stern*, 135 Ohio St. 225, 237, 20 N.E.2d 241, 1939).
[62] *Hansel v. Creative Concrete & Masonry Constr. Co.*,148 Ohio App.3d 53, 2002-Ohio-198, 772 N.E.2d 138, ¶ 11 (10th Dist.).
[63] Id. at ¶ 12.

he can recover under the contract.' "[64] Phrased differently, "where a contract is made for an agreed exchange of two performances, one of which is to be rendered first, substantial performance rather than exact, strict or literal performance by the first party of the terms of the contract is adequate to entitle the party to recover on it."[65]

"Substantial performance of a contract is interpreted to mean that the mere nominal, trifling, or technical departures are not sufficient to break a contract, and that slight departures, omissions and inadvertences should be disregarded."[66] When a party make[s] "an honest effort" to perform under the contract, "and there is no willful omission on its part, substantial performance is all that is required to entitle the party to payment under the contact."[67] In order for the court to find that a party substantially performed, "the part unperformed must not destroy the value or purpose of the contract."[68]

Unlike substantial performance, which allows for slight departures from the contract, a "condition precedent is an event that must occur before an obligation in the contract will become effective."[69] When the condition precedent fails to occur, the party

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[64] (Citation omitted.) *Kaufman v. Byers*, 159 Ohio App.3d 238, 2004-Ohio-6346, 823 N.E.2d 530, ¶ 31 (11th Dist.).
[65] Id.
[66] *Words, Inc. v. Tens Pain Management, Inc.*, 12th Dist. Warren No. CA92-01-007, 1992 WL 193659, *3 quoting *Kicheler's Inc. v. Persinger*, 24 Ohio App.2d 124, 126 (1st Dist. 1970).
[67] Id. at *2 quoting *Cleveland Neighborhood Health Serv., Inc. v. St. Clair Builders, Inc.*, 64 Ohio App.3d 639, 644 (8th Dist. 1989).
[68] *Stonehenge Land Co.*, 2008-Ohio-148 at ¶ 24 quoting *Hansel v. Creative Concrete & Masonry Constr. Co.*, 148 Ohio App.3d 53, 2002-Ohio-198, 772 N.E.2d 138, ¶ 12 (10th Dist.).
[69] *Evans, Mechwart, Hambleton & Tilton, Inc. v. Triad Architects, LTD*, 196 Ohio App.3d 784, 2011-Ohio-4979, 965 N.E.2d 1007, ¶ 14 (10th Dist.), citing *Moody v. Ohio Rehab. Servs. Comm.*, 10th Dist. Franklin No. 02AP-596, 2002-Ohio-6965, ¶ 9. *See Hiatt v. Giles*, 2d Dist. Darke No. 1662, 2005-Ohio-6536, ¶ 23, quoting *Rudd v. Online Resources, Inc*, 2d Dist. Montgomery No. 17500, 1999 WL 397351 (June 18, 1999) ("A condition precedent is a condition which must be performed before the obligations in the contract become effective.").

is excused from performing its contractual obligations.[70] In other words, "when a condition precedent exists, performance by one party at the time given by the contract is essential to enable him to require the counterperformance of the other party."[71] The parties' intent determines whether a provision is "a condition precedent or merely a promise to perform."[72] Intent may be discerned from "considering the language of a particular provision, the language of the entire agreement, or the subject matter of an agreement."[73]

Notably, the "law disfavors conditions precedent," and therefore "'whenever possible courts will avoid construing provisions to be such unless the intent of the agreement is plainly to the contrary."[74] As such, "[w]hen possible, courts should construe promises in a bilateral contract as mutually dependent and concurrent, rather than one promise as a condition precedent to the other."[75] When "promises in a bilateral contract are mutually dependent and concurrent, a party's promises are constructive conditions to the other party's performance, and [the court will] apply the doctrine of substantial performance" discussed above.[76] In "the absence of unambiguous language indicating an intention to create a conditional obligation," courts will not find a provision to be a condition precedent.[77]

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[70] *Triad Architects, LTD*, 2011-Ohio-4979 at ¶ 14, citing *Adkins v. Bratcher*, 4th Dist. Washington No. 07CA55, 2009-Ohio-42, ¶ 31.
[71] *Kaufman*, 2004-Ohio-6346 at ¶ 28.
[72] *Triad Architects, LTD*, 2011-Ohio-4979 at ¶ 14, citing *Adkins*, 2009-Ohio-42 at ¶ 31.
[73] *Hiatt*, 2005-Ohio-6536 at ¶ 23.
[74] *Triad Architects, LTD*, 2011-Ohio-4979 at ¶ 15, quoting *Hiatt*, 2005-Ohio-6536 at ¶ 23.
[75] *Triad Architects, LTD*, 2011-Ohio-4979 at ¶ 15, citing *Adkins*, 2009-Ohio-42 at ¶ 32. *See Kaufman*, 2004-Ohio-6346 at ¶ 30 (holding same).
[76] *Kaufman*, 2004-Ohio-6346 at ¶ 30.
[77] *Triad Architects, LTD*, 2011-Ohio-4979 at ¶ 15, citing 13 Lord, Williston on Contracts (4th Ed. 2000) 429, Section 38:13.

Conditions precedent are disfavored even more so when, by interpreting a provision as a condition precedent and not a promise, forfeiture would result.[78] Forfeiture "is the denial of compensation that results when the obligee loses its right to the agreed exchange after he has relied substantially, as by performance, on the expectation of that exchange."[79] For example:

> "[U]nder a provision that a duty is to be performed 'when' an event occurs, it may be doubtful whether it is to be performed only if that event occurs, in which case the event is a condition, or at such time as it would ordinarily occur, in which case the event is referred to merely to measure the passage of time. In the latter case, if the event does not occur some alternative means will be found to measure the passage of time, and the non-occurrence of the event will not prevent the obligor's duty from becoming one of performance. If the event is a condition, however, the obligee takes the risk that its nonoccurrence will discharge the obligor's duty."[80]

If a party satisfactorily demonstrates a breach of the contract, "damages should place the injured party in as good a position as it would have been absent the breach."[81] To do so, the plaintiff "must present sufficient evidence to show entitlement to damages in an amount which can be ascertained with reasonable certainty."[82] Generally,

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[78] *Triad Architects, LTD*, 2011-Ohio-4979 at ¶ 15. *See Kaufman*, 2004-Ohio-6346 at ¶ 28 (Citation omitted.) ("As a general rule, 'stipulations in an agreement are not to be construed as conditions precedent unless such construction is required by clear, unambiguous language; and particularly so where a forfeiture would be involved or inequitable consequences would result.'").
[79] *Triad Architects, LTD*, 2011-Ohio-4979 at ¶ 16, citing Restatement of the Law 2d, Contracts, Section 227, Comment *b* and Section 229, Comment *b*.
[80] *Triad Architects, LTD*, 2011-Ohio-4979 at ¶ 16, citing Restatement of the Law 2d, Contracts, Section 227, Comment *b*.
[81] *Garfalo v. Chicago Title Ins. Co.*, 104 App.3d 95, 108, 661 N.E.2d 218 (8th Dist. 1995).
[82] *James v. Sky Bank*, 11th Dist. Trumbull No. 2010-T-0116, 2012-Ohio-3883, ¶ 33, quoting *Tri-State Asphalt Corp. v. Ohio Dept. of Transp.*, 10th Dist. Franklin No. 94API07-986, 1995 WL 222160 (Apr. 11, 1995).

"substantial compliance will support a recovery of the contract price less the allowance for defects in performance or damages for failure to strictly comply with the contract."[83]

In the instant case, the plaintiffs have moved for summary judgment against the defendants for breach of contract. They argue that, at the very least, the court should award summary judgment on the issue of liability. The first step in the court's analysis is to determine whether there is any genuine issue as to any material fact that remains to be litigated.[84]

The parties are in agreement regarding the material facts for liability. The parties agree that they entered into a contract, which is the Agreement referenced herein. The parties agree that on the date of closing the defendants did not pay the plaintiffs for on hand inventory of saleable goods. They agree that the plaintiffs provided the defendants an inventory list, although they dispute as to whether that was provided at closing or the following week. They agree that the plaintiffs have provided receipts to the defendants for at least some of the on hand inventory.

The defendants submit, and the plaintiffs have not disputed, that they did not provide the defendants with receipts until October or November of 2014, that some items on the inventory list are still without corresponding receipts, and that some of the items on the inventory list were not saleable due to health code infractions, among other reasons. Finally, they agree that the defendants retained the on hand inventory, with the exception of the scones stored at the plaintiffs' residence.

To succeed on their breach of contract claim, the plaintiffs must prove (1) the existence of a contract, (2) that the plaintiffs fulfilled their contractual obligations, (3) that

[83] *Hansel*, 2002-Ohio-198 at ¶ 13, citing *Spitzer v. Forrester*, 2d Montgomery No. 7087, 1981 WL 2572 (Oct. 19, 1981).
[84] Civ.R. 56(C).

the defendants failed to fulfill their contractual obligations, and (4) that the plaintiffs incurred damages as a result.[85] As to the first element, the defendants agree that the parties had entered into a valid contract.[86] However, as to the second and third elements, the parties disagree as to whether the plaintiffs and defendants fulfilled their contractual obligations under Section Three of the Agreement.

Under Section Three, the plaintiffs were obligated to "provide receipts for saleable goods on hand to the Buyer at the closing." The plaintiffs aver that they satisfied their duties by providing the defendants with receipts. The plaintiffs did not submit evidence to dispute the defendants' claim that the receipts were not produced until October or November 2014, more than half a year after closing. The defendants argue that the plaintiffs are in breach because they failed to provide an inventory list and receipts at closing, which was a condition precedent to the defendants' duty to pay for the on hand inventory. As such, the defendants posit that they were never required to perform under Section Three.

First, it should be noted that Section Three does not obligate the plaintiffs to provide an inventory list to the defendants, whether at the closing or otherwise. Thus, their dispute as to when the inventory list was provided, whether at the closing or in the following week, is not a material fact that would prevent this court from ruling on summary judgment.

Regarding the defendants' argument, a "condition precedent is an event that must occur before an obligation in the contract will become effective," and they are

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[85] *Patel*, 2012-Ohio-3319 at ¶ 25, citing *S & G Invests., L.L.C.*, 2010-Ohio-3691 at ¶ 12.
[86] Defs. Resp. at pg. 4.

highly disfavored.[87] In examining the Agreement, it contains no express language stating that the plaintiffs must provide the receipts to the defendants at closing as a condition precedent to the defendants' payment, nor is there other clear language suggesting that Section Three is a condition precedent. The court looks to the parties' intent to ascertain whether there is a condition precedent.[88] The parties could have easily provided that the defendants will pay the plaintiffs "contingent upon" or "only if" they receive inventory receipts at the closing, yet they did not.

The law especially disfavors construing Section Three as a condition precedent because doing so would result in the plaintiffs' forfeiture of payment for goods that the defendants have retained.[89] Although some goods were not saleable, the defendants did admit at oral argument that some goods they retained were saleable, namely the non-perishable items.

For these reasons, the court cannot conclude that Section Three contains a condition precedent for the defendants' payment for on hand inventory. Rather, because the promises between the parties are bilateral, mutually dependent, and concurrent, the court must instead apply the doctrine of substantial performance to determine whether the plaintiffs materially breached the contract.[90]

Under the substantial performance doctrine, "where a contract is made for an agreed exchange of two performances, one of which is to be rendered first, substantial performance rather than exact, strict or literal performance by the first party of the terms

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[87] *Triad Architects, LTD*, 2011-Ohio-4979 at ¶¶ 14-15.
[88] Id. at ¶ 14 citing *Adkins*, 2009-Ohio-42 at ¶ 31.
[89] *Triad Architects, LTD*, 2011-Ohio-4979 at ¶ 15.
[90] *Kaufman*, 2004-Ohio-6346 at ¶ 30.

of the contract is adequate to entitle the party to recover on it."[91] The plaintiffs will not be considered to have materially breached Section Three if they substantially performed their duties.[92] The plaintiffs substantially performed under Section Three because they provided receipts to the defendants for the saleable goods that were on hand at the time of the closing. That the plaintiffs produced the receipts months late and did not produce some receipts at all are defects in the plaintiffs' performance that may affect any damages that the plaintiffs may receive.[93]

Having determined that the plaintiffs substantially performed under Section Three, the next issue is whether the defendants failed to fulfill their contractual obligations.[94] The defendants admit that at least some of the on hand inventory was saleable and accounted for in receipts they have received. Further, it is undisputed that the defendants have not paid the plaintiffs for any these goods. Therefore, the defendants are in breach of Section Three which clearly directs them to "pay Seller on the closing date the purchased cost of saleable goods on hand * * *."

The last issue on the breach of contract claim is whether the plaintiffs have incurred damages as a result of the defendants' breach, and if so, how much.[95] As to the issue of damages there are material facts at issue that remain to be litigated, namely determining which on hand inventory items have corresponding receipts and which of those goods were saleable.

Accordingly, because the plaintiffs substantially performed their obligations under Section Three of the Agreement to provide the defendants with receipts for on hand

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[91] Id. at ¶ 31.
[92] *Hansel*, 2002-Ohio-198 at ¶ 12.
[93] Id. at ¶ 13.
[94] *Patel*, 2012-Ohio-3319 at ¶ 25, citing *S & G Invests., L.L.C.*, 2010-Ohio-3691 at ¶ 12.
[95] *Patel*, 2012-Ohio-3319 at ¶ 25, citing *S & G Invests., L.L.C.*, 2010-Ohio-3691 at ¶ 12.

saleable goods, the defendants are liable to the plaintiffs for the costs of those saleable goods. As such, the court grants summary judgment on the issue of liability for the breach of contract claim. The question of damages will be resolved at trial.

The plaintiffs' motion for summary judgment is devoid of any argument or analysis for their unjust enrichment[96] claim or their request for the court to reform the contract to reflect the actual names of the parties. Although the plaintiffs' motion lacks any legal citations, including law to support its breach of contract claim, it does include arguments as to why its claim for breach of contract should be granted. However, the plaintiffs are completely silent on unjust enrichment and contract reformation. These latter issues were not broached at oral argument either. Given the absence of any argument and legal support regarding the unjust enrichment claim and the request for reformation, the court denies summary judgment as to those claims.

Lastly, at oral argument the plaintiffs stated that they do not oppose the defendants' motion to strike the affidavit of Sam White. As such, the motion to strike Sam White's affidavit is granted.

CONCLUSION

For the aforementioned reasons, the plaintiffs' motion for summary judgment is granted in part and denied in part. The court grants the plaintiffs' motion for liability on

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[96] Unjust enrichment requires the plaintiff to prove "(1) a benefit the plaintiff conferred upon the defendant; (2) the defendant's knowledge retaining the benefit and (3) the impropriety of defendant's retaining the benefit conferred without rendering payment to plaintiff for the same." *Thyssen Krupp Elevator Corp. v. Constr. Plus, Inc.*, 10th Dist. Franklin No. 09AP-788, 2010-Ohio-1649, ¶ 24, citing *Metz v. Am. Elec. Power Co., Inc.*, 10th Dist. Franklin No. 06AP-1161, 2007-Ohio-3325, ¶ 43.

the plaintiffs' breach of contract claim. The court denies the plaintiffs' motion for summary judgment on the damages for the breach of contract claim, as well as for the claim of unjust enrichment and the request for contract reformation. The court grants the defendants' motion to strike the affidavit of Sam White.

IT IS SO ORDERED.

DATED: 2-19-2016

Judge Jerry R. McBride

CERTIFICATE OF SERVICE

I hereby certify that copies of the within Decision/Entry were sent on this 19th day of February 2016 by e-mail to Zachary Gottesman, Attorney for the Plaintiffs, at zg@zgottesmanlaw.com, and to James A. Whitaker, at jim@whitakerattorneys.com, and Kristine L. Tammaro, at kristine@whitakerattorneys.com, Attorney for the Defendants.

Tammy Mey
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