[Cite as *Shaffer v. Triple Diamond Excavating*, 2010-Ohio-3808.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

ROY SHAFFER,	:	**O P I N I O N**
Plaintiff-Appellant,	:	
- vs -	:	**CASE NO. 2009-T-0104**
TRIPLE DIAMOND EXC., et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2008 CV 00712.

Judgment: Affirmed.

Michael Georgiadis, 135 Pine Avenue, S.E., #211, Warren, OH 44481, and *Rhonda L. Granitto Santha*, 6401 State Route 534, Farmington, OH 44491 (For Plaintiff-Appellant).

Timothy J. Hart, 136 North Water Street, #209, Kent, OH 44240 (For Defendants-Appellees).

MARY JANE TRAPP, P.J.

{¶1} Appellant, Roy Shaffer, appeals the judgment of the Trumbull County Court of Common Pleas, which found in favor of appellee, Jason Purdy, dba Triple Diamond Excavating, on Mr. Shaffer's breach-of-oral-contract claim. Following a bench trial, the court found that any oral agreement that may have existed between the parties was too indefinite to constitute a contract, and at best, a joint venture that fell through. We agree.

{¶2} **Substantive and Procedural History**

{¶3} In 2003, Mr. Shaffer, who built homes for investment purposes, was building a house located at 3077 Lyntz Townline Road. This was his first house on Lyntz Townline Road, although he anticipated building several more depending on its profitability.

{¶4} Mr. Shaffer engaged the services of his long-time childhood friend, Mr. Purdy, who ran an excavation and construction company, Triple Diamond Excavating, to perform certain excavation and construction work on and around the property. Sometime after contracting with Mr. Purdy, Mr. Shaffer claimed that they had entered into an oral agreement regarding a joint venture to install and connect the house to the sewer system and to extend the sewer system the length of the street to allow for future tie-ins from the main sewer line to all the lots on the street.

{¶5} By the time the house was finished in 2004, the parties had suffered a communication breakdown, and the extension project remained unfinished. In 2005, about a year and half after the house was built, Mr. Shaffer contracted with another company, Built Right Construction, who undertook the sewer project and completed it within two to three weeks. Soon after, Mr. Shaffer sold the house.

{¶6} Mr. Shaffer then filed suit against Mr. Purdy alleging that due to Mr. Purdy's breach of their oral agreement, the house sold for a lesser value and he incurred additional costs associated with servicing the loans and utility bills.

{¶7} At trial, each party testified as to the alleged oral contract. The trial court found that there was no written documentation as to the terms of any contract entered into by the parties, either for the work on the home or concerning the sewer system extension. Further, there was no document presented by either party that the court

could rely on to establish the terms of the parties' oral agreement. The estimated cost of the contemplated extension of the sewer system was $70,000 - $90,000, with all the work to be advanced by the parties: Mr. Purdy, the labor, and Mr. Shaffer, the materials. Both would apparently settle up after a third party tapped into the line. This sum was in addition to the $15,000 in excavation and construction work that Triple Diamond had already completed and that Mr. Shaffer had paid for over the course of the house construction.

{¶8} Mr. Shaffer testified that the sewer system was supposed to have been completed in 2003. Plans were prepared during the summer of 2003, but Mr. Purdy refused to begin another project when bills were outstanding for the excavation and construction work already performed. Those plans were then modified in 2005.

{¶9} In June of 2004, Mr. Purdy purchased the manhole covers and delivered them to the property, which does indicate that Mr. Purdy was still working toward the sewer extension. Mr. Shaffer could have, but opted not to, install a temporary holding tank system to mitigate any damages. Instead, Mr. Shaffer waited until nearly a year and half after the house was finished to contract with Built Right to complete the project.

{¶10} The court reviewed the six joint exhibits, finding that the total amount paid by Mr. Shaffer was substantially equal to Mr. Purdy's invoice, plus the costs of the sewer manholes, which were advanced by Mr. Purdy and left at the residence. Mr. Shaffer did not pay Mr. Purdy for any work performed until after April 27, 2004, and a final payment was made in October of that year.

{¶11} The court concluded that while Mr. Shaffer obviously incurred some loss from the parties' failure to conclude the venture, there was no written contract, and the

nature and extent of the oral agreement is unknown. Finding Mr. Shaffer had failed to prove by a preponderance of the evidence that an oral contract existed, judgment was entered in favor of Mr. Purdy.

{¶12} Mr. Shaffer now raises two assignments of error for our review:

{¶13} "[1.] The Trial Court erred in its determination that the nature of the relationship between the parties was too speculative to amount to a contractual agreement.

{¶14} "[2.] The trial court erred in its findings that there was only testimonial evidence and little other evidence to rely upon its determination."

{¶15} **The Alleged Oral Contract**

{¶16} In his first assignment of error, Mr. Shaffer contends the trial court erred in determining that no oral contract existed, and in failing to recognize that the damages Mr. Shaffer sought were the lost profits and additional costs he incurred due to the delay caused by the failure of the sewer extension project.

{¶17} "Three types of contractual obligations have been historically recognized by Ohio courts: express, implied in fact, and implied in law." *Dinunzio v. Murray*, 11th Dist. No. 2003-L-213, 2005-Ohio-4047, ¶17, citing *Vargo v. Clark* (1998), 128 Ohio App.3d 589, 595, citing *Legros v. Tarr* (1989), 44 Ohio St.3d 1, 6. "Express contracts are those in which the parties assent to the terms actually expressed through the written offer and acceptance. In an implied-in-fact contract, 'the meeting of the minds is shown by the surrounding circumstances that demonstrate that a contract exists as a matter of tacit understanding.' Implied-in-law contracts are not in the nature of a true contract, but are rather quasi- or constructive contracts imposed by courts and based upon equitable

principles, where 'civil liability attaches by operation of law,' if it would be unjust for one party to receive benefits that he is not entitled to retain." *Dinunzio* at ¶17 (internal citations omitted).

{¶18} In order to be successful on a breach of contract claim, oral or written, Mr. Shaffer was required to provide evidence of (1) the existence of a contract; (2) performance on the part of Mr. Shaffer; (3) breach by Mr. Purdy; and (4) damages. *Huffman v. Kazak Brothers* (Apr. 12, 2002), 11th Dist. No. 2000-L-152, 2002 Ohio App. LEXIS 1660, 11, citing *Doner v. Snapp* (1994), 98 Ohio App.3d 597, 600.

{¶19} Most fundamentally, "[t]o have a valid and enforceable contract there must be an offer by one party and an acceptance of the offer by another." Id. at 11-12, citing *Camastro v. Motel 6 Operating, L.P.,* (Apr. 27, 2001), 11th Dist. No. 2000-T-0053, 2001 Ohio App. LEXIS 1936, 9. "In turn, 'for there to be a proper offer and acceptance, parties to a negotiation must have a meeting of the minds.'" Id. at 12, quoting *Gall v. Trumbull Mem. Hosp.*, (July 7, 2000), 11th Dist. No. 99-T-0102, 2000 Ohio App. LEXIS 3053, 7. "Stated differently, when entering into a contract, 'parties must have a distinct and common intention which is communicated by each party to the other.'" Id., quoting *McCarthy, Lebit, Crystal & Haiman Co., L.P.A. v. First Union Mgt., Inc.* (1993), 87 Ohio App.3d 613, 620. Therefore, "[i]f the minds of the parties have not met, no contract is formed." Id.

{¶20} "The party claiming that there was a meeting of the minds may show this by 'the surrounding circumstances which make it inferable that the contract exists as a matter of tacit understanding.'" Id., quoting *Gall* at 8, quoting *Biddle v. Warren Gen. Hosp.* (Mar. 27, 1998), 11th Dist. No. 96-T-5582, 1998 Ohio App. LEXIS 1273. Courts,

however, "should only consider objective manifestations of intent when determining whether the parties had a meeting of the minds in a particular case." Id. at 13, citing *Nilavar v. Osborn* (1998), 127 Ohio App.3d 1, 12.

{¶21} "In addition to a meeting of the minds, a contract must also be definite and certain with respect to its essential terms." Id., citing *Episcopal Retirement Homes, Inc. v. Ohio Dept. of Indus. Relations* (1991), 61 Ohio St.3d 366, 369. "Essential terms include such things as the identity of the parties to the contract, the subject matter of the contract, and consideration." Id., citing *McMillian v. Haueter* (Apr. 30, 1999), 11th Dist. Nos. 98-G-2124 and 98-G-2125, 1999 Ohio App. LEXIS 2019, 11, quoting *Alligood v. Proctor & Gamble Co.* (1991), 72 Ohio App.3d 309, 311-312.

{¶22} "[T]he terms of a contract are sufficiently certain if they 'provide a basis for determining the existence of a breach and for giving an appropriate remedy.'" Id. at 13-14, citing *Nilavar* at 13, quoting *Mr. Mark Corp. v. Rush, Inc.* (1983), 11 Ohio App.3d 167, 169. Furthermore, "if the court can determine that the parties intended to be bound, it may fashion those less essential terms that were omitted in order to reach a fair and just result." Id. at 14, quoting *Gurich v. Janson* (Nov. 17, 2000), 11th Dist. No. 99-A-0006, 2000 Ohio App. LEXIS 5369, 12.

{¶23} However, as the Supreme Court of Ohio observed in *Litsinger Sign Co., Inc. v. Am. Sign Co.* (1967), 11 Ohio St.2d 1:

{¶24} "It is settled law that if the parties' manifestations taken together as making up the contract, when reasonably interpreted in the light of all the circumstances, do not enable the court to determine what the agreement is and to

enforce it without, in effect, 'making a contract for the parties,' no enforceable obligation results." Id. at 14.

{¶25} Our review reveals Mr. Shaffer did not introduce any evidence demonstrating a meeting of the minds with respect to the extension of the sewer system. There is no doubt the parties had some sort of agreement as to a joint venture, but the terms of that agreement are not evidenced by the sparse record provided in this case.

{¶26} The evidence reflects that the parties' past dealings were conducted as events occurred, tied loosely by estimated billings and submitted receipts for materials and labor. Mr. Purdy's requests for payment and Mr. Shaffer's payments were sporadic and untimely. Moreover, the profits from the sewer system extension venture were speculative and uncertain as they were not going to be fully realized until future homes were built. Mr. Purdy was expected to perform the extension with no expectation of payment until some later, unknown, and unspecified date, while Mr. Shaffer was to pay for the needed materials.

{¶27} The parties' testimony reveals they never agreed to a start or end time for the project. Mr. Purdy insisted that the project was not to begin until his off-season, and, further, that he was not going to begin another project until he was paid for the work already performed. Mr. Shaffer contended the project was to be done before the house was completed. Neither gave a certain time line or even an approximation. It cannot be said that there was mutual assent or a meeting of the minds as to any material terms of the project. Both parties were proceeding under different assumptions as to time for performance and payment.

{¶28} "[F]or a contract to exist, there must first be mutual assent or a meeting of the minds as to the offer and acceptance." *Camastro* at 9, citing *Ravenna v. Fouts* (Feb. 4, 1994), 11th Dist. No. 92-P-0098, 1994 Ohio App. LEXIS 379, 8; *Noroski v. Fallet* (1982), 2 Ohio St.3d 77, 79. See, also, *Sat Adlaka v. Valley Electric Consolidated, Inc.*, 11th Dist. No. 2007-T-0071, 2008-Ohio-1690, ¶24 (because the parties never reached a verbal meeting of the minds concerning the essential terms of a contract, there was no evidence the parties entered into an oral contract).

{¶29} **Speculation as to Lost Profits**

{¶30} Mr. Shaffer further alleges he lost certain profits due to the delay in selling the home that was caused by the lack of a septic system. He did not, however, mitigate the damages by installing a septic holding tank. Furthermore, any loss of profit from the delay in the sale of the home caused by the failure to complete the sewer system extension installation is speculative at best. Moreover, once hired, Built Right Construction completed the project within two to three weeks. Nothing prevented Mr. Shaffer from contracting with another company, such as Built Right, before this time.

{¶31} Thus, even if we were to find mutual assent existed in this case, there was no evidence as to the essential terms of the contract and no evidence that the breach of the "oral agreement" was the proximate cause of Mr. Shaffer's loss of profit. "A valid contract must 'be specific as to its essential terms, such as identity of the parties to be bound, the subject matter of the contract, consideration, a quantity term, and a price term.'" *Gurich* at 12, citing *Alligood* at 311.

{¶32} "[T]he terms of a contract are sufficiently certain if they 'provide a basis for determining the existence of a breach and for giving an appropriate remedy.'" *Huffman*

at 20, quoting *Nilavar* at 13. "Here, while one may infer from the record what would constitute a breach, there is, at the same time, nothing in the record that would allow a trier of fact to 'fashion those less essential terms that were omitted in order to reach a fair and just result, concerning an appropriate remedy.'" Id. at 20-21, citing *Gurich* at 12.

{¶33} To support his breach of contract claim, Mr. Shaffer was first obligated to show, by a preponderance of the evidence, that the parties had an enforceable contract, which he failed to do. The record clearly demonstrates the parties never reached a meeting of the minds, and even if they had, the terms of the contract were not specific enough to allow enforcement.

{¶34} Mr. Shaffer's first assignment of error is without merit.

{¶35} **<u>Lack of Evidence</u>**

{¶36} Mr. Shaffer next argues that the written evidence of other work performed by Mr. Purdy and a blueprint for the sewer system extension project is sufficient to find an oral contract existed. Thus, he contends, without citing to any legal authorities in support, that the trial court erred in finding there was a lack of evidence to support the parties' verbal agreement.

{¶37} "Pursuant to App.R. 16(A)(7), an appellant is required to include in his appellate brief '[a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies.'" *Craft v. Edwards*, 11th Dist. No. 2007-A-0095, 2008-Ohio-4971, ¶26.

{¶38} "An appellant bears the burden of affirmatively demonstrating error on appeal. It is not the obligation of an appellate court to search for authority to support an appellant's argument as to an alleged error." Id. at ¶28 (internal citations omitted).

{¶39} Thus, for this reason alone, Mr. Shaffer's second assignment of error is without merit. In any case, even if it were not, there was no evidence, written or otherwise, to support the finding that an oral contract existed with evidence of the essential terms that could be enforced by the court.

{¶40} Six joint exhibits were admitted into evidence. The first exhibit is an estimate of the initial work that was performed by Mr. Purdy on the home. The second exhibit consists of five checks from Mr. Shaffer to Triple Diamond with no indication of what they were for, and no receipts or billing attached. Exhibit three is an invoice from Poland Concrete Products, Inc. to Triple Diamond for the sewer manholes. Exhibit four is a letter sent to Mr. Purdy by Mr. Shaffer's attorney informing Mr. Purdy that he violated the parties' oral agreement. The letter demanded an accounting of all the money that was to be reimbursed to Mr. Shaffer for any and all monies spent on the sewer system extension thus far, minus costs. The fifth exhibit is a list purportedly created by Mr. Purdy that outlines the proposed and actual work that was completed on the home. It is unsigned and not dated. Finally, exhibit six is a series of utility and loan servicing bills Mr. Shaffer incurred while the house stood vacant.

{¶41} The parties' testimony revealed only differing minds as they each contradicted the other in regard to time of performance and payment. The evidence does reflect that the parties had a customary practice of conducting business with one another. Unfortunately, this practice did not include written contracts, at the very least

memoranda as to the basic terms and conditions of the job, or documented billing and payments. Even if the court found an oral contract existed despite the parties' contradicted testimony, the essential terms of such a contract cannot be gleaned and fashioned from the sparse record provided.

{¶42} Mr. Shaffer's second assignment of error is without merit.

{¶43} The judgment of the Trumbull County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

COLLEEN MARY O'TOOLE, J.,

concur.