[Cite as *Untied v. J.J. Detweiler Ents., Inc.* , 2009-Ohio-3976.]

COURT OF APPEALS
COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
CHARLES UNTIED, et al.,	:	Sheila G. Farmer, P.J.
	:	W. Scott Gwin, J.
Plaintiffs-Appellees	:	Julie A. Edwards, J.
	:	
-vs-	:	Case No. 08 CA 0016
	:	
	:	
J.J. DETWEILER ENTERPRISES, INC., et al.,	:	O P I N I O N
Defendants-Appellants		

CHARACTER OF PROCEEDING:	Civil Appeal from Coshocton County Court of Common Pleas Case No. 04-CI-620
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT ENTRY:	August 10, 2009
APPEARANCES:	
For Plaintiffs-Appellees	For Defendants-Appellants
RANDOLPH L. SNOW Black, McCuskey, Souers & Arbaugh 220 Market Avenue, South, Suite 1000 Canton, Ohio 44702	ROBERT A. SKELTON Pomerene Burns & Skelton 309 Main Street Coshocton, Ohio 43812

Edwards, J.

{¶1} Defendants-appellants, J.J. Detweiler Enterprises, Inc. and Joseph J. Detweiler, appeal from the trial court's denial, upon remand, of appellants' Motion for New Trial.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant Joseph Detweiler is a land developer and the sole shareholder of appellant J.J. Detweiler Enterprises, Inc. Appellants ran an advertisement in the Columbus Dispatch advertising acreage for sale. The advertisement stated that five (5) acres with free gas could be purchased for $9,950.00.

{¶3} On or about July 12, 1987, appellees Charles and Edith Untied entered into an agreement with appellant J.J. Detweiler Enterprises, Inc. to purchase 5.1 acres for $8,950.00. Exhibit A, which was attached to the agreement, states, in relevant part, as follows:

{¶4} "Buyer will install meter for free gas allowance, which is 200,000 cubic feet per year. Any amount of gas used over the allowance will be billed at the current wholesale marketing rate. Buyer will install all gas lines at his/her expense. Gas lines must be buried a minimum of twenty-four (24) inches deep. A yearly gas availability and maintenance fee of Fifty and 00/100 Dollars ($50.00) will be due January 1st of each year, to be paid directly to J.J. DETWEILER ENTERPRISES, INC."

{¶5} A warranty deed was subsequently prepared by appellant J.J. Detweiler Enterprises, Inc. and provided to appellees. Attached to the warranty deed and recorded along with the deed was an Exhibit A. Such Exhibit A similarly provides, in relevant part, as follows: "Buyer will install meter for free gas allowance, which is

200,000 cubic feet per year. …A yearly gas availability and maintenance fee of Fifty and 00/100 Dollars ($50.00) will be due January 1st of each year, to be paid directly to J.J. DETWEILER ENTERPRISES, INC." The fee was later increased to $100.00.

{¶6} Appellees moved onto the property and received free gas until June of 1995. On or about June 15, 1995, appellant J.J. Detweiler Enterprises, Inc. sent a letter to appellee Charles Untied advising him that "the gas well which supplied the free gas to you…has stopped producing gas. We temporarily tied into an old well which will not last since it stopped productions a long time ago. The bottom line is that since the well is dry you should get an alternate source of fuel. I suggest you do this as soon as possible since the temporary well is unpredictable." In a second letter to appellee Charles Untied on or about December 20, 1995, appellant J.J. Detweiler Enterprises, Inc. informed appellee Charles Untied that he would need to have an alternate source of fuel by January 1, 1996, because the gas wells were going to be shut down. Appellees purchased propane as an alternate source of fuel and have been using the same to heat their home since 1996.

{¶7} On October 29, 2004, appellees filed a complaint for breach of covenant against appellant J.J. Detweiler Enterprises, Inc. Appellees filed an amended complaint for breach of covenant and misrepresentation/ fraud against both appellants on January 3, 2006. Appellees' First Claim, in their amended complaint, is captioned "Breach of Contract."

{¶8} On May 25, 2006, appellants filed a Motion in Limine with respect to appellees' First Cause of Action. Appellants, in such motion, asked the trial court for an order prohibiting appellees from presenting testimony concerning oral representations

made by appellee for purposes of proving appellees' First Cause of Action. Appellants argued, in part, that because appellees, in their First Cause of Action, had elected to sue on the basis of a written contract, "oral representations should not be admissible." The trial court denied such motion via a Judgment Entry filed on August 4, 2006.

{¶9} Thereafter, on September 1, 2006, appellants filed a Motion to Dismiss appellees' First Cause of Action, arguing that the statute of limitations for a cause of action of a written breach of contract had passed. Appellants specifically argued that an agreement to provide free gas would fall under the Uniform Commercial Code and that R.C. 1302.98 set forth a four year statute of limitations for breach of any such contract. Pursuant to a Judgment Entry filed on September 25, 2006, the trial court denied such motion.

{¶10} Subsequently, a jury trial commenced on September 26, 2006. The jury found in favor of appellees as against appellant J.J. Detweiler Enterprises, Inc. on the breach of contract claim in the amount of $19,500.00, and for appellants on appellees' fraud claim. Following the jury's decision, appellants moved for a judgment notwithstanding the verdict due to inconsistencies with some of the jury's answers to interrogatories. In the alternative, appellants requested a new trial. Pursuant to a Judgment Entry filed on January 12, 2007, the trial court granted the motion for judgment notwithstanding the verdict and set aside the jury's verdict. The trial court deemed the motion for new trial moot and, therefore, denied same.

{¶11} Appellees then appealed. Pursuant to an Opinion filed on February 21, 2008 in *Untied v. J.J. Detweiler Enterprises, Inc*., Coshocton App. No. 07CA003, 2008-Ohio-838, this Court held that the trial court had erred in granting the motion for

judgment notwithstanding the verdict. We further remanded the matter to the trial court to rule on appellants' pending motion for a new trial. As memorialized in a Judgment Entry filed on July 23, 2008, the trial court denied such motion, finding that there was sufficient evidence in the record to support the jury's verdict and the award of money judgment in appellees' favor.

{¶12} Appellants now raise the following assignments of error on appeal:

{¶13} "I. THE TRIAL COURT ERRED IN ALLOWING EVIDENCE CONCERNING A BREACH OF CONTRACT, AND IN DENYING APPELLANT'S [SIC] MOTION FOR A DIRECTED VERDICT AS APPELLEE'S COMPLAINT ALLEGES BREACH OF A WARRANTY DEED COVENANT AND NO COVENANT EXISTS THAT WAS BREACHED.

{¶14} "II. THE TRIAL COURT ERRED IN DENYING APPELLANTS' MOTION TO DISMISS AND MOTION FOR A DIRECTED VERDICT FOR VIOLATION OF THE STATUTE OF LIMITATIONS AS TO A WRITTEN BREACH OF CONTRACT CASE.

{¶15} "III. THE TRIAL COURT ERRED IN ALLOWING INTO EVIDENCE TESTIMONY AS TO ANY ORAL AND/OR WRITTEN PROMISES ALLEGED BY THE APPELLEE TO BE MADE BY THE APPELLANTS WHICH WERE NOT CONTAINED WITHIN THE DEEDS AND/OR EXHIBIT 'A' ATTACHED TO THE APPELLEE'S AMENDED COMPLAINT.

{¶16} "IV. THE TRIAL COURT INCORRECTLY INSTRUCTED THE JURY CONCERNING DAMAGES AND ERRED IN ALLOWING INTO EVIDENCE INADMISSIBLE TESTIMONY AND DOCUMENTATION CONCERNING DAMAGES

AND ERRED IN NOT GRANTING APPELLANT'S [SIC] MOTION FOR DIRECTED VERDICT.

{¶17} "V. THE TRIAL COURT ERRED IN NOT GRANTING A MOTION FOR DIRECTED VERDICT AS APPELLEES FAILED TO PROVE THAT THERE WAS A WRITTEN CONTRACT WHICH WAS BREACHED.

{¶18} "VI. THE TRIAL COURT ERRED IN NOT GRANTING APPELLANT'S [SIC] MOTION FOR A DIRECTED VERDICT BASED UON THE DOCTRINE OF MERGER.

{¶19} "VII. THE TRIAL COURT ERRED IN NOT GRANTING THE APPELLANT'S [SIC] MOTION FOR A NEW TRIAL."

I

{¶20} Appellants, in their first assignment of error, argue that the trial court erred in allowing in evidence concerning a breach of contract. Appellants further argue that the trial court erred in denying their motion for a directed verdict because, while appellees complaint alleges a breach of a warranty deed covenant, no covenant exists that was breached.

{¶21} Appellants, in their first assignment, initially argue that the trial court erred in allowing evidence concerning a breach of contract. Appellants specifically contend that appellees' complaint alleged a breach of warranty deed covenants rather than a breach of contract action. According to appellants, "[e]ach paragraph in the First Cause of Action states and alleges that promises were made to the Plaintiff in their deed which were breached by the Defendant/Appellant."

{¶22} Civ.R. 8(A) requires no more than a "short and plain statement of the claim" demonstrating that an aggrieved party is entitled to relief. While Civ.R. 8(A) provides that a pleading which sets forth a claim for relief need not state all elements of the claim, enough must be pleaded so that the person or entity sued has adequate notice of the nature of the action." *Saylor v. Providence Hosp.* (1996), 113 Ohio App.3d 1, 4, 680 N.E.2d 193.

{¶23} The first cause of action in appellees' First Amended Complaint is titled "FIRST CLAIM-BREACH OF CONTRACT." We find that the same alleges that appellants breached a written agreement to provide free gas. We find that the complaint put appellants on notice that appellees were asserting a breach of contract action against them.

{¶24} Moreover, as is stated above, appellants in various motions filed with the trial court, stated that appellees had filed a breach of contract action. Thus, appellants were on notice that appellees were pursuing such a claim. Finally, one court has held that a clause in a deed was a "contract in writing" for purposes of the statute of limitations. See *Mccormick v. Raff* (1938), 61 Ohio App. 200, 22 N.e.2d 510.

{¶25} Appellants' first assignment of error is, therefore, overruled.

III, V

{¶26} Appellants, in their fifth assignment of error, argue that the trial court erred in not granting appellants' motion for a directed verdict as to appellees' breach of contract claim. In their third assignment of error, appellants contend that the trial court erred in allowing in testimony as to any oral and/or written promises alleged by

appellees to have been made by appellants which were not contained in Exhibit A. We agree.

{¶27} Civ. R. 50 states in pertinent part: "When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue."

{¶28} A motion for directed verdict presents a question of law, not fact, even though we review and consider the evidence. *O'Day v. Webb* (1972), 29 Ohio St.2d 215, 280 N.E.2d 896, syllabus 3 by the court. Thus, we review a motion for directed verdict using the de novo standard of review. *Cleveland Electric Illuminating Company v. Public Utility Commission,* 76 Ohio St.3d 521, 523, 1996-Ohio-298, 668 N.E.2d 889, citation deleted.

{¶29} As is stated above, appellees, in their complaint, alleged that appellants breached a written agreement to provide free gas to appellees.[1] Appellants, in the case sub judice, moved for a directed verdict on appellees' breach of contract claim, arguing that there was no written contract between the parties.

{¶30} The elements of a contract include the following: an offer, an acceptance, contractual capacity, consideration (the bargained-for legal benefit or detriment), a manifestation of mutual assent, and legality of object and of consideration. *Kostelnik v. Helper,* 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58, ¶ 16. The contract must be

[1] Appellants could not have asserted a breach of an oral agreement to supply free gas because an action for breach of an oral agreement would have been barred by the six year statute of limitations contained in R.C. 2305.07.

definite and certain. *Episcopal Retirement Homes, Inc. v. Ohio Dept. of Indus. Relations* (1991), 61 Ohio St.3d 366, 369, 515 N.E.2d 134. A party asserting a contract must prove by a preponderance of the evidence the existence of the elements of the contract. *Cooper & Pachell v. Haslage* (2001), 142 Ohio App.3d 704, 707, 756 N.E.2d 1248.

{¶31} We find that the alleged contract in this case, Exhibit A, lacks sufficient information to constitute a written contract. The same is not definite and certain. The written document produced at trial, which was attached to the warranty deed and recorded along with the deed, states, in relevant part, as follows: "Buyer will install meter for free gas allowance, which is 200,000 cubic feet per year…A yearly gas availability and maintenance fee of Fifty and 00/100 Dollars ($50.00) will be due January 1st of each year, to be paid directly to J.J. DETWEILER ENTERPRISES, INC." Appellees were the "Buyer" referred to. The document further lists a number of restrictions that appellees agreed to follow. There is no language in Exhibit A obligating appellants to provide gas, free or otherwise, to appellees. Nowhere in such document is it specified who or what entity will provide the free gas or for how long it will be provided. In fact, the language of Exhibit A does not impose any contractual obligations on appellant. Moreover, while Exhibit A is signed by appellees, it was not signed by appellants. Finally, while appellees, in their brief, emphasize that appellant Joseph Detweiler, on a number of occasions, testified that a written contract existed, whether or not a contract exists is a legal question.

{¶32} Based on the foregoing, we find that the trial court erred in denying appellants' motion for a directed verdict.

{¶33} We note that appellants, in their third assignment of error, contend that the trial court erred in allowing in parol evidence as to any oral and/or written promises allegedly made by appellants which were not contained in Exhibit A. Appellees, in their brief, contend that parol evidence was admissible to resolve any ambiguity in the term "free gas allowance".

{¶34} However, if a writing leaves an agreement vague and indefinite as to an essential term, there is no contract and one cannot be created through the use of parol evidence. *Beidler v. Davis* (1943), 72 Ohio App. 27, 50 N.E.2d 613. Having found that there is no written contract, we agree that the trial court erred in allowing in parol evidence.

{¶35} Appellant's third and fifth assignments of error are, therefore, sustained.

II, VI, VII

{¶36} Based on our disposition of appellants' third and fifth assignments of error, appellants' second, fourth, sixth and seventh assignments of error are moot.

{¶37} Accordingly, the judgment of the Coshocton County Court of Common Pleas is reversed and this matter is remanded to the trial court for further proceedings.

By: Edwards, J.

Farmer, P.J. and

Gwin, J. concur

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JUDGES

JAE/d0319

[Cite as *Untied v. J.J. Detweiler Ents., Inc.* , 2009-Ohio-3976.]

IN THE COURT OF APPEALS FOR COSHOCTON COUNTY, OHIO

FIFTH APPELLATE DISTRICT

CHARLES UNTIED, et al.,	:	
Plaintiffs-Appellees	:	
-vs-	:	JUDGMENT ENTRY
J.J. DETWEILER ENTERPRISES, INC., et al.,	:	
Defendants-Appellants	:	CASE NO. 08 CA 0016

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Coshocton County Court of Common Pleas is reversed and this matter is remanded to the trial court for further proceedings. Costs assessed to appellees.

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JUDGES