

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

JOSEPH I. BOULLATA AND LAUREL	:	IN THE SUPERIOR COURT OF
H. BOULLATA, HUSBAND AND WIFE	:	PENNSYLVANIA
	:	
Appellant	:	
	:	
v.	:	
	:	
SL WILSON REAL ESTATE SERVICES,	:	
INC., T/D/B/A WILKINSON DUNN	:	
CO., N/K/A CENTURY 21 GOLD STAR	:	
REAL ESTATE	:	No. 967 MDA 2021

Appeal from the Order Entered June 24, 2021,  
in the Court of Common Pleas of Tioga County,  
Civil Division at No(s): 549 CV 2017.

BEFORE: PANELLA, P.J., KUNSELMAN, J., and KING, J.

MEMORANDUM BY KUNSELMAN, J.:

**FILED: JUNE 13, 2022**

Joseph and Laurel Boullata appeal from the order granting summary judgment to SL Wilson Real Estate Services, Inc., t/d/b/a Wilkinson Dunn Co., n/k/a Century 21 Gold Star Real Estate ("Century 21").<sup>1</sup> The Boullatas sued Century 21 for allegedly breaching a **written** contract while serving as the Boullatas' real-estate agent. Because the Boullatas failed to produce such a writing by the close of discovery, they did not prove the legal theory alleged in their Complaint, and we affirm.

---

<sup>1</sup> The Boullatas named several other defendants in their Complaint, but none of those other defendants remained a party to the case. Hence, we removed their names from the caption.

Also, the Boullatas' breach-of-contract claim against Century 21 was the only claim pending when the trial court granted summary judgment. Thus, the order disposed of all claims and all parties. It was a final, appealable order; we have appellate jurisdiction. **See** Pa.R.A.P. 341(b).

“In reviewing an order granting a motion for summary judgment, an appellate court must examine the entire record in the light most favorable to the non-moving party and resolve all doubts against the moving party.” ***Donegal Mut. Ins. Co. v. Fackler***, 835 A.2d 712, 715 (Pa. Super. 2003). As such, we review the evidence favorable to the Boullatas (*i.e.*, the non-moving party) and accept as true the facts they related during their depositions.

The Boullatas are residents of Montgomery County. In the late spring of 2013, they sought a vacation home in north-central Pennsylvania. They therefore contacted Annette Hamon, a real-estate broker with Century 21 in Tioga County. She served as the Boullatas’ agent and showed them several properties. ***See*** 10/23/20 Depo. of Joseph Boullata at 15-16. Ms. Hamon eventually showed them the home of George and Helen Krasselt (“Sellers”). The Sellers and the Sellers’ agent were present for the Boullatas’ walkthrough. In the garage, the Boullatas observed numerous “blue tanks” for “filtering water that comes from the well.” ***Id.*** at 23-24.

On July 20, 2013, the Boullatas and Sellers entered into an agreement of sale for the property, and the Boullatas signed a Consumer Notice that Ms. Harmon provided them. The Notice contained all of the language required under 49 Pa. Code §35.336, including a disclaimer at the top that “THIS IS NOT A CONTRACT.” ***Id.*** at 18; Ex. 1 of Depo. of Mr. Boullata at 1 (capitalization in original and in 49 Pa. Code §35.336).

The Boullatas and Century 21 executed no other writings. Instead, Mr. Boullata recalled "just a verbal agreement" that Ms. Hamon would represent them as their agent. *Id.* at 19.

Four days later, Ms. Hamon e-mailed the Sellers' Disclosure Form to the Boullatas. *See id.* at 30. Regarding the property's well water, the Sellers left the Disclosure Form mostly blank. That section of the Form was as follows:

**8. WATER SUPPLY**

(a) What is the source of your drinking water?  Public Water  Well Water  Community Water  None  Other (explain): \_\_\_\_\_

(b) When was your water last tested? \_\_\_\_\_

Test results: \_\_\_\_\_

If your drinking water source is not public, is the pumping system in working order?  Yes  No

If "no," explain: \_\_\_\_\_

(c) Do you have a softener, filter, or other treatment system?  Yes  No

If you do not own the system, explain: \_\_\_\_\_

(d) Have you ever had a problem with your water supply?  Yes  No

(e) Has your well ever run dry?  Yes  No  Not Applicable

(f) Is there a well on the property not used as the primary source of drinking water?  Yes  No

If yes, is the well capped?  Yes  No

(g) Is the water system shared?  Yes  No

(h) Are you aware of any leaks or other problems, past or present, relating to the well's supply, pumping system, and related items? \_\_\_\_ Yes \_\_\_\_ No

**Explain any "yes" answers in this section, including the location and extent of any problem(s) and any repair or mediation efforts:** \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

**See *id.*** at 31-32; Ex. 3 of Depo. of Joseph Boullata at 2 (checkmarks handwritten in original).

The incomplete Sellers' Disclosure Form did not concern the Boullatas, because they were not "familiar with these kinds of documents." ***Id.*** at 32-33. Instead, they "assumed everything was correct and [Ms. Hamon] would let [them] know if there was anything that was amiss." ***Id.*** at 33. Neither of the Boullatas asked Ms. Hamon any questions after reading the Sellers' Disclosure Form.

Next, the Boullatas hired a home inspector. The Boullatas, the Sellers, and the Sellers' agent attended the inspection, but Ms. Hamon did not. During the inspection, the Boullatas asked the inspector about the blue tanks in the garage. He could only say "something to the effect that [they were] filtering water." ***Id.*** at 45. Mr. Boullata inquired why the property had multiple tanks, whereas the other homes they toured had fewer filtration tanks. The home inspector did not know.

The Sellers' agent then went upstairs to present Mr. Boullatas' question to the Sellers. When the Sellers' agent returned, she told the Boullatas, "there

was an oil spill at some point and [the Sellers] had extra tanks there just in case they needed it, but there was no problem anymore, and the tanks were offline[. They] weren't necessary." **Id.** at 46. Mr. Boullata interpreted "oil spill" as "lawnmower oil or something" similar. **Id.** at 47.

Moreover, the Sellers' agent made it seem like the spill "had been years in the past" and there was "nothing to be concerned about." **Id.** at 48. Ms. Boullata recalled that the Sellers' agent specifically said, "It was taken care of years ago and there's no problem at all." 10/23/20 Depo. of Laurel Boullata at 21. As a result, the Boullatas never relayed the "oil spill" matter to Ms. Hamon.

The Boullatas closed on the property on September 27, 2013, and they began making weekend visits to the property to perform various repairs. Initially, there were no issues with the well water. A few months later, the water started to smell rubbery. This prompted the Boullatas to call a well technician to investigate.

"As it turned out, the gentlemen who came . . . happened to have been the person [who was] involved with the property" in the past. 10/23/20 Depo. of Joseph Boullata at 60. Upon smelling the water, he told the Boullatas, "You've got fuel in your water." **Id.** The well technician related that "there had been a . . . diesel fuel leak." **Id.** The Sellers had placed an above-ground, diesel-fuel tank on the property that leaked and poisoned the well.

On December 5, 2013, the Boullatas e-mailed Ms. Hamon to inform her of the situation and that they would undertake additional testing. Ms. Hamon

never replied. **See** 10/23/20 Depo. of Laurel Boullata at 27. After further investigation, the Boullatas discovered that, not only had the Sellers known of the diesel-fuel leak, but the Department of Environmental Protection (“DEP”) had assumed jurisdiction and supervised the Sellers’ attempts to rectify the problem.

In June of 2011, the DEP had sent a Notice of Violation to the Sellers. **See** Complaint at 2. The agency asserted the Sellers were responsible “under Section 316 [of the Clean Streams Law] to correct any polluting condition at the Site, consistent with the Land Recycling and Environmental Remediation Standards Act (Act 2) and in a manner which is satisfactory to the Department.” **Id.** at 2-3.

The Sellers retained contractors to remediate both the diesel in their soil and their water supply. DEP required the Sellers to replace the leaking tank, to excavate contaminated soil, and to install a filtration system for the house’s water system. DEP deemed the Sellers’ efforts inadequate. In August of 2012, DEP recommended that until the chemicals present in the water fell to below the Statewide Health Standards that “the groundwater not be used for any purpose.” **Id.** at 3. The agency also stated that the Sellers’ new filtration system had “to be repaired as soon as possible to render the water safe for use and consumption.” **Id.** The following year, the Sellers sold the property to the Boullatas.

Hence, the Boullatas were left to undertake additional remediation of the land and water. They also had to make unanticipated repairs to portions

of the home that the contaminated water had destroyed. Their experts anticipated cleanup costs to reach \$110,000. **See** 10/23/20 Depo. of Joseph Boullata at 75. Some of the chemical compounds in the well water still exceeded Environmental Protection Agency limits, and the property's well water remained undrinkable in October of 2020. **See id.** at 79.

Nearly four years after buying the property, the Boullatas filed this lawsuit. In their only count against Century 21, they alleged that:

63. [The Boullatas] and Century 21 entered into a written agreement when [they] hired it to represent them in their purchase of property in Tioga County. A true and correct copy of said Agreement is attached hereto and incorporated herein by reference as Exhibit "K."<sup>[2]</sup>
64. [The Boullatas] do not have any specialized training, knowledge, or experience in purchasing real estate.
65. At all times material to this action, [they] relied upon their realtor, Century 21, to protect their interests and to properly complete this transaction.
66. As part of this transaction, [the Sellers] completed a Sellers' Property Disclosure Statement . . .
67. Century 21, despite its training, knowledge and experience in real-estate matters, completely failed to address with any of the parties, including but not limited to [the Boullatas] . . . the unanswered questions on the Disclosure regarding the domestic water supply at the property.
68. Century 21 knew, or should have known, that unanswered questions on a Disclosure are a red flag

---

<sup>2</sup> Exhibit "K" is the Consumer Notice that Ms. Hamon provided to the Boullatas. **See** 49 Pa. Code §35.336.

that require, at the very least, further inquiry and a request for Sellers to fully complete the Disclosure.

69. Century 21 owed to [the Boullatas] a contractual duty to diligently represent them in the purchase of this property and to protect their interests.
70. Century 21 breached this duty and as a result [the Boullatas] have suffered significant monetary damages and losses . . . .

Complaint at 12-13.

After discovery closed, Century 21 moved for summary judgment, which the trial court granted. It ruled the Boullatas should have sued Century 21 for negligence<sup>3</sup> (instead of breach of contract) and, alternatively, there was no contract between the Boullatas and Century 21. This timely appeal followed.

The Boullatas raise the following three issues:

1. Whether the trial court erred in its characterization of the Boullatas' claim as one of tort, rather than contract, and in summarily determining that the parties failed to form or enter into a contract?
2. Whether the trial court erred in determining that there is not an implied contract between the parties?
3. Whether the trial court erred in deeming the Boullatas' claims of both verbal contract and promissory estoppel as being inapplicable?

Boullatas' Brief at 4.

---

<sup>3</sup> Typically, plaintiffs must assert a negligence claim within two years of the act that harmed them. **See** 42 Pa.C.S.A. § 5524(7); **see also** *Montanya v. McGonegal*, 757 A.2d 947, 950 (Pa. Super. 2000).



First, the Boullatas assert that the trial court misapplied the doctrine of the gist of the action and that the court erred in holding that the parties failed to form a contract. They argue that, under the Real Estate Licensing and Registration Act ("RELRA"), 63 P.S. § 455.101-455.803, Century 21 had a statutory obligation to contract with them in writing. **See** Boullatas' Brief at 11. According to the Boullatas, "The simple fact that Century 21 failed to do so does not now summarily abrogate the breach of contract action filed by the Boullatas." **Id.** In their view, the trial court should have disregarded the fact that their Complaint alleged a written contract with Century 21 and allowed the case to proceed on alternative theories of contractual formation.

A motion for summary judgment is properly made if "there is no genuine issue of any material fact as to a necessary element of the cause of action." Pa.R.C.P. 1035.2(1). Hence, summary judgment grants the moving party judgment as a matter of law.

"Our standard of review of the grant of summary judgment is *de novo*, and our scope of review is plenary." ***Pyeritz v. Commonwealth***, 32 A.3d 687, 692 (Pa. 2011). "The grant of summary judgment may be reversed only if the lower court committed an error of law." **Id.**

We begin our analysis with the Pennsylvania Rules of Civil Procedure regarding the content of the pleadings. Rule 1019(h) provides, "When any claim or defense is based upon an agreement, the pleadings shall state specifically if the agreement is oral or written." Pa.R.C.P. 1019(h).

Additionally, if the agreement is in writing, it must be attached to the pleading.

**See** Pa.R.C.P. 1019(i).

In their Complaint, the Boullatas alleged a written contract with Century 21. **See** Boullatas' Complaint at ¶63, Ex. K. They claimed the written contract was the Consumer Notice that Ms. Harmon provided them, pursuant to 49 Pa. Code §35.336. **See id.**

At the very top of the Consumer Notice, as required by the state agency that regulates and licenses real-estate agents in Pennsylvania, was a clear disclaimer that "THIS IS NOT A CONTRACT." **Id.** (capitalization in original and in 49 Pa. Code §35.336). Despite this disclaimer, the Boullatas alleged in their Complaint that this document was a written contract between themselves and Century 21. Like the trial court, we cannot agree with the Boullatas that the Consumer Notice was a written contract.

Under Pennsylvania law, the elements of an enforceable contract are an offer, acceptance, consideration, consideration of "mutual meeting of the minds." **Schreiber v. Olan Mills**, 627 A.2d 806, 808. In order for a document to constitute a contract, "there must be a meeting of the minds; the very essence of an agreement is that the parties mutually assent to the same thing." **Id.** (some punctuation omitted).

Here, Ms. Hamon provided the Boullatas with a Consumer Notice that indicated Century 21 was not offering the document as a potential written contract that the Boullatas could accept, because the Notice announced, "THIS IS NOT A CONTRACT." Thus, there was no meeting of the minds between

these parties that the Notice would serve as a written contract between them, and the Boullatas produced no evidence to that effect. Indeed, Mr. Boullata (rather than stating that the parties intended the Consumer Notice to function as a written contract) conceded that there was "just a verbal agreement" between the Boullatas and Century 21. 10/23/20 Depo. of Joseph Boullata at 19. Accordingly, Mr. Boullata's own testimony contradicts the allegations of the Complaint.

Moreover, if we were to hold that the Consumer Notice were a written contract between the Boullatas and Century 21, we would violate the plain language of 49 Pa. Code §35.336, which calls for the contract between real-estate agents and consumers to be a separate writing. Furthermore, the Boullatas have not challenged 49 Pa. Code §35.336 as being beyond the authority of the authoring agency or in derogation of the RELRA. Thus, neither the propriety of 49 Pa. Code §35.336 nor the legality of its directive that the Consumer Notice is "NOT A CONTRACT" is before us in this appeal. Therefore, we express no opinion on either point.

It is clear and indisputable from the evidence and testimony that the Boullatas never entered into a written contract with Century 21. As a result, they failed to prove the facts alleged in their count for breach of contract. The Complaint made no mention of any other oral or implied agreement between the parties. Moreover, the Boullatas admitted during oral argument before this Court that they never sought leave of the trial court to amend their Complaint to include an allegation that Century 21 breached an oral contract

that the parties may have formed. Nor did the Boullatas seek leave from this Court to amend their Complaint.

In short, the Boullatas alleged Century 21 breached a written contract, but they never produced such a document. Thus, the trial court correctly granted summary judgment to Century 21 based upon the legal theory the Boullatas alleged, when compared to the facts that emerged during discovery. The Boullatas' first appellate issue affords them no relief.<sup>4</sup>

Turning to the Boullatas second and third appellate issues, the Boullatas claim that the trial court erred by not allowing them to proceed under theories of implied contract, verbal contract, and promissory estoppel. Critically, the Boullatas did not allege any of these alternative, contractual theories in their Complaint. Under our Rules of Civil Procedure, if the Boullatas were making a claim based upon an oral or implied agreement, they needed to specifically allege that in their pleadings. **See** Pa.R.C.P. 1019(h). Furthermore, the Boullatas did not seek leave of court to amend their pleadings to add these new theories to their Complaint.

Accordingly, these alternative, contractual theories of relief are not preserved for our appellate review, because the Boullatas did not properly allege them in their Complaint below. "Issues not raised in the trial court are

---

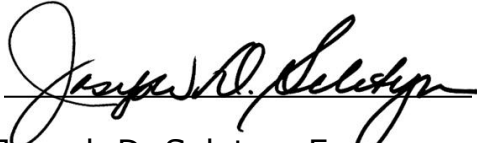
<sup>4</sup> Having affirmed the trial court's decision based on the Boullatas' failure to produce a written contract, we dismiss as moot the question of whether the trial court misapplied the gist-of-the-action doctrine.

waived and cannot be raised for the first time on appeal.” Pa.R.A.P. 302.

Thus, we dismiss the Boullatas’ final two issues as waived.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn". The signature is written in a cursive style and is positioned above a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 06/13/2022