[Cite as *Gates v. Praul*, 2011-Ohio-6230.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Jeffrey C. Gates,	:	
Plaintiff-Appellant,	:	
v.	:	
		No. 10AP-784
Bruce H. Praul et al.,	:	(C.P.C. No. 04CVH-08-8614)
Defendants-Appellees.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on December 6, 2011

Law Offices of James P. Connors, and *James P. Connors*, for appellant.

Kagay, Albert, Diehl & Groeber, and *Jeffrey D. Swick*, for appellees.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Plaintiff-appellant, Jeffrey C. Gates ("appellant"), appeals from the July 20, 2010 judgment of the Franklin County Court of Common Pleas, entered against appellant and in favor of defendants-appellees, Bruce H. Praul ("Praul") and Artistic Green Inc. ("AGI"). For the following reasons, we affirm in part and reverse in part.

I. Facts and Procedural History

{¶2} This action involves a dispute between appellant and Praul as to the nature of their business relationship involving AGI. Appellant filed a complaint against Praul

asserting claims for breach of contract, an accounting, constructive trust, winding up of the partnership, and conversion. AGI moved to intervene and asserted counterclaims for breach of an oral contract, conversion, and replevin and also requested an order of possession and pre-judgment interest.

{¶3} This matter was first appealed after the trial court ruled upon objections filed to a magistrate's decision issued following a bench trial. The magistrate recommended dismissal of all claims asserted by appellant, as well as dismissal of AGI's breach of contract counterclaim, but found in favor of AGI on its counterclaims for conversion and replevin and ruled that its motion for an order of possession was moot. The parties filed timely objections to the magistrate's decision. On January 7, 2009, the trial judge issued a decision and entry sustaining in part and overruling in part the objections to the magistrate's decision. On February 6, 2009, appellant filed a notice of appeal. On May 11, 2010, we dismissed the appeal for lack of a final appealable order. On July 20, 2010, the trial court issued a new entry ruling on the objections and adopting the magistrate's decision, subject to some modifications. This matter is now before us on appeal for a second time. Nevertheless, a further review of the factual background and procedural history of this action is warranted.

{¶4} At trial, appellant asserted he and Praul were partners in a business called AGI, which provided tree and lawn care services. Appellant focused on tree and shrub care, while Praul concentrated on lawn care services. Praul, however, disputed the existence of a partnership and asserted that he was the sole owner and shareholder of AGI, while appellant was simply a trusted employee.

{¶5} Both appellant and Praul agree they stopped working together and parted amicably in January or February 2003. As a result of this separation, they distributed the various pieces of equipment used in their business. Appellant took the equipment used for tree and shrub care, while Praul retained the equipment used for lawn care services. In addition, appellant and Praul each took the equipment they had individually owned prior to the start of their business relationship. Appellant also assumed liability for a truck that was purchased by AGI. At the time of the split, Praul contends he negotiated an agreement with appellant whereby appellant agreed to make payments of $1,000 per month for 20 months in exchange for the tree and shrub care equipment. Appellant, however, denies that such an agreement was ever made.

{¶6} In approximately November 2003, appellant approached Praul regarding two snow plows that had been purchased during the time period when appellant and Praul were working together. Appellant claims the snow plows were purchased for the purpose of being used with the truck appellant had brought with him to AGI, and also with the truck for which appellant later assumed liability. Appellant submits he contacted Praul to obtain the snow plows and Praul refused to give him the snow plows, claiming he had already sold them. Following that dispute, appellant filed his complaint against Praul.

{¶7} After hearing the testimony, the magistrate issued a written decision determining that AGI was not a partnership between appellant and Praul. The magistrate found that any partnership agreement was required to be in writing in order to comply with the Statute of Frauds. Finding no written partnership agreement existed, the magistrate further found appellant failed to prove the existence of a contract which stated the essential terms with reasonable certainty. The magistrate also determined the doctrine of

promissory estoppel was inapplicable because appellant had not detrimentally relied upon the alleged oral partnership agreement. Therefore, the magistrate found Praul was the sole owner and shareholder of AGI and appellant had only been an employee of AGI during the relevant time period until their relationship terminated. As a result, the magistrate recommended dismissal of appellant's breach of contract claim, as well as his claims for an accounting, constructive trust and winding up of the partnership, and conversion.[1]

{¶8} The magistrate further determined that several pieces of equipment, including two spray tanks, a ladder, a chipper, and two chain saws, all of which were in the possession of appellant, were owned by AGI. Additionally, the magistrate held the snow plows at issue, which were not currently in the possession of either appellant or Praul, were owned by AGI. While the magistrate found Praul's testimony asserting that appellant had agreed to pay $20,000 in exchange for the equipment[2] was more credible than appellant's claim that he never agreed to pay anything for the equipment, the magistrate also found that such an agreement, which was not in writing, violated the Statute of Frauds. Therefore, the magistrate declined to find in favor of AGI on its counterclaim for breach of an alleged oral contract. However, the magistrate did find in favor of AGI on its counterclaims for conversion and replevin regarding the above referenced equipment, but determined AGI's motion for order of possession was now moot.

[1] Appellant's conversion action was based upon his claim that the snow plows were his property and that Praul refused to release them.

[2] The magistrate determined that the equipment involved in this negotiation included the spray tanks, a ladder, a chipper, and the chain saws. However, the snow plows were not part of the agreement.

{¶9} As noted above, appellant and appellees Praul and AGI (collectively "appellees") filed timely objections to the magistrate's decision. Appellees argued the magistrate erred in sua sponte applying the Statute of Frauds to both oral agreements when neither side pled the Statute of Frauds as a defense. As a result, appellees argued all parties waived the Statute of Frauds as an affirmative defense. Appellees also argued the magistrate erred in failing to grant relief on AGI's claim for replevin and in finding AGI's motion for an order of possession to be moot. Additionally, appellees asserted the magistrate erred in failing to award interest on AGI's judgment.

{¶10} Appellant also filed numerous objections. The most relevant objections alleged the magistrate erred by: (1) failing to consider or decide appellant's breach of contract claim; (2) failing to consider or address the evidence regarding appellant's claim that a partnership existed and failing to apply the correct legal standard; (3) excluding relevant and admissible evidence; (4) granting judgment to AGI by "default" and on claims not presented at or during trial; and (5) allowing the filing of and making a decision on a post-trial motion for replevin.

{¶11} On January 7, 2009, the trial judge issued a decision and entry sustaining in part and overruling in part the objections to the magistrate's decision. Specifically, the trial judge overruled all of appellant's objections and granted appellees' objections with respect to the application of the Statute of Frauds to the oral agreement between the parties regarding the equipment. The trial judge found the magistrate improperly applied the Statute of Frauds sua sponte, since the parties' failure to raise it as an affirmative defense caused it to be waived. As a result, the trial judge determined an oral agreement did exist between the parties and that appellant had agreed to purchase the tree and

shrub care equipment for $20,000. The trial judge agreed with the magistrate's conclusion that there was no partnership between appellant and Praul, and that Praul was the sole owner and shareholder of AGI.

{¶12} The trial judge also found that its entry dated January 4, 2008, which granted AGI an order of possession, effectively and properly acted to overrule the segment of the magistrate's decision which found the request for an order of possession to be moot. Therefore, the trial judge sustained AGI's objection on this point. In addition, the trial judge determined that appellees' objection regarding the failure to award interest was premature, since the magistrate's decision was not a final judgment. However, the trial judge then awarded interest, to be computed with a starting date of March 1, 2003. The trial judge further noted that AGI was not entitled to double recovery and that the award for damages would be reduced by the value of any seized property.

{¶13} As stated above, appellant filed a notice of appeal challenging the trial court's January 7, 2009 order. We subsequently dismissed appellant's appeal for lack of a final appealable order, finding the trial court failed to clearly adopt or reject, with or without modification, the decision of the magistrate as an order of the court. We further found the trial court failed to: independently enter its own judgment; reduce the damages at issue to an amount certain, taking into account any appropriate offset for the value of the seized property; and, state upon what amount its award of interest was granted.

{¶14} Following our dismissal, on July 20, 2010, the trial court issued a new judgment entry ruling on the objections and adopting the findings of fact and conclusions of law as set forth by the magistrate with some noted exceptions. The trial court specifically granted judgment in favor of AGI for breach of contract in the amount of

$20,000, plus interest at the statutory rate from March 1, 2003, through the date of its judgment. The judgment entry also acknowledged AGI's entitlement to an order of possession. Additionally, the trial court ordered post-judgment interest.

II. Assignments of Error

{¶15} Following the issuance of the trial court's July 20, 2010 entry, appellant filed a notice of appeal, asserting the following five assignments of error for our review:

> 1. The trial court erred by finding that there was a verbal agreement under which appellant Jeffrey Gates agreed to pay $20,000 to appellee Artistic Green, Inc. for equipment, customer lists, and goodwill.
>
> 2. The trial court erred by apparently finding for the appellees on their counterclaims for conversion and replevin, and possession of the subject equipment.
>
> 3. The trial court erred by not dismissing the counterclaims because they were waived, abandoned and not prosecuted or otherwise pursued or presented at trial.
>
> 4. The trial court erred by granting prejudgment interest.
>
> 5. The trial court erred by failing to apply the statute of frauds, as the magistrate properly did, to the alleged agreement since the statute of frauds defense was tried without objection by the parties at trial.

III. Analysis

A. First Assignment of Error – Finding the Existence of an Oral Agreement

{¶16} In his first assignment of error, appellant argues the trial court erred in finding there was an oral agreement by which he agreed to pay AGI $20,000 for the tree and shrub equipment and for customer lists and goodwill. Appellant contends the elements of a contract were not met. Specifically, he argues the terms of the agreement were not defined, the parties were not identified, there was no offer and acceptance, there

was no "meeting of the minds," and the splitting of the business and the equipment did not involve an agreement whereby he would pay $1,000 per month for 20 months.

{¶17} " 'A contract is generally defined as a promise, or a set of promises, actionable upon breach. Essential elements of a contract include an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/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, ¶16, quoting *Perlmuter Printing Co. v. Strome, Inc*. (N.D.Ohio 1976), 436 F.Supp. 409, 414. See also *Minster Farmers Coop. Exch. Co. v. Meyer*, 117 Ohio St.3d 459, 2008-Ohio-1259, ¶28. "A meeting of the minds as to the essential terms of the contract is a requirement to enforcing the contract." Id. at ¶28, citing *Episcopal Retirement Homes, Inc. v. Ohio Dept. of Indus. Relations* (1991), 61 Ohio St.3d 366, 369.

{¶18} To prove the existence of a contract, the plaintiff must show both parties consented to the terms of the contract, both parties had a "meeting of the minds," and the terms of the contract are definite and certain. *Blessing v. Bowersock* (Dec. 12, 2000), 10th Dist. No. 00AP-635, citing *McSweeney v. Jackson* (1996), 117 Ohio App.3d 623, 631. To prove a breach of contract claim, a plaintiff must show: (1) the existence of a contract; (2) performance by the plaintiff; (3) breach by the defendant; and (4) loss or damage to the plaintiff. *Doner v. Snapp* (1994), 98 Ohio App.3d 597, 600. The terms of an oral contract must be established through oral testimony and a determination of those terms is a question for the trier of fact. *Blessing*, citing *Murray v. Brown-Graves Co*. (App. 1922), 1 Ohio L. Abs. 167. However, "[e]vidence of the exact words of offer and acceptance in proof of an oral contract is not essential. It is sufficient if the words, deeds,

acts, and silence of the parties disclose the intent to contract and the terms of the agreement." *Rutledge v. Hoffman* (1947), 81 Ohio App. 85, paragraph one of the syllabus. Parties manifest their mutual assent either by making a promise or by beginning or rendering performance. *Ford v. Tandy Transp., Inc*. (1993), 86 Ohio App.3d 364, 380.

{¶19} In an oral contract, the " '[t]erms of an oral contract may be determined from 'words, deeds, acts, and silence of the parties.' " *Kostelnik* at ¶15, quoting *Rutledge* at paragraph one of the syllabus. "[S]eldom, if ever, does the evidence in proof of an oral contract present its terms in the exact words of offer and acceptance found in formal written contracts. And no such precision is required. It is sufficient if the intent is disclosed by word, deed, act, or even silence." *Rutledge* at 86. "[W]hile mutual assent is usually manifested by offer and acceptance, in oral contracts, mutual assent may be manifested by other acts or failures to act." *LaPoint v. Templeton*, 6th Dist. No. F-07-014, 2008-Ohio-1792, ¶25.

{¶20} "Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Const. Co*. (1978), 54 Ohio St.2d 279. In determining whether a trial court's judgment is manifestly against the weight of the evidence, a reviewing court must make every reasonable presumption in favor of the judgment and the finding of facts. *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80. "The underlying rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." Id.

{¶21} Although appellant has disputed the assertion that he agreed to pay AGI $20,000 for tree and shrub care equipment following the termination of their business relationship, we find Praul's testimony establishes the existence of an oral contract.

{¶22} The trial court found Praul was the sole owner and shareholder of AGI and appellant has not challenged this finding on appeal. Praul testified that he met with appellant in his driveway in late January or early February of 2003. He proposed that appellant take the tree and shrub care equipment owned by AGI, along with the customer base associated with that aspect of the business. In exchange, Praul proposed that appellant make payments of $1,000 per month for 20 months. Praul further testified that appellant responded to the proposal with an "okay." Appellant subsequently took and/or retained possession of the equipment at issue. Praul also testified he gave appellant until May 2003 to make the first installment payment. When Praul asked appellant about making a payment in May, appellant promised to provide him with some invoices upon which Praul could collect payment.

{¶23} The events and actions described by Praul's testimony establish the elements of a contract. Praul, on behalf of AGI, proposed an agreement with definitive terms, to which appellant manifested a mutual assent by acquiescing to the agreement and by taking and/or retaining the equipment, and by agreeing to send Praul invoices as payment.

{¶24} Appellant argues that Praul's testimony is in direct conflict with appellant's own testimony and that Praul's testimony is not credible. However, the magistrate who tried this case made it clear that she found the testimony of Praul to be more credible than that of appellant. She also found appellant's assertion that he was permitted to

simply take assets without any exchange of payment to be unbelievable. As a reviewing court, we must defer to the magistrate's findings in this regard, which were in turn adopted by the trial court. Furthermore, despite appellant's protests, there is nothing in the record to indicate that Praul, who is the sole owner and shareholder of AGI, was acting in an individual capacity when he negotiated the deal with appellant for the equipment and customer base that was owned by AGI. Thus, it is apparent that the agreement was made between AGI and appellant.

{¶25} Accordingly, we overrule appellant's first assignment of error.

B. Fifth Assignment of Error – Application of Statute of Frauds

{¶26} Because appellant's fifth assignment of error[3] is closely related to his first assignment of error, we shall address it next, for ease of discussion, even though it is out of order.

{¶27} In his fifth assignment of error, appellant argues the trial court erred in failing to apply the Statute of Frauds to bar the alleged oral agreement. Because Praul acknowledged at trial that the purported agreement for the payment of $20,000 over the course of a 20-month period was not memorialized in writing, appellant submits the issue was implicitly, if not expressly, raised and tried, and therefore there is now no basis to hold that the Statute of Frauds defense was waived and therefore not applicable. We disagree.

[3] Appellant lists five assignments of error on page one of his brief. However, within his brief, he argues his fifth assignment of error, which addresses the statute of frauds, within the context of his first assignment of error, which addresses the purported lack of an oral contract. Appellees, on the other hand, have labeled the statute of frauds challenge as appellant's second assignment of error. As a result, appellees' responses to appellant's assignments of error do not match up numerically. For ease of discussion, we shall address the statute of frauds argument as appellant's fifth assignment of error, and we shall follow the numerically listing of the assignments of errors as set forth on page one of appellant's brief.

{¶28} Pursuant to Civ.R. 8, affirmative defenses such as the Statute of Frauds must be pled; otherwise such defenses are waived. "[T]he failure to plead the statute of frauds as an affirmative defense constitutes a waiver of that defense." *McSweeney* at 629, citing *Houser v. Ohio Historical Soc.* (1980), 62 Ohio St.2d 77, 79.

{¶29} Appellant claims acknowledging that an agreement was not in writing is sufficient to implicitly "try" the issue. However, appellant has provided no authority to support this assertion. Furthermore, it is entirely possible to have an oral agreement that does not violate the Statute of Frauds. Additionally, the rules of civil procedure are clear that such a defense must be affirmatively pled or it is deemed waived. Because appellant failed to plead this affirmative defense, appellant waived this as a defense to AGI's breach of contract counterclaim. Therefore, the trial court did not err in refusing to apply the Statute of Frauds to bar AGI's counterclaim for breach of contract.

{¶30} Accordingly, we overrule appellant's fifth assignment of error.

C. Third Assignment of Error – Failure to Present Counterclaims at Trial

{¶31} In his third assignment of error, appellant contends AGI failed to raise or present its counterclaims for replevin, conversion, or breach of contract at trial, and therefore the trial court erred by not dismissing those counterclaims.

{¶32} Appellant asserts Praul, on behalf of AGI, offered no evidence to suggest that appellant's possession of the equipment at issue violated AGI's rights to the equipment, claiming Praul failed to establish AGI had title to the equipment. Appellant disputes that he converted the equipment and argues it was rightfully within his possession. Appellant further submits AGI failed to advance or prosecute these counterclaims at trial, and therefore they were waived or abandoned.

{¶33} Replevin is a statutory cause of action. *America Rents v. Crawley* (1991), 77 Ohio App.3d 801. Replevin has been defined as:

> * * * [A] remedy and a civil action by which the owner or one who has a general or special interest in specific and identifiable personal property and the right to its immediate possession seeks to recover the possession of such property in specie, the recovery of damages, if it is sought, being only incidental.

Holstein v. Holstein (May 4, 1982), 7th Dist. No. 559, quoting 18 Ohio Jurisprudence 3d 536-37, Conversion and Replevin, Section 66.

{¶34} "[C]onversion is the wrongful exercise of dominion over property to the exclusion of the rights of the owner, or withholding it from his possession under a claim inconsistent with his rights." *Joyce v. General Motors Corp*. (1990), 49 Ohio St.3d 93, 96. See also *Boston v. Sealmaster Industries*, 6th Dist. No. E-03-040, 2004-Ohio-4278.

{¶35} The testimony provided at trial through the cross-examination of appellant and the direct examination of Praul supports the magistrate's findings for replevin and conversion. The testimony of these two witnesses also support the counterclaim for breach of contract, although the magistrate did not make that finding, as a result of the belief that she was required to apply the Statute of Frauds, sua sponte, to bar such a claim.

{¶36} Based upon the testimony provided by appellant and Praul (and to some extent, the testimony of Kurt Salisbury, the accountant for the parties), the magistrate determined Praul was the sole owner and shareholder of AGI, while appellant was simply an employee of AGI. The testimony also supported the finding that the equipment at issue was owned by AGI.

{¶37} For example, evidence introduced at trial showed that Praul, on behalf of AGI, purchased the spray tanks. Evidence was also introduced to demonstrate that appellant was reimbursed for the purchase of the ladder at issue and, thus, the ladder is owned by AGI. Although appellant co-signed the credit application for the chipper, it was purchased in the name of AGI and there was also evidence showing the payments on the chipper were made by AGI. In addition, evidence was introduced to demonstrate AGI purchased the two chain saws. Evidence was also introduced to show that appellant is in possession of all of these items, all of which belong to AGI.

{¶38} As a result, appellant's argument that AGI failed to advance its counterclaims for conversion and replevin, and therefore the claims were waived and abandoned, is without merit.

{¶39} Appellant also contends AGI abandoned and waived its breach of contract counterclaim, arguing the claim was not affirmatively advanced at trial. Appellant argues AGI failed to establish the elements of a contract, particularly a meeting of the minds or mutual assent. Finally, appellant asserts AGI abandoned and waived this claim because Praul testified he "gave up" on the claim and had previously advised appellant he was not going to pursue it.

{¶40} In our analysis of appellant's first assignment of error, we demonstrated how the elements of a contract were met, including the requirement for a meeting of the minds or mutual assent. Therefore, we reject this argument again here. As for appellant's contention the counterclaim for breach of contract was abandoned and/or waived because Praul testified at trial that he had previously informed appellant he was not going to pursue enforcement of the agreement, we find that argument to be equally

meritless. AGI's decision not to immediately pursue litigation against appellant as a result of financial concerns does not constitute waiver or abandonment of the claim when AGI was still well within the statute of limitations for bringing the claim at the time it actually filed its counterclaim. See R.C. 2305.07 (an action upon a contract not in writing shall be brought within six years after the cause thereof accrued).

{¶41} Accordingly, we overrule appellant's third assignment of error.

D. Second Assignment of Error – Relief on Multiple Counterclaims

{¶42} In his second assignment of error, appellant argues the trial court erred by apparently finding for AGI on the counterclaims for conversion and replevin and on the order of possession, in addition to awarding damages on the breach of contract counterclaim in the amount of $20,000. Appellant submits the trial court's July 20, 2010 judgment entry is confusing and contradictory because he cannot be liable for replevin and conversion, while at the same time also be liable for breach of contract based upon the alleged verbal agreement. Appellant further argues he never wrongfully detained the equipment at issue.

{¶43} We agree with appellant's assertion that the trial court's July 20, 2010 judgment entry is confusing. Although the testimony and evidence established at trial could easily support claims for replevin and conversion, upon closer review, it is apparent that the trial court's judgment entry does not provide relief to AGI pursuant to all of its asserted counterclaims. Instead, we believe the judgment entry only finds appellant to be liable to AGI under a breach of contract theory and only awards damages on the basis of that finding.

{¶44} " 'A replevin action provides the means to obtain possession of specific personal property that one has a right to possess. Where one claims title to, and the right to immediate possession of, specific personal property which is wrongfully detained from him, he has the right to recover possession of that property by an action in replevin.' " *Bono v. McCutcheon*, 159 Ohio App.3d 571, 2005-Ohio-299, ¶15, quoting *Walther v. Central Trust Co., N.A*. (1990), 70 Ohio App.3d 26, 31-32, citing *Service Transport Co. v. Matyas* (1953), 159 Ohio St. 300, paragraph one of syllabus.

{¶45} R.C. Chapter 2737 governs actions in replevin. "A petitioner may move for a *preliminary order of possession*, pending a determination of the request for a writ of replevin." *Kreuzer v. Scott* (Mar. 8, 1995), 2d Dist. No. 14840. (Emphasis added.) R.C. 2737.01(D) defines an "order of possession" as "the order issued by a court under this chapter for delivery to the movant of possession of specific personal property *pending final judgment in the action*." (Emphasis added.)

{¶46} "Ohio case law is consistent with the proposition that replevin is solely a prejudgment remedy. When property has not been seized, or where the defendant has retained possession by posting bond prior to the entry of final judgment, the action in essence converts from one in replevin to one in conversion and only damages are awardable." *America Rents* at 803-04, citing *Pugh v. Calloway* (1860), 10 Ohio St. 488.

{¶47} Furthermore, courts have historically viewed actions for breach of contract and conversion as alternate causes of action. See *Boston* at ¶36, citing *Richardson v. Shaw* (1908), 209 U.S. 365, 382-83, 28 S.Ct. 512, 517-18. An action for damages may be held in either one or the other. Id., citing *Erie R.R. Co. v. Steinberg* (1916), 94 Ohio St. 189, paragraph one of the syllabus. In a conversion action, the measure of damages

is the value of the converted property at the time it was converted. *Silverman v. Am. Income Life Ins. Co. of Indianapolis*, 10th Dist. No. 01AP-338, 2001-Ohio-8890. Thus, where the full value of the converted property has been paid to the owner, the owner has suffered no damages pursuant to a conversion action. Id.

{¶48} A brief recap of the history of the instant case is necessary here in order to decipher the context of the trial court's judgment entry.

{¶49} As previously noted, the magistrate found in favor of AGI on its counterclaims for replevin and conversion, but not on its counterclaim for breach of contract, due to the magistrate's application of the Statute of Frauds. The magistrate also denied the request for an order of possession as moot. Consequently, the magistrate ordered appellant to pay AGI $15,322.97, based upon testimony elicited at trial regarding the value of the equipment. The trial court then granted AGI's renewed motion for an order of possession[4] prior to the issuance of its January 4, 2008 decision addressing the objections to the magistrate's decision. However, the equipment at issue was never seized or delivered to AGI and, thus, much of the equipment remained in the possession of appellant, except that which was purportedly stolen from appellant. Nevertheless, appellant filed a motion to vacate the order of possession, which AGI opposed.

{¶50} In January 2009, the trial court issued its initial decision and entry sustaining in part and overruling in part the objections to the magistrate's decision. That decision and entry also overruled appellant's motion to vacate the order of possession and found for AGI as to the breach of contract counterclaim and ordered damages in the

[4] Appellant contends the trial court lacked jurisdiction to modify the magistrate's judgment on the issue of the order of possession. However, appellant has produced no authority to support this assertion and we find this argument to be meritless. See Civ.R. 53(D).

amount of $20,000. The trial court further clarified that the award for damages and the granting of the order of possession did not constitute entitlement to double recovery.

{¶51} Appellant filed an appeal from that order, which we dismissed for lack of a final appealable order. On remand, the trial court issued a subsequent entry on July 20, 2010, which, at first glance, appears to award damages to AGI on its breach of contract counterclaim in the amount of $20,000, while also finding appellant liable and awarding relief pursuant to AGI's counterclaims for replevin, conversion, and an order of possession, due to language in the entry which acknowledges the order of possession previously granted and states the trial court adopts the magistrate's decision "in all respects except those aspects that have been specifically overruled in this Entry." (July 20, 2010 Judgment Entry; R. 154 at 3.) However, we reject appellant's interpretation of the trial court's judgment entry for the reasons set forth below.

{¶52} The trial court's references in its judgment entry to the action in replevin and the order of possession are simply references to previous rulings. References to these previously available forms of relief do not constitute an order for this type of remedy in the final judgment. The trial court acknowledged that AGI was entitled to an order of possession, which order had previously been improperly denied by the magistrate, but properly granted by the trial court in January 2008. The trial court addressed this issue simply in response to appellant's motion to vacate the order of possession, which the trial court denied. When read in its complete context, it is apparent that the trial court, while acknowledging that appellant had been entitled to this *preliminary* prejudgment remedy, also acknowledged that such property had never been returned, appellant did not comply

with the order, and therefore, it could not currently be used to offset the $20,000 ordered in damages for the breach of contract claim.

{¶53} Moreover, the trial court clearly did not order that the property be returned. As stated above, when the property has not been seized, the action in essence converts from one in replevin to one in conversion, whereby only damages are awardable. See *America Rents* at 803-04. Here, it was readily apparent to the trial court that the value and condition of the property had diminished over the span of several years, and ordering the return of the property would not satisfy the judgment because of the depreciation in the value of the property. And, because the property had not been seized pursuant to the preliminary order of possession, the trial court determined it would be improper to award permanent possession of the equipment to AGI at this point in time.

{¶54} We believe that much of the initial confusion surrounding the trial court's entry could have been eliminated if the trial court had not referenced the fact that appellant could have offered a return of the property in order to offset the $20,000 judgment. However, these references are merely dicta regarding possible options that could have been exercised, but which were clearly not ordered by the trial court. Nowhere in its final judgment entry does the trial court grant AGI a permanent order of possession or order the property to be returned to AGI. Pursuant to our precedent as set forth in *America Rents*, because the property was not seized pursuant to an order of possession, the replevin action converted to an action in conversion, for which damages are recoverable. It is evident the trial court did not adopt the magistrate's findings with respect to the replevin action.

{¶55} As for the magistrate's findings regarding the conversion action, it is well-established that breach of contract and conversion are alternate claims and an action for damages may be held in either one or the other, but not both. See *Boston* at ¶36, and *Erie R.R. Co.* at paragraph one of the syllabus. Although the trial court's judgment entry does not expressly state that it rejected or modified the magistrate's order regarding the action in conversion, it is obvious that it did, as the trial court clearly did not order the $15,322.97 in damages for conversion found by the magistrate, and to do so would have been undoubtedly and quite obviously inconsistent with current caselaw. Instead, the trial court simply found appellant had breached the oral agreement made with Praul on behalf of AGI and ordered damages based solely upon that breach. Because the full value of the alleged converted property was returned to AGI via the award for breach of contract, AGI suffered no damages pursuant to an action for conversion, and no such damages were awarded. Therefore, we find trial court's judgment entry in the instant case does not order relief pursuant to alternate claims.

{¶56} Accordingly, we overrule appellant's second assignment of error.

E. Fourth Assignment of Error – Prejudgment Interest

{¶57} In his fourth assignment of error, appellant argues the trial court erred by granting prejudgment interest. Appellant submits the trial court's order is unclear as to which claim it is awarding interest. Appellant further argues the trial court erred by failing to explain how it determined the date from which interest would run and by arbitrarily choosing the date of March 1, 2003, since that date precedes completion of the contract by at least 20 months.

{¶58} We disagree with appellant's assertion that an award of prejudgment interest was improper. However, we agree with appellant's contention that the trial court abused its discretion in utilizing the March 1, 2003 date as the date upon which prejudgment interest accrued.

{¶59} Prejudgment interest "acts as compensation and serves ultimately to make the aggrieved party whole." *Royal Elec. Constr. Corp. v. Ohio State Univ.*, 73 Ohio St.3d 110, 117, 1995-Ohio-131. R.C. 1343.03(A) provides, in relevant, part as follows:

> (A) In cases other than those provided for in sections 1343.01 and 1343.02 of the Revised Code, when money becomes due and payable upon any bond, bill, note, or other instrument of writing, upon any book account, upon any settlement between parties, upon all verbal contracts entered into, and upon all judgments, decrees, and orders of any judicial tribunal for the payment of money arising out of tortious conduct or a contract or other transaction, the creditor is entitled to interest at the rate per annum determined pursuant to section 5703.47 of the Revised Code, unless a written contract provides a different rate of interest in relation to the money that becomes due and payable, in which case the creditor is entitled to interest at the rate provided in that contract. * * *

{¶60} Prejudgment interest compensates the plaintiff for the period of time between the accrual of the claim and the judgment, regardless of whether the judgment is based upon a claim that was liquidated or unliquidated, and even if the amount due was not capable of ascertainment until determined by the court. Id. at syllabus. Once the plaintiff receives judgment on a contract claim, the trial court has no discretion other than to award prejudgment interest under R.C. 1343.03(A). *First Bank of Marietta v. L.C. Ltd*. (Dec. 28, 1999), 10th Dist. No. 99AP-304. Therefore, the only issue to be resolved by a trial court with respect to prejudgment interest pursuant to R.C. 1343.03(A) is how much interest is due. *Zunshine v. Cott*, 10th Dist. No. 06AP-868, 2007-Ohio-1475, ¶26.

{¶61} However, "[t]he trial court must make factual determinations as to when interest commences to run, based on when the claim became due and payable, and as to what legal rate of interest applies." Id. "[A]lthough the right to prejudgment interest on a contract claim is a matter of law, pursuant to R.C. 1343.03(A), the amount awarded is based on the trial court's factual determinations of the accrual date of the plaintiff's claim and the applicable interest rate." Id. See also *Bell v. Teasley*, 10th Dist. No. 10AP-850, 2011-Ohio-2744, ¶28; *Miller v. Lindsay-Green, Inc*., 10th Dist. No. 04AP-848, 2005-Ohio-6366, ¶107; and *Royal Elec. Constr. Corp*. at 115 (after the initial hurdle, the trial court must make factual determinations of "*when* interest commences to run, i.e., when the claim becomes 'due and payable' " and "*what* legal rate of interest should be applied"). (Emphasis sic.) Appellate courts review these two factual determinations under an abuse of discretion standard. *Bell* at ¶28. Therefore, the trial court's discretion in awarding prejudgment interest on a contract claim only extends to the factual determinations of when the interest begins to run and what interest rate is applicable. *Zunshine* at ¶27.

{¶62} "[W]here money becomes due under a contract, interest accrues from the time that the money due *should have been paid*." *Bell* at ¶27. (Emphasis sic), citing *Braverman v. Spriggs* (1980), 68 Ohio App.2d 58. However, the Supreme Court of Ohio has "specifically and clearly declined to establish a bright-line rule regarding the accrual date of prejudgment interest but rather left such a determination to the trial courts on a case-by-case basis." *Miller v. Gunckle*, 96 Ohio St.3d 359, fn. 4, citing *Landis v. Grange Mut. Ins. Co*., 82 Ohio St.3d 339, 1998-Ohio-387. See also *Parrish v. Coles*, 10th Dist. No. 06AP-696, 2007-Ohio-3229, ¶69.

{¶63} AGI is entitled to prejudgment interest as a matter of law, beginning from the accrual date of its claim, at the legal rate determined under R.C. 5703.47. However, the trial court here did not make factual determinations as to the accrual date of AGI's claim, which would in turn mark when the prejudgment interest commenced to run. In the instant case, the trial court simply noted "pre-judgment interest accrued on said amount at the statutory rate of interest from March 1, 2003 through the date of judgment." (July 20, 2010 Judgment Entry; R. 154 at 3.) No factual determination was made regarding when the monies became due and payable. Instead, the trial court's judgment entry on this issue simply states that interest commenced on a date (March 1, 2003) that *precedes* the date upon which the full claim could have become due and payable.

{¶64} Specifically, the trial court awarded interest beginning on March 1, 2003 on the full $20,000 amount, even though only one or two payments, at most, *could* have been due and payable at that time, and even though the final $1,000 payment was not yet due for nearly 20 months from that date. Moreover, the transcript from the trial reflects Praul testified he "didn't expect the first payment until after the month of May" (Tr. 119-20) and when he did not receive any payment by late May, Praul discussed the issue with appellant, who promised to provide AGI with some invoices to bill. This testimony suggests that the earliest date upon which AGI's claim could have become due and payable for just the first $1,000 payment was May 2003.

{¶65} The trial court did not provide an explanation as for how it arrived at the March 1, 2003 accrual date, nor make factual determinations regarding when the claim became due and payable. Additionally, the trial court failed to make factual determinations which would demonstrate how it is possible to assess interest from a

single date on a contract that is designed to take 20 months to complete when the single accrual date applied preceded the date upon which at least 18, if not all, of the payments were due. Based upon our analysis as set forth above, which is based upon the evidence in the record, and without the benefit of any specific factual determinations set forth in the trial court's decision, we are unable to find that an award of interest on the full $20,000 amount utilizing a March 1, 2003 accrual date, is supported by the record. As a result, we find the trial court abused its discretion.

{¶66} Therefore, we sustain in part appellant's fourth assignment of error. Although we find an award of prejudgment interest to be proper, on remand, the trial court must factually determine when the money was due and payable and, thus, when the prejudgment interest should begin to run.

IV. Conclusion

{¶67} In conclusion, we overrule appellant's first, second, third, and fifth assignments of error and overrule in part and sustain in part appellant's fourth assignment of error. Thus, we affirm in part and reverse in part the judgment of the Franklin County Court of Common Pleas. We remand this matter to the trial court for further proceedings consistent with this decision and the law as it relates only to the issue of prejudgment interest.

Judgment affirmed in part and reversed in part; cause remanded with instructions.

KLATT and FRENCH, JJ., concur.

_____