[Cite as *Kasper v. Mazer*, 2001-Ohio-4053.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Larry J. Kasper,	:	
Plaintiff-Appellant,	:	
v.	:	No. 01AP-599
Bernard D. Mazer,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

O P I N I O N

Rendered on November 27, 2001

Joseph F. Frasch, Jr., for appellant.

Wiles, Boyle, Burkholder & Bringardner Co., L.P.A., and *Michael L. Close*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

TYACK, J.

On March 20, 2000, Larry J. Kasper filed suit against Bernard D. Mazer seeking payment for sums allegedly due Mr. Kasper. After service of process was perfected, an answer was filed on behalf of Mr. Mazer in which liability was denied.

On August 8, 2000, counsel for Mr. Mazer filed a motion for summary judgment, arguing that the sums owed were not owed by attorney Bernard D. Mazer but were owed by Mr. Mazer's client, Mary Anne Prescott Powell. The motion also argued

that any obligation of Mr. Mazer had been released in the course of settlement of previous litigation and that the statute of frauds barred recovery.

Counsel for Mr. Kasper responded to the motion for summary judgment and argued that Mr. Mazer had expressly promised to pay sums owed if his client did not pay. Counsel further asserted that Mr. Mazer had never been released from an obligation to pay the sums owed.

Summary judgment was ultimately granted on behalf of Mr. Mazer. Mr. Kasper (hereinafter "appellant") has pursued a direct appeal, assigning three errors for our consideration:

> 1. The Trial Court erred in granting Defendant-Appellee's motion for summary judgment.
>
> 2. The Trial Court erred in holding that Plaintiff-Appellant's claim on the promissory notes was barred by the parol evidence rule and the statute of frauds.
>
> 3. The Trial Court erred in holding that Plaintiff-Appellant released Defendant-Appellee from any liability.

As they are interrelated, we address appellant's assignments of error together. The standard for summary judgment is as follows. Summary judgment is appropriate when, construing the evidence most strongly in favor of the nonmoving party, (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, that conclusion being adverse to the nonmoving party. *Zivich v. Mentor Soccer Club, Inc.* (1998), 82 Ohio St.3d 367, 369-370, citing *Horton v. Harwick Chem. Corp.* (1995), 73 Ohio St.3d 679, paragraph three of the syllabus. Our review of the appropriateness of summary judgment

is *de novo*. See *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35.

In 1995, Mary Anne Prescott Powell was engaged in litigation with Huntington Trust, NA over the issue of whether Ms. Powell was entitled to damages resulting from the way Huntington Trust had handled a trust for which Ms. Powell was a beneficiary. Bernard Mazer (hereinafter "appellee"), acting as attorney for Ms. Powell in the trust litigation, retained appellant as an expert and accountant to perform services for Ms. Powell with respect to the litigation. Appellant drafted an engagement letter describing the terms for his services and sent it to Ms. Powell, in care of appellee. The letter was signed by appellee, and appellant began performing the services expected of him.

Ms. Powell did not pay appellant the sums he requested for his services. This led to a disagreement among the parties which was supposedly resolved when Ms. Powell executed two documents that were each entitled "PROMISSORY NOTE." The one document included a promise to pay a sum not exceeding $106,050. The second document included a promise to pay a sum not to exceed $127,002.59. Eventually these documents were "satisfied" by a single payment of $110,000 from Ms. Powell. A mutual release was executed on behalf of Ms. Powell by appellee, as her attorney, and by appellant. The release reads:

> Mary Ann Prescott Powell and Larry Kasper agree as follows:
>
> Upon payment by Prescott Powell to Kasper of the sum of $110,000 and the cancellation and return of two promissory notes dated October 15, 1996 and May 1, 1997 by Kasper, the parties mutually release and discharge any claim, demand, or suit regarding services rendered and, or monies

> owed between the parties as it relates to the Powell Trusts litigation.
>
> This release is executed in settlement of all claims of the parties and specifically in relation to a pending Motion in the Probate and General Divisions of Franklin County, Judge Thomas Louden presiding.

At all relevant times, both appellant and appellee knew that appellee was functioning as the attorney and agent for Ms. Powell. The letter of engagement specifying the terms for the services to be performed by appellant was addressed to Ms. Powell, in care of appellee, and such engagement letter clearly contemplated that appellant was performing services for Ms. Powell and that the agreement was between appellant and Ms. Powell. Appellant signed the engagement letter in his capacity as Ms. Powell's attorney/agent. Therefore, appellee was not liable under such engagement letter. Accordingly, summary judgment in favor of appellee on any breach of contract claim asserted by appellant was appropriate.

Appellant also asserted below that appellee misrepresented the nature of the two agreements made subsequent to the engagement letter. As indicated above, these two documents bear the title "PROMISSORY NOTE." However, it is debatable whether they are in fact promissory notes or merely contracts. Irrespective of the answer to this question, even if we accepted appellant's contention that appellee misrepresented the nature of such documents, such misrepresentation is immaterial. The documents clearly imposed an obligation on the part of Ms. Powell to pay appellant certain sums, regardless of the legal name one applies to them. There is no evidence that the nature of

the documents—whether promissory notes or mere contracts—was somehow material to appellant's decision to execute them.

Hence, appellant has raised no genuine issue that appellee somehow materially misrepresented the nature of the documents and that appellant relied on such misrepresentation to his detriment and/or was injured as a result of such reliance.

Appellant also claims that he was induced into executing the two documents by appellee's promise to pay the amounts owed if Ms. Powell failed to pay. Appellant is correct that the parol evidence rule does not bar a party from introducing extrinsic evidence for the purpose of proving fraud in the inducement. See *Galmish v. Cicchini* (2000), 90 Ohio St.3d 22, 28. However, even if we were to accept, for the purposes of summary judgment, appellant's assertions that appellee promised to pay Ms. Powell's debt if she failed to so pay, summary judgment in favor of appellee is still appropriate.

Under R.C. 1335.05, no action can be brought to charge the defendant, upon a special promise, to answer for the debt of another unless the agreement is in writing and signed by the party to be charged therewith. In the case at bar, there is no writing evidencing such alleged promise by appellee. Therefore, appellee cannot be held liable for the amounts appellant claims are still owed him.

Given all of the above, summary judgment in favor of appellee was appropriate. Accordingly, appellant's assignments of error are overruled.

All three assignments of error having been overruled, the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

DESHLER and LAZARUS, JJ., concur.