[Cite as *Tucker v. White*, 2010-Ohio-5654.]

COURT OF APPEALS
KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JACK W. TUCKER	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellant	:	Hon. John W. Wise, J.
	:	Hon. Julie A. Edwards, J.
-vs-	:	
	:	
DEBBIE WHITE	:	Case No. 10CA000001
	:	
Defendant-Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 080T09-0565
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	November 17, 2010

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
D. DERK DEMAREE 112 North Main Street Mount Vernon, OH 43050	DEBORAH L. KENNEY One South Park Place Newark, OH 43055

Farmer, P.J.

{¶1} On September 12, 2008, appellant, Jack Tucker, filed a complaint against appellee, Debbie White, for money due and owing on a purported loan. Appellant alleged that on January 6, 2005, he loaned $22,000.00 to appellee, his then stepdaughter.

{¶2} On October 26, 2009, appellee filed a motion for summary judgment. By order filed November 23, 2009, the trial court denied the motion.

{¶3} A bench trial commenced on November 30, 2009. At the outset, appellee renewed her motion for summary judgment. The trial court granted the motion and dismissed the complaint. Said decision was journalized on December 9, 2009.

{¶4} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶5} "THE TRIAL COURT'S SUMMARY JUDGMENT WAS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE."

I

{¶6} Appellant claims the trial court erred in granting summary judgment to appellee as there exist genuine issues of material fact. We disagree.

{¶7} Summary Judgment motions are to be resolved in light of the dictates of Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins,* 75 Ohio St.3d 447, 448, 1996-Ohio-211:

{¶8} "Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be

litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex. rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274."

{¶9} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc*. (1987), 30 Ohio St.3d 35.

{¶10} By judgment entry filed December 9, 2009, the trial court found appellee was entitled to judgment as a matter of law as appellant's claims were barred by the doctrine of res judicata and the statute of frauds.

{¶11} Appellee's October 26, 2009 motion for summary judgment was predicated upon three issues: 1) no loan in existence; 2) res judicata; and 3) the statute of frauds.

{¶12} In his complaint filed September 12, 2008, appellant averred that on January 6, 2005, he loaned appellee $22,000.00 from his Personal Reserve Account at First-Knox National Bank (hereinafter "PRA"). Appellee presented the account records from the bank wherein he signed for a personal line of credit on August 6, 1984. There is no indication of a $22,000.00 withdrawal from that account on January 6, 2005. See,

Defendant's Exhibit A, attached to Motion for Summary Judgment filed October 26, 2009.

{¶13} In response to the motion, appellant did not address this issue, but argued that appellee admitted in the trial of her mother's divorce from appellant that appellant had loaned her funds to pay off her credit card bills, approximately $10,549.90 and $8,592.98, and that she had repaid appellant $9,500.00. See, Appellee's Testimony at 120-122, attached to Plaintiff's Memorandum Contra filed November 17, 2009. However, appellant did not apply the $500.00 monthly payments made by appellee to the PRA loan. Id. at 122-123.

{¶14} Appellant also argued res judicata. Res judicata is defined as "[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." *Grava v. Parkman Twp.,* 73 Ohio St.3d 379, 1995-Ohio-331, syllabus.

{¶15} In appellant's divorce decree from appellee's mother (Case No. 06DV090200), the following order was made relative to the loan between appellant and appellee:

{¶16} "The parties took the PRA loan from First Knox National Bank in order to allow wife's daughter to pay off some outstanding debts. Daughter admitted making no payments to stepfather since July 2006, but had paid $9,500.00 to him prior to this. She testified she tried to find out from the bank the total pay off, but they would not tell her and indicated to her additional funds had been borrowed." See, Defendant's Exhibit A, attached to Supplemental Trial Brief filed November 30, 2009.

{¶17} In the divorce decree, the PRA loan was assigned to appellant. As the decree properly noted, appellee was not a party to the action and therefore the matter is not "res judicata" as to the loan.

{¶18} Lastly, appellee argued the statute of frauds. R.C. 1335.05 governs certain agreements to be in writing:

{¶19} "No action shall be brought whereby to charge the defendant, upon a special promise, to answer for the debt, default, or miscarriage of another person; nor to charge an executor or administrator upon a special promise to answer damages out of his own estate; nor to charge a person upon an agreement made upon consideration of marriage, or upon a contract or sale of lands, tenements, or hereditaments, or interest in or concerning them, or upon an agreement that is not to be performed within one year from the making thereof; unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized."

{¶20} It is undisputed that the loan was never in writing, and it is clearly evident from the testimony that a $500.00 per month payment on $22,000.00 would not complete the agreement within one year.

{¶21} The remaining issue is whether part performance by appellee negated the requirement of the statute of frauds. Generally, under an agreement not to be performed within a year, part performance does not apply. *Hodges vs. Hodges* (1933), 46 Ohio App. 307. This may be relieved by resorting to equitable estoppel only. *Rutledge v. Hoffman* (1947), 81 Ohio App. 85; *Spectrum Benefit Options, Inc. v. Medical Mutual of Ohio,* 174 Ohio App.3d 29, 2007-Ohio-5562.

{¶22} Upon review, we find the trial court did not err in determining that under the language of appellant's complaint, there was no proof of a loan and the statute of frauds barred the action.

{¶23} The sole assignment of error is denied.

{¶24} The judgment of the Court of Common Pleas of Knox County, Ohio is hereby affirmed.

By Farmer, P.J.

Wise, J. concur and

Edwards, J. dissents.

_s/ Sheila G. Farmer_____

_s/ John W. Wise_____

_____

JUDGES

SGF/sg 730

EDWARDS, P.J., DISSENTING OPINION

{¶25} I respectfully dissent from the majority's analysis and disposition of appellant's sole assignment of error.

{¶26} I concur with the majority that the doctrine of res judicata is not applicable. However, I disagree with the majority's conclusion that the statute of frauds barred the complaint in this case.

{¶27} As is stated above, R.C. 1335.05 states as follows:

{¶28} No action shall be brought * * * upon an agreement that is not to be performed within one year from the making thereof; unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith * * *

{¶29} As noted by the Ohio Supreme Court in *Sherman v. Haines*, 73 Ohio St.3d 125, 1995-Ohio-222, 652 N.E.2d 698:

{¶30} "For over a century, the 'not to be performed within one year' provision of the Statute of Frauds, in Ohio and elsewhere, has been given a literal and narrow construction. The provision applies only to agreements which, by their terms, cannot be fully performed within a year, and not to agreements which may possibly be performed within a year. Thus, where the time for performance under an agreement is indefinite, or is dependent upon a contingency which may or may not happen within a year, the agreement does not fall within the Statute of Frauds." Id at 127.

{¶31} In such case, the Ohio Supreme Court held in the syllabus as follows:

{¶32} "An alleged oral agreement to pay money in installments is 'an agreement that is not to be performed within one year' pursuant to R.C. 1335.05 when the

installment payment obligation exceeds one year. However, where the time of payment under the agreement is indefinite or dependent upon a contingency which may happen within one year, the agreement does not fall within the 'not to be performed within one year' provision of R.C. 1335.05."

{¶33} In the case sub judice, it was alleged that, on January 6, 2005, appellee borrowed $22,000.00 from appellant. The agreement was an oral agreement. While appellee, as evidenced by the testimony, repaid $9,500.00, of such amount between February 7, 2005, and August 25, 2006, (or approximately $500.00 a month), there was no agreement to pay such amount. Rather, the agreement was indefinite as to the terms of repayment. In short, I would find that the agreement in the case sub judice, by its terms, could possibly be performed within one year.

{¶34} I would find, therefore, that the agreement in this case did not fall within the statute of frauds and that the trial court erred in granting summary judgment in favor of appellee.

s/ Judge Julie A. Edwards

Judge Julie A. Edwards

IN THE COURT OF APPEALS FOR KNOX COUNTY, OHIO

FIFTH APPELLATE DISTRICT

JACK W. TUCKER	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
DEBBIE WHITE	:	
Defendant-Appellee	:	CASE NO. 10CA000001

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Knox County, Ohio is affirmed. Costs to appellant.

s/ Sheila G. Farmer

s/ John W. Wise

JUDGES