**[Cite as *Kiser v. Williams*, 2010-Ohio-3390.]**

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| STATE OF OHIO | ) | IN THE COURT OF APPEALS |
| | )ss: | NINTH JUDICIAL DISTRICT |
| COUNTY OF SUMMIT | ) | |

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| PAUL C. KISER | C.A. No. 24968 |
| Appellee | |
| v. | APPEAL FROM JUDGMENT ENTERED IN THE |
| RICHARD D. WILLIAMS, et al. | COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO |
| Appellants | CASE No. CV 2008 03 2522 |

DECISION AND JOURNAL ENTRY

Dated: July 21, 2010

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DICKINSON, Presiding Judge.

INTRODUCTION

**{¶1}** Paul Kiser allegedly lent $53,533.79 to Richard and Kimberly Williams so they could purchase a rental property located at 2566 Shortway Drive, Akron, Ohio. Although there was no written agreement, the Williamses paid Mr. Kiser between $500 and $600 almost every month for the next three and one-half years. After Mr. Kiser died, the Williamses made two more payments and then stopped paying altogether. The executor of Mr. Kiser's estate sued the Williamses, alleging they owed the estate $36,279.66. He also alleged that the Williamses had been unjustly enriched. The Williamses counterclaimed, alleging that Mr. Kiser had not paid for some services that they had provided to him before he died. The estate moved for summary judgment on its claims and the Williamses' counterclaims. The Williamses responded with a cross-motion for summary judgment on the estate's claims, arguing that those claims were barred by the statute of frauds. The trial court determined that the statute of frauds did not apply to the

loan agreement, that there were no genuine issues of material fact, and that the estate was entitled to judgment on its claims as a matter of law. It determined that a genuine issue of material fact existed regarding the Williamses' counterclaims. Accordingly, it granted the estate's motion for summary judgment as to its claims, denied the estate's motion as to the Williamses' counterclaims, and denied the Williamses' cross-motion for summary judgment. The Williamses have assigned as error that the court incorrectly granted the estate's motion for summary judgment. This Court reverses because the trial court incorrectly concluded that, viewing the evidence and the inferences that can be drawn from it in a light most favorable to the Williamses, the estate is entitled to judgment as a matter of law.

CIVIL RULE 54(B)

**{¶2}** Although the trial court determined that the Williamses are liable for the remaining balance on the loan, it did not resolve their counterclaim. Under Rule 54(B) of the Ohio Rules of Civil Procedure, a "court may enter final judgment as to one or more but fewer than all of the claims . . . only upon an express determination that there is no just reason for delay." The day after the trial court granted the estate summary judgment on its claims, and before the Williamses filed their notice of appeal, it made an express determination that "there is no just reason for delay." Accordingly, the trial court's judgment is appealable under Rule 54(B).

SUMMARY JUDGMENT

**{¶3}** The Williamses' assignment of error is that the trial court incorrectly granted the estate's motion for summary judgment. Under Civil Rule 56(C), it is appropriate for a trial court to grant summary judgment to a party "when all relevant materials filed in the action reveal that 'there is no genuine issue as to any material fact and that the moving party is entitled to judgment

as a matter of law.'" *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St. 3d 250, 2010-Ohio-1027, at ¶103 (quoting Civ. R. 56(C)). The court must construe the filed materials "most strongly in the nonmoving party's favor, and 'summary judgment shall not be rendered' unless those materials establish that 'reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made . . .'" *Id*. (quoting Civ. R. 56(C)). In reviewing a trial court's ruling on a motion for summary judgment, this Court applies the same standard a trial court is required to apply in the first instance: whether there are any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law. *Parenti v. Goodyear Tire & Rubber Co.*, 66 Ohio App. 3d 826, 829 (1990).

STATUTE OF FRAUDS

**{¶4}** The Williamses have made several arguments in support of their assignment of error. This Court will begin with their argument that the trial court incorrectly concluded that the estate's claims are not barred by the Statute of Frauds. Under Section 1335.05 of the Ohio Revised Code, "[n]o action shall be brought whereby to charge the defendant, upon a special promise, to answer for the debt, default, or miscarriage of another person; . . . 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 . . . ."

**{¶5}** The trial court concluded that Section 1335.05 did not apply to the alleged loan for two reasons. First, it determined that "there is no indication that the contract could not have been performed within one year of its making." Second, it concluded that the estate "ha[d]

presented writings signed by [the Williamses] sufficient to constitute a memorandum of the oral contract."

**{¶6}** Regarding whether the contract could have been performed within one year, the trial court correctly noted that the "'not to be performed within one year' provision of the Statute of Frauds . . . has been given a literal and narrow construction." *Sherman v. Haines*, 73 Ohio St. 3d 125, 127 (1995). In particular, the Ohio Supreme Court has held that, "[if] 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 [Section 1335.05]." *Id*. at syllabus.

**{¶7}** The trial court determined that there was no evidence that the loan had a definite repayment term. It discounted the fact that the Williamses usually paid Mr. Kiser $600 toward the loan each month because there "were several breaks in the monthly repayment cycle . . . [and] [t]he record does not show that these deficiencies were made up in later payments . . . ." The court, however, failed to construe the evidence and the inferences to be drawn from it in a light most favorable to the Williamses.

**{¶8}** In March 2003, Mr. Kiser withdrew $53,533.79 from a personal line of credit. The Williamses made their first payment to him in April 2003, which was for $532.63. From May to November 2003, they paid Mr. Kiser $600 per month. In December 2003, they paid him $500.44. From January 2004 to September 2004, they again paid him $600 per month. In October and November 2004, they did not pay him anything. In December 2004, they started paying him $600 per month again, which they continued through July 2005. In August and September 2005, the Williamses did not pay anything on the loan. In October 2005, they paid Mr. Kiser $600 again, which they continued each month until November 2006, except for May 2006, when they did not pay anything.

**{¶9}** Because there were gaps in the Williamses' payments, the trial court inferred that the loan had an indefinite term. While that is one reasonable inference, another that could reasonably be drawn from the Williamses' pattern of payments is that they had agreed to pay Mr. Kiser $600 per month until the loan was repaid, but had occasionally missed some payments. The Ohio Supreme Court has held that "[a]n 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." *Sherman v. Haines*, 73 Ohio St. 3d 125, syllabus (1995). Accordingly, viewing the evidence in a light most favorable to the Williamses and resolving all inferences in their favor, the trial court incorrectly determined that reasonable minds could only conclude that the loan had an indefinite repayment term.

**{¶10}** The trial court further determined that, even if the loan had a definite repayment term, it remained outside the Statute of Frauds because all of the documentary evidence submitted by the estate, read together, "constitute[d] a memorandum, signed by [the Williamses], which reasonably establishes a loan for money to purchase the property at 2566 Shortway, and to be repaid at six hundred dollars per month." As previously noted, the Statute of Frauds is satisfied if "some memorandum or note [of the agreement], is in writing and signed by the party to be charged therewith . . . ." R.C. 1335.05

**{¶11}** According to the Ohio Supreme Court, "[t]he memorandum in writing which is required by the statute of frauds . . . is not sufficient unless it contains the essential terms of the agreement, expressed with such clearness and certainty that they may be understood from the memorandum itself, or some other writing to which it refers, without the necessity of resorting to parol proof." *Kling v. Bordner*, 65 Ohio St. 86, paragraph one of the syllabus (1901). The Supreme Court has permitted "[s]everal writings, though made at different times, [to] be

construed together, for the purpose of ascertaining the terms of [the] contract . . . ." *Thayer v. Luce*, 22 Ohio St. 62, paragraph one of the syllabus (1871).

**{¶12}** The trial court concluded that the estate had presented sufficient written evidence of the terms of the loan to satisfy the Statute of Frauds. It wrote that there was evidence that Mr. Kiser took an advance against his line of credit on March 27, 2003, and that the Williamses purchased 2566 Shortway Drive for approximately the same amount on March 26, 2003. It also wrote that there was a series of checks from the Williamses to Mr. Kiser with notations indicating that they were for "2566 Shortway," "Shortway," "Loan Payment," "For Shortway," or "Loan on Shortway."

**{¶13}** Although the documents submitted by the estate could be read together to establish many of the terms of the alleged agreement between Mr. Kiser and the Williamses, they fail to establish all of the essential terms of a loan. In particular, they do not establish the principal. While the estate has argued that Mr. Kiser lent the Williamses all of the money he obtained from his line of credit, there are two problems with its argument. The first is that, while Mr. Kiser withdrew $53,533.79 from his line of credit, the Williamses paid only $51,200 for the property, with an additional $204.80 in conveyance fees. Accordingly, it is unclear whether Mr. Kiser lent the Williamses the entire $53,533.79 or only the $51,404.80 they would have needed to pay for the property. The second problem is that the documents the estate submitted establish that the Williamses paid for the rental property in full before Mr. Kiser lent them any money. According to the Sheriff's Deed that the estate submitted, the Williamses won the property at an auction in January 2003 and paid for it by March 3, 2003. Mr. Kiser did not receive any money on his line of credit, let alone lend it to the Williamses, until March 28, 2003. It is possible that

Mr. Kiser lent the Williamses some sum of money for a different purpose, such as renovations to the Shortway property.

**{¶14}** Viewing the evidence in a light most favorable to the Williamses, the documents submitted by the estate do not establish the amount of the loan. Because the principal is unknown, it is not possible to determine whether they have fulfilled their repayment obligation or are in default. This Court concludes that the amount of the loan is one of its essential terms. The trial court, therefore, incorrectly concluded that the Williamses' checks to Mr. Kiser were enough to constitute a "memorandum" under Section 1335.05. See *Kling v. Bordner*, 65 Ohio St. 86, paragraph one of the syllabus (1901) (holding that the memorandum must express the essential terms of the agreement "with such clearness and certainty that they may be understood from the memorandum itself . . . without the necessity of resorting to parol proof.").

**{¶15}** Although not relied on by the trial court, the estate has argued that the doctrine of part performance is another reason why the Statute of Frauds does not apply to the loan agreement. "Early in the history of the statute of frauds, courts of equity, to prevent the statute [from] being used as a shield by a wrongdoer, evolved the doctrine of part performance to remove a contract from the statute." *Hughes v. Oberholtzer*, 162 Ohio St. 330, 337 (1954). The doctrine takes a case out of the operation of the statute of frauds if the "acts of the parties . . . are such that it is clearly evident that such acts would not have been done in the absence of a contract and . . . there is no other explanation for the performance of such acts except a contract containing the provisions contended for by the plaintiff." *Id*. at 337-38. The Ohio Supreme Court, however, has limited the application of the doctrine to "cases involving the sale or leasing of real estate, wherein there has been a delivery of possession of the real estate in question, and in settlements made upon consideration of marriage, followed by actual marriage." *Hodges v.*

*Ettinger*, 127 Ohio St. 460, syllabus (1934); see also *O'Bryon v. Poff*, 9th Dist. No. 02CA0061, 2003-Ohio-3405, at ¶32. While the estate has alleged that the Williamses used the money they borrowed from Mr. Kiser to purchase real estate, the Williamses did not directly buy or lease the property from Mr. Kiser. Accordingly, the estate may not invoke the doctrine of part performance to remove the alleged loan from the operation of the Statute of Frauds.

**{¶16}** The estate has further argued that the loan should be removed from the operation of the Statute of Frauds "by virtue of promissory estoppel." The Ohio Supreme Court, however, has held that "[a] party may not use promissory estoppel to bar the opposing party from asserting the affirmative defense of the statute of frauds . . . ." *Olympic Holding Co. L.L.C. v. ACE Ltd.*, 122 Ohio St. 3d 89, 2009-Ohio-2057, at paragraph two of the syllabus. Instead of using "promissory estoppel to bar the opposing party from asserting the affirmative defense of the statute of frauds," parties "may pursue promissory estoppel as a separate remedy for damages." *Id*. at ¶38. "An action for damages under promissory estoppel provides an adequate remedy for an unfulfilled or fraudulent promise." *Id*. at ¶39. Accordingly, even if the estate has a viable promissory estoppel claim, it does not take the loan outside the operation of Section 1335.05.

**{¶17}** The trial court incorrectly determined that reasonable minds could come to but one conclusion, which is that Section 1335.05 does not apply to the estate's breach of contract claim as a matter of law. The Williamses' assignment of error is sustained.

## CONCLUSION

**{¶18}** The trial court incorrectly concluded that there were no genuine issues of material fact in dispute and that the estate was entitled to judgment on its claims as a matter of law. The judgment of the Summit County Common Pleas Court is reversed, and this matter is remanded for proceedings consistent with this opinion.

Judgment reversed,
and cause remanded.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellee.

CLAIR E. DICKINSON
FOR THE COURT

CARR, J.
BELFANCE, J.
CONCUR

APPEARANCES:

MICHAEL T. CALLAHAN, attorney at law, for appellants.

ROBERT C. HUNT, attorney at law, for appellee.