

2015 IL App (2d) 140960-U
No. 2-14-0960
Order filed May 29, 2015

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

| | | |
|--------------------------------------|---|-------------------------------|
| MOULDTEC, INC., |) | Appeal from the Circuit Court |
| |) | of McHenry County. |
| Plaintiff-Appellee, |) | |
| |) | |
| v. |) | No. 12-AR-321 |
| |) | |
| JOSEPH & SONS, INC., <i>et al.</i> , |) | Honorable |
| |) | Michael J. Chmiel, |
| Defendants-Appellants. |) | Judge, Presiding. |

JUSTICE HUDSON delivered the judgment of the court.
Justices McLaren and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's judgment for defendants on plaintiff's breach-of-contract claim was not against the manifest weight of the evidence: defendants complied with the contract by paying \$28,000 to plaintiff's agent rather than \$35,000 to plaintiff; as to plaintiff's unpleaded assertion that defendants breached an obligation to investigate whether the agent had authority to direct payment to herself, the court could find that, under the circumstances, defendants had no reason to suspect that she lacked that authority.

¶ 2 In this breach-of-contract action, plaintiff, Mouldtec, Inc., appeals the trial court's judgment in favor of defendants, Joseph & Sons, Inc., *et al.* (collectively, Joseph). At issue is whether there was a breach of contract by Joseph when an agent of Mouldtec fraudulently

induced Joseph to pay her personally on invoices for goods and then failed to remit that money to Mouldtec. We affirm.

¶ 3

I. BACKGROUND

¶ 4 Mouldtec is an Illinois company that manufactures plastic buckets with special lids that allow flower growers to stack flowers for transportation. The buckets are produced for Mouldtec by a company in California. Joseph, a California company, has been in the business of flower growing for 12 to 14 years. Joseph purchased buckets through plaintiff's agent, Geena Cepek, and paid her directly for them. Mouldtec did not receive the money and filed suit alleging civil conspiracy and breach of contract.

¶ 5 Only the breach-of-contract claim is at issue on appeal. The contract consisted of two invoices totaling \$28,000 and directing that payment be made to Cepek. In its complaint, however, Mouldtec alleged that the contract was breached when Joseph failed to pay Mouldtec \$35,000, which it alleged was the actual value of the buckets. In June 2014, a bench trial was held.

¶ 6 The evidence showed that Cepek was previously affiliated with a competitor company called Pagter and was well known in California as its salesperson. She joined Mouldtec in August 2011 as an inside salesperson. Her job was to market Mouldtec to her connections and send samples to contacts. In its complaint, Mouldtec stated that she also had the authority to enter into initial purchase transactions on Mouldtec's behalf. However, she was not a corporate officer or shareholder, and she was not authorized to represent to any third party that she was an owner of Mouldtec. She also did not have the authority to set the pricing of Mouldtec products. Instead, only Richard Del Olmo, the president of Mouldtec, had that authority. She further did not have the authority to direct that payment be made directly to her.

¶ 7 Joseph had previously purchased transportation and storage containers from Pagter. Shortly before joining Mouldtec, Cepek had discussions with Joseph about switching over to Mouldtec products, during which discussions she held herself out as an owner of Mouldtec. In November 2011, Joseph received product samples from Mouldtec. Cepek was not listed as a shipping representative or as a contact person on the delivery ticket.

¶ 8 Joe Ortiz, Jr., the sales manager of Joseph, negotiated a discount on pricing with Cepek for Mouldtec products. Joseph then sent purchase orders for products, received and used the products, and was sent two invoices. Ortiz stated that the information on each invoice was the entire agreement between himself and Cepek, acting on behalf of Mouldtec. Each invoice directed Joseph to remit payment to Cepek. Joseph paid for the products by remitting payment to Cepek as directed. Ortiz testified that he had no reason to believe that Cepek was not an owner of Mouldtec. Cepek had told him why she wanted to be paid directly, and the conversation did not raise any red flags about the propriety of doing so. Ortiz agreed that the invoices were the entire agreement between Joseph and Cepek. Cepek never remitted the money to Mouldtec.

¶ 9 Cepek's deception was discovered when Mouldtec determined that it had not been paid, based on competing invoices that it had in its computer system. It was then that Del Olmo contacted Joseph and learned what had happened. Del Olmo testified that it was not industry custom to direct a customer to pay an individual instead of the invoicing corporation. Ortiz testified that the payment to Cepek was the only time, with one possible exception, that Joseph had made payment to an individual instead of the invoicing corporation. However, when asked if it was industry custom to pay the invoicing corporation, Ortiz said that it was customary to pay

the person directing the payment. He never sought to check if Cepek was authorized to direct payment to herself, because she had told him that she was an owner of Mouldtec.

¶ 10 The trial court found in favor of Joseph. Noting that the real culprit in the matter was Cepek, the court stated that Joseph was not in breach of contract as it received the invoices under the contract and paid them. Mouldtec moved to reconsider and asked the court to clarify its order. The court denied the motion to reconsider and clarified its decision, stating that it was established that there was a contract and that the breach allegations were limited to the two invoices, which Joseph paid. Thus, Mouldtec failed to show a breach. The court also stated that Cepek had apparent authority to form the contract, as she was the person representing Mouldtec in California. Mouldtec appeals.

¶ 11

II. ANALYSIS

¶ 12 Mouldtec contends that the trial court erred in finding that there was no breach of contract. Specifically, it argues that Cepek had no authority to direct payment to herself and that Joseph failed to make a reasonable inquiry into her authority. Noting that the cause of action claimed was breach of contract, Joseph argues that it fully performed the contract as specified and, thus, there was no breach.

¶ 13 The elements of a breach-of-contract action are: (1) a valid and enforceable contract; (2) performance by the plaintiff; (3) breach by the defendant; and (4) injury to the plaintiff. *Timan v. Ourada*, 2012 IL App (2d) 100834, ¶ 24. The interpretation of a contract presents a question of law and is reviewed *de novo*. *Doornbos Heating & Air Conditioning, Inc. v. James D. Schlenker, M.D., S.C.*, 403 Ill. App. 3d 468, 488 (2010). Conversely, whether a breach of contract occurred is a question of fact, and the trial court's finding will not be disturbed on appeal unless it is against the manifest weight of the evidence. *Id.* "A factual finding is

against the manifest weight of the evidence if the opposite conclusion is plainly evident, or where the decision is unreasonable, arbitrary or without a basis in the evidence.” *Asset Recovery Contracting, LLC v. Walsh Construction Co. of Illinois*, 2012 IL App (1st) 101226, ¶ 74. The trial court, as trier of fact, is in a superior position to observe the witnesses while testifying, to judge their credibility, and to determine the weight that their testimony should receive. *Hessler v. Crystal Lake Chrysler-Plymouth, Inc.*, 338 Ill. App. 3d 1010, 1022 (2003).

¶ 14 Here, Mouldtec’s complaint sought \$35,000 based on Joseph’s failure to remit that amount to Mouldtec. But the contract did not state that Joseph was required to pay that amount to Mouldtec. Instead, it stated that Joseph was to pay \$28,000 to Cepek, which is what it did. Thus, the contract as written was not breached. Mouldtec attempts to avoid this problem by arguing that Joseph failed to investigate and discover the extent of Cepek’s authority. However, as Joseph points out, that theory was not pled in the complaint. In any event, the trial court’s apparent finding that Joseph satisfied any such obligation was not against the manifest weight of the evidence.¹

¶ 15 Mouldtec’s argument is based on Cepek’s lack of authority to set prices and enter contracts directing that payment be sent to her personally. In an agency relationship, a principal may empower an agent with the authority to enter into contracts with third parties on the principal’s behalf. *Progress Printing Corp. v. Jane Byrne Political Committee*, 235 Ill. App. 3d 292, 307 (1992). An agent’s authority to bind a principal may be actual, apparent, or created by estoppel. *Id.* “Actual authority is express or implied; express authority is, of course, a specific

¹ To the extent that the trial court did not expressly so find, we presume that it made findings consistent with its judgment. See *Hanson-Suminski v. Rohrman Midwest Motors, Inc.*, 386 Ill. App. 3d 585, 596 (2008).

grant of authorization to perform a particular act, and implied authority is that which is inherent in an agent's position." *Id.* at 308.

¶ 16 "Apparent authority arises where a principal creates, through words or conduct, the reasonable impression that the putative agent has been granted authority to perform certain acts." *State Security Insurance Co. v. Burgos*, 145 Ill. 2d 423, 431 (1991). It is "that authority which a reasonably prudent person, in view of the principal's conduct, would naturally suppose the agent to possess." *Id.* at 432. "The principal, having created the appearance of authority, is estopped to deny it to the detriment of a third party." *Id.*; J.A.C. Hetherington, *Trends in Enterprise Liability: Law and the Unauthorized Agent*, 19 Stan. L. Rev. 76 (1966) (describing trend to protect consumers who are deceived by imposter/agents in the course of routine business transactions, with liability falling on those who allowed the deception to occur).

¶ 17 Third parties have a duty to verify an agent's authorization to enter contracts on behalf of its principal, but the duty is one of reasonable diligence. *Progress Printing Corp.*, 235 Ill. App. 3d at 309. Also, a third party's duty in this regard does not obviate a principal's own duty to third parties, which is to exercise reasonable diligence in monitoring its agents' activities so that they are not exceeding their authority. *Id.* Generally, a third party must investigate further when, in the exercise of reasonable prudence, it should have suspected that the agent lacked authority. See *id.* The existence and scope of an agency relationship are questions of fact unless the parties' relationship is so clear as to be undisputed. *Zahl v. Krupa*, 365 Ill. App. 3d 653, 661 (2006).

¶ 18 Here, Mouldtec hired Cepek and held her out as its salesperson. It also admitted in its complaint that Cepek had authority to enter into purchase transactions. Given the course of dealing and Cepek's representations to Joseph, the court could find that Joseph had no reason to

suspect that she lacked further authority to set prices and direct the terms for making payment. Although Mouldtec provided evidence that it was unusual for payment to be directed to an individual and although Ortiz admitted that he generally had not previously done so, Ortiz testified that industry custom was to pay the person directing payment and that he had no reason to question Cepek, as she held herself out as an owner of Mouldtec. Indeed, Ortiz testified that he spoke with Cepek about why she required direct payment and that the conversation did not raise any concerns about the matter. The trial court was free to credit that testimony and find that, under the circumstances, Cepek had apparent authority to create the contract, and Joseph, in the exercise of reasonable prudence, was not required to investigate that authority further.

¶ 19 The contract here was performed by Joseph as required, and thus there was no breach. To the extent that Cepek lacked authority to direct payment to herself, the trial court's determination that Joseph was not required to investigate further and discover her lack of authority was not against the manifest weight of the evidence. Ultimately, Mouldtec would certainly have a claim against Cepek,² but the trial court correctly determined that it did not have a claim for breach of contract against Joseph.

¶ 20 III. CONCLUSION

¶ 21 The trial court did not err in ruling for Joseph on the breach-of-contract claim. Accordingly, the judgment of the circuit court of McHenry County is affirmed.

¶ 22 Affirmed.

² In its brief, Joseph states that Mouldtec obtained a default judgment against Cepek.