2018 IL App (2d) 170613-U
No. 2-17-0613
Order filed August 14, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

JOHN KRUSHKE, Plaintiff-Appellant, v. KENNETH NEWSOME, Defendant, and HUMPAL REALTORS, INC., d/b/a REMAX PROPERTY SOURCE, Defendant-Appellee.	)	Appeal from the Circuit Court of Winnebago County. No. 15-L-85 Honorable Eugene G. Doherty, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Presiding Justice Hudson and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's finding of summary judgment in favor of defendant was proper as there is no genuine issue of material fact supporting plaintiff's claims of actual or apparent agency.

¶ 2 I. BACKGROUND

¶ 3 Plaintiff, John Krushke, contacted Kenneth Newsome about his interest in real estate located at 2111 11th Street, Rockford, Illinois. Krushke saw a sign at the property that read "RE/MAX Property Source" and listed Kenneth Newsome and his contact phone number. Krushke contacted Newsome and they met at the property on September 6, 2014. On that day, Krushke wished to inspect the roof of the building. Newsome retrieved an extension ladder and Krushke ascended to the roof. On his way down, the ladder slid, and Krushke fell.

¶ 4 On March 18, 2015, Krushke filed three-count complaint. Relevant here, counts II and III alleged negligence under two theories of *respondeat superior* against Humpal Realtors, Inc., d/b/a, Remax Property Source. Count II alleged that Newsome was acting as the acutal agent of Humpal. Count III, alternatively, alleged that Newsome was acting as the apparent agent of Humpal. In its answer, Humpal denied Krushke's allegations.

¶ 5 During deposition testimony, Krushke said that he assumed that Newsome was employed by the company listed on the sign in front of the property, although he had no idea if Newsome was an employee of Remax Property Source or an independent contractor. He admitted that he had no past experience with how a real estate company directs a realtor to perform his job or how the realtor is compensated by the real estate company. Krushke assumed that because the sign said Remax Property Source and the business card Newsome provided said Remax Property Source, Newsome must have been an employee of Remax Property Source. Krushke said that regardless of the fact that the sign in front of the property said Remax Property Source, it played no role in his decision to visit the property. Had he known that Newsome was an independent contractor instead of an employee, it would have made no difference as far as his decision to visit the property, climb the ladder, and inspect the roof.

¶ 6 Thomas Humpal, owner of Humpal Realtors, Inc., d/b/a Remax Property Source, gave deposition testimony. He testified that Newsome is an independent contractor for Remax Property Source. Humpal is a sponsoring broker and Newsome is a sponsored licensee. As Newsome's sponsoring broker, Humpal holds his license. Humpal and Newsome entered into an independent contractor agreement (the Agreement) and Newsome signed an independent contractor status affidavit in 1996. Humpal said that the purpose of the agreement and the accompanying affidavit was to illustrate the fact that Newsome was an independent contractor, and that Humpal had no control over how Newsome performed his job. Newsome was never an employee who received a W-2, never received any benefits or insurance, was paid only by commission, and never received a salary or reimbursement of expenses from Humpal. Humpal testified that Newsome is never controlled in any way by his company.

¶ 7 Newsome also gave deposition testimony regarding his work as an independent contractor for Remax Property Source. Newsome testified that his relationship with Humpal had always been that of an independent contractor per the Agreement. During his time affiliated with Humpal he never was a W-2 employee. He never received a salary and was only paid by commission. Humpal paid for no benefits, insurance, or reimbursement of expenses. Humpal exercised no control over how Newsome performed his work.

¶ 8 The Agreement between Humpal and Newsome states that:

> "Pursuant to the terms of this Agreement, [Humpal] hereby retains [Newsome] as an independent contractor real estate sales associate exclusively for [Humpal]. [Newsome] shall be free to devote such portion of [Newsome's] entire time, energy, effort and skill as [Newsome] sees fit and to establish [Newsome's] own endeavors. [Newsome] shall not have mandatory duites except those imposed by law or regulation and those

> specifically set out in this Agreement. [Newsome] shall abide by all decisions and rules relating to the operations of [Humpal] that are adopted by [Humpal]. Nothing contained in this Agreement shall be regarded as creating any relationship (including, without limitation, employer/employee, joint venture, partnership, shareholder) between [Humpal] and [Newsome], other than the independent contractor relationship set forth in this Agreement."

The Agreement also requires Newsome to adhere to the Office Policy Manual, a generic form created by the Illinois Association of Realtors.

¶ 9 On October 27, 2016, Humpal filed a motion for summary judgment, arguing that there was no actual or apparent agency relationship between Newsome and Humpal. The trial court held a hearing on Humpal's motion on January 17, 2017, and issued its memorandum opinion and order on February 23, 2017.

¶ 10 The trial court granted Humpal's motion for summary judgment, finding "that there is no genuine issue of material fact ***. This *** order will stand as the order entering summary judgment for Humpal and against plaintiff ***." On March 15, 2017, Humpal filed a motion for 304(a) language, alleging that there was no just reason for delaying either enforcement or appeal of the court's summary judgment order. The trial court continued the matter.

¶ 11 On April 6, 2017, Krushke filed a motion to reconsider the judgment dismissing Humpal. Krushke argued that the trial court must review his arguments under the auspices of 735 ILCS 5/2-1301(e), as to whether granting his motion to reconsider would do "substantial justice." Krushke's motion also argued that *Jacobs v. Yellow Cab Affiliation*, 2017 IL App (1st) 151107, decided shortly after the trial court's grant of summary judgment, changed the law relied upon by

the trial court regarding the issue of apparent agency. The court heard arguments on Krushke's motion to reconsider on June 14, 2017.

¶ 12 On July 7, 2017, the trial court issued its memorandum opinion and order on Krushke's motion to reconsider the judgment dismissing Humpal. The trial court took issue with Krushke's assertion that the motion to reconsider the judgment dismissing Humpal was really a motion pursuant to section 2-1301(e) of the Code of Civil Procedure (the Code) to be viewed under a substantial justice standard. To wit, the court said:

> "Plaintiff acknowledges that this case doesn't precisely fit Section 2-1301, because that provision applies *** explicitly to a default or to a final order or judgment. Plaintiff agrees that the prior decision granting summary judgment to Humpal is not final, because the court has not yet entered a Rule 304(a) finding with respect to that ruling. However, plaintiff contends that Section 2-1301 applies because…well, the Court cannot quite capture the argument, but apparently it is that Section 2-1301 applies to any motion seeking to revisit an earlier, non-final judgment."

The court noted that it would examine Krushke's motion for what it purported to be; a motion to reconsider the judgment dismissing Humpal Realtors, Inc.

¶ 13 The trial court examined Kruske's argument that *Jacobs* had changed the law that the trial court relied on in granting summary judgment on the issue of apparent agency. The trial court said:

> "Nothing in *Jacobs* affects the rationale of the Court's decision on the apparent agency aspect of Plaintiff's claim ***. Plaintiff's new arguments on the apparent agency issue point to things which may well be a 'holding out' of the agent, but they do not cure the problem with reliance. That evidence is uniquely within Plaintiff's control – he, after all

> would be the one doing the relying – and it wasn't offered. *** The Court concludes that there has been no change in the law which would require reconsideration of the earlier ruling."

¶ 14 The court ultimately denied Krushke's motion to reconsider and granted Humpal's motion for a 304(a) finding. Krushke timely appealed.

¶ 15 II. ANALYSIS

¶ 16 Krushke raises two contentions in this appeal. First, that the trial court erred in granting summary judgment to Humpal because facts exist showing that Newsome was its actual or, alternatively, apparent agent, and that Newsome was acting within the scope of his agency when Krushke was injured. Second, and a bit more perplexing, Krushke contends that the trial court should have considered his motion to reconsider under section 2-1301(e) of the Code, assessing whether the grant of summary judgment in favor of Humpal would achieve substantial justice. We will address each contention in turn.

¶ 17 Summary judgment is appropriate where the pleadings, depositions, and admissions on file, together with any affidavits, when viewed in the light most favorable to the nonmovant, reveal that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. *Smith v. Bhattacharya*, 2014 IL App (2d) 130891, ¶ 12. We review *de novo* a trial court's grant of summary judgment, and we will reverse only if we conclude that there exists a genuine issue of material fact. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶ 18 The doctrine of *respondeat superior* allows an injured party to hold a principal vicariously liable for the conduct of his or her agent. *Oliveira-Brooks v. Re/Max Int'l, Inc.*, 372 Ill. App. 3d 127, 134 (2007). "The test of agency is whether the alleged principal has the right to

control the manner and method in which work is carried out by the alleged agent and whether the alleged agent can affect the legal relationships of the principal." *Anderson v. Boy Scouts of America, Inc.*, 226 Ill. App. 3d 440, 443–44 (1992). While the existence of any agency relationship is usually a question of fact, it becomes a question of law when the facts regarding the relationship are undisputed or no liability exists as a matter of law. *Anderson*, 226 Ill. App. 3d at 444. "The burden of proving the existence of an agency relationship and the scope of authority is on the party seeking to charge the alleged principal." *Anderson*, 226 Ill. App. 3d at 444.

¶ 19 Proof of actual agency requires a showing that (1) a principal/agent, master/servant, or employer/employee relationship existed; (2) the principal controlled or had the right to control the conduct of the alleged employee or agent; and (3) the alleged conduct of the agent or employee fell within the scope of the agency or employment. *Wilson v. Edward Hosp.*, 2012 IL 112898 ¶ 18.

¶ 20 As a general rule, no vicarious liability exists for the actions of independent contractors. *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530 ¶ 42. An independent contractor is one who undertakes to produce a given result but in the actual execution of the work is not under the orders or control of the person for whom he does the work but may use his own discretion in things not specified * * * [and] without his being subject to the orders of the [person for whom the work is done] in respect to the details of the work. *Id.* ¶ 43.

¶ 21 The factors to be considered in distinguishing an agent from an independent contractor are: (1) the right to control the manner in which the work is performed; (2) the method of payment and whether taxes are deducted from the payment; (3) the level of skill required to perform the work; and (4) the furnishing of the necessary tools, materials or equipment. *Amigo's*

Inn, Inc. v. License Appeal Comm'n of City of Chicago, 354 Ill. App. 3d 959, 965 (2004). The right to control the manner in which the work is performed is the predominant factor. *Lang v. Silva*, 306 Ill. App. 3d. 960, 972 (1999).

¶ 22 The Real Estate License Act of 2000 (the Act) requires "[e]very broker who *** has an independent contractor relationship with a licensee" to "have a written employment agreement with each such licensee. The broker having this written employment agreement with the licensee must be that licensee's sponsoring broker." 225 ILCS 454/10-20(b) (West 2016). Further, the Act requires "[e]very sponsoring broker must have a written employment agreement with each licensee the broker sponsors. The agreement shall address the *** independent contractor relationship terms, including without limitation supervision, duties, compensation, and termination." 225 ILCS 454/10-20(c) (West 2016).

¶ 23 There is no doubt that the Agreement between Humpal and Newsome is in conformity with the Act for the purposes of establishing what must be present to be in compliance with the Act's statutory provisions. The Agreement was undoubtedly written, Humpal is Newsome's sponsoring broker, and the Agreement specifically addresses the independent contractor relationship terms. The Agreement clearly evidences Humpal and Newsome's intent to establish an independent contractor relationship. See *Warren v. Le May*, 142 Ill. App. 3d 550, 576 (1986) (an independent contractor relationship can be established by an agreement clearly establishing and creating such a relationship).

¶ 24 However, even if the Agreement itself was not evidence enough of an independent contractor relationship between Humpal and Newsome, each factor to be considered in distinguishing an agent from an independent contractor weigh in Humpal's favor. The Agreement and deposition testimony showed that Newsome has always worked as an

independent contractor, and never a W-2 employee. Newsome was paid by commission only and had no salary. Humpal did not pay for any of Newsome's benefits or insurance. Newsome could terminate his affiliation with Humpal at any time. The record reflects that Newsome's actions were never directed or controlled by Humpal, or anyone else, regarding: where and when to work; what equipment to use or how to acquire any equipment; or how to perform any work. Indeed, Krushke does not point to any provision in the Agreement or otherwise that gives Humpal control over the manner in which Newsome performed his work.

¶ 25 Krushke argues that *Bruntjen v. Bethalto Pizza*, LLC, 2014 IL App (5th) 120245, supports his contention that summary judgment should have been denied. Krushke thinks that because that case held that an agreement and operating manual evidenced sufficient rights to control a delivery driver, it follows that Humpal and Newsome's agreement and accompanying Office Policy Manual evidence control to find an actual agency relationship. We disagree.

¶ 26 In *Bruntjen*, the plaintiff was injured by a pizza delivery driver. The issue before the court was whether the delivery driver was acting as the agent of the pizza franchisor. The court found that the contracts between the driver and the franchisor showed significant control over employment decisions, training, safety, daily maintenance, wage and hour requirements, record-keeping, supervision and discipline of employees, and hiring and firing. *Id*. ¶ 84. The contracts between the delivery drivers and the pizza franchisor included detailed requirements concerning the hiring and supervising of drivers, and evidenced "control extended specifically to the pizza delivery drivers." Id. ¶ 86.

¶ 27 The facts of the present case are wholly different from those in *Bruntjen*. Here, the exact opposite level of control is evidenced in the Agreement. The Agreement between Humpal and Newsome provides no control over how Newsome performs his work. Krushke's reliance of

Bruntjen based on the facts contained in the record of this appeal is misguided. There is nothing in the record to suggest that Humpal and Newsome's relationship was one of actual agency. Newsome was an independent contractor. Humpal had no right of control over how Newsome performed his work.

¶ 28 Krushke argues that our Supreme Court's holding in *Zannini v. Reliance Insurance Company of Illinois, Inc.*, 147 Ill. 2d 437 (1992), supports his assertion that Newsome was Humpal's express actual agent. Krushke argues that the written grant of authority allowing Newsome to change legal relations and market the property on which Krushke was injured shows *prima facie* evidence that Newsome was Humpal's express agent.

¶ 29 In *Zannini*, an insurance agent had express written authority to bind coverage for the insurance company, and the agent acted "in accord with his express authority." *Zannini*, 147 Ill. 2d 437, 452 (1992). Because the insurance company had expressly given authority to the insurance agent to bind coverage, the 4-factor test to determine agency (See supra ¶ 21) is improper. See *Zannini*, at 451.

¶ 30 The Supreme Court's holding in *Zannini* would produce an absurd result if applied to the facts of the present case. The Agreement in the present case puts specific limitations on Newsome's express authority. The Agreement grants the right to market, authority to submit the listing to the Commercial and Industrial Information Exchange to provide minimum services as required by the Act, and to advertise and place For Sale signs on the property. An application of Krushke's interpretation of *Zannini* here would result in Humpal being not only bound by Newsome's actions in executing the express grants of the Agreement, but any action that Newsome undertakes while showing the property to prospective buyers including, but not limited to, how to properly adjust a ladder as the prospective buyer ascends and descends from

the roof of the property. Therefore, based on the foregoing, we cannot say that the trial court erred as to finding no genuine issue of material fact regarding an actual agency relationship between Humpal and Newsome.

¶ 31 Krushke's argument on the impropriety of the trial court's summary judgment findings continues with the assertion that Humpal and Newsome were engaged in an apparent agency relationship because Humpal required Newsome to represent to the public that he was working on its behalf and in its name and that Krushke relied on these representations.

¶ 32 To establish apparent agency, a plaintiff must prove that (1) the principal or its agent acted in a manner that would lead a reasonable person to conclude that the individual who was alleged to be negligent was an employee or agent of the principal; (2) the principal had knowledge of and acquiesced in the acts of the agent; and (3) the plaintiff acted in reliance upon the conduct of the principal or its agent, consistent with ordinary care and prudence. *Wilson v. Edward Hosp.*, 2012 IL 112898 ¶ 18.

¶ 33 Krushke's own deposition testimony in the present case belies any argument that he acted in reliance upon the conduct of Newsome or Humpal. In his deposition testimony, Krushke admitted that he had no idea whether Newsome was a Remax employee. Further, and most importantly, there is no evidence that Krushke chose to work with Newsome because he believed Newsome was Humpal's employee. Krushke said that regardless of the fact that the sign in front of the property said Remax Property Source, it played no role in his decision to visit the property. Krushke has presented no evidence of reliance. If anything, his deposition testimony evinces the antithesis of reliance. Without reliance, Krushke cannot establish apparent agency.

¶ 34 Accordingly, we find that the trial court properly granted summary judgment in favor of Humpal as no genuine issue of material fact supporting Krushke's claims of actual or apparent

agency exists.

¶ 35 We now turn briefly to Krushke's contention that the trial court should have considered his motion to reconsider under section 2-1301(e) of the Code. The argument seems to be that section 2-1301(e) was the appropriate vehicle for Krushke's motion to reconsider because the trial court's summary judgment order was not final. Therefore, according to Krushke, the trial court should have reviewed the motion under section 2-1301(e) of the Code and considered whether granting the motion would achieve substantial justice. We disagree.

¶ 36 Section 2-1301(e) of the Code states "[t]he court may in its discretion, before final order or judgment, set aside any default, and may on motion filed within 30 days after entry thereof set aside any final order or judgment upon any terms and conditions that shall be reasonable." 735 ILCS 5/2-1301(e) (West 2016).

¶ 37 The trial court could not fully grasp Krushke's contention on this issue and, quite frankly, neither can this court. Krushke acknowledged to the trial court that his motion to reconsider doesn't not fit section 2-1301(e) because that provision explicitly refers to "default" or a "final order or judgment." The trial court's order granting summary judgment to Humpal contained no 304(a) language. Indeed Humpal filed a motion seeking just that finding about three weeks after the trial court issued its summary judgment order. The order granting summary judgment followed a full briefing on all issues, and a full hearing before the trial court. Hence, there was no default entered against Krushke to trigger an analysis under section 2-1301(e). Krushke argued to the trial court, and again here in this appeal, that *Washington Mutual Bank, F.A. v. Archer Bank*, 385 Ill. App. 3d 427 (2008), supports his contention.

¶ 38 *Washington Mutual Bank* concerned a lienholder-defendant in a foreclosure action seeking reversal of an order dismissing its request that the trial court vacate an order defaulting

it. *Id*. at 428. Although the trial court's order in *Washington Mutual Bank* was not final and appealable due to a lack of a Rule 304(a) finding, section 2-1301 was applicable because the order at issue was a default order. *Id*.

¶ 39 We can find no error in the trial court's refusal to consider Krushke's motion to reconsider the summary judgment order pursuant to a section 2-1301(e) substantial justice standard when that order was neither a default nor a final order triggering the implication of section 2-1301(e). See 735 ILCS 5/2-1301(e) (West 2016).

¶ 40 We conclude by noting that the trial court examined Krushke's motion for what it purported to be: a motion to reconsider the judgment dismissing Humpal Realtors, Inc. However, Krushke's brief presented to this court limits its arguments concerning the motion to reconsider summary judgment to the discussion on the applicability of section 2-1301(e) exclusively. As such, Krushke has waived all other claims of error concerning the trial court's findings on that motion. See 210 Ill.2d R. 341(h)(7).

¶ 41 III. CONCLUSION

¶ 42 For the reasons stated, we affirm the judgment of the circuit court of Winnebago County

¶ 43 Affirmed.