[Cite as *84 Lumber Co. v. Schottenstein*, 2010-Ohio-3025.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

84 Lumber Co.,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-971 (C.P.C. No. 07CVH06-8052)
Eric J. Schottenstein et al.,	:	(REGULAR CALENDAR)
Defendants-Appellants.	:	

D E C I S I O N

Rendered on June 30, 2010

Buckley, King & Bluso and *Gary A. Gillett*, for appellee.

Wiles, Boyle, Burkholder & Bringardner Co., L.P.A., Brian M. Zetsi and *Alicia E. Zambelli*, for appellants.

APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Defendants-appellants, Eric J. Schottenstein ("Schottenstein"), and Joshua Investment Company ("Joshua") (collectively referred to as "appellants"), appeal from the judgment of the Franklin County Court of Common Pleas granting summary judgment in favor of plaintiff-appellee, 84 Lumber Company ("appellee"), and awarding damages of $259,487.61, plus interest, from the date of judgment at a rate of five percent per annum.

{¶2} This matter arises out of a contract between the parties providing that appellee would provide framing services and materials for Joshua on credit. On

September 30, 2003, the parties executed a document entitled "Contractor-Commercial Credit Application" ("Application"). Schottenstein signed the Application, which provided:

> By signing below I hereby certify that I am the owner, general partner or president of the above business, and I do unconditionally and irrevocably personally guaranty this credit account and payments of any and all amounts due by the above business, and that I have read all of the terms and conditions on the reverse side of this application and understand and agree to the same, and that all of the information contained in this application is true and correct to the best of my knowledge.

{¶3} The relevant terms and conditions of the Application were as follows:

> 11. The entire agreement of the parties is set forth in this written document and there are no other oral or written understandings, promises, representations or agreements. This Agreement cannot be modified or amended except by a written document signed by both Applicant and the 84 Credit Department; and this Agreement shall supersede all previous communications, representations, or agreements, either verbal or written, between the parties hereto. This Agreement shall take precedence, supercede and control over any conflicting or additional terms contained in purchase orders, contracts or other similar documents issued or executed by the parties and no such documents shall be binding upon 84 unless approved and signed by the 84 Credit Department.
>
> * * *
>
> 14. This Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Pennsylvania.

{¶4} Thereafter, an Independent Contractor Agreement ("Agreement") was prepared. Though it was dated October 31, 2003, the parties contend it was prepared prior to that date. Appellee's legal department then prepared a Rider to the Agreement ("Rider"), dated October 1, 2003. The Rider contained the following language:

> 5. Contractor agrees that subcontractor's signed Commercial Credit Application and terms contained within shall take

> precedence, supercede, and control in all areas of conflict with the terms and conditions herein.

{¶5} However, Todd J. Ohlmeier, Director of Systems Operations for Joshua, made several handwritten amendments to the Rider, including completely striking the aforementioned paragraph. Mr. Ohlmeier signed the Rider on October 16, 2003, and Daniel R. Broderick ("Broderick"), manager of appellee's store in Pataskala, Ohio, signed the Rider on October 20, 2003. It is undisputed, however, that Broderick did not have the authority to execute either the Agreement or the Rider, as Broderick testified at his deposition that even though he had no authority to sign the documents, he did so regardless because they needed the business.

{¶6} Eventually payments lapsed, and appellee made a demand for payment. After appellee's demand for payment was not met, appellee filed a complaint against appellants on June 18, 2007, alleging unjust enrichment and action on an account. The complaint also alleged Schottenstein was personally liable for all amounts due and owing based on the guarantee in the Application. On November 26, 2008, appellee filed a motion for partial summary judgment. Thereafter, Schottenstein filed a cross-motion for summary judgment. On February 4, 2009, appellants filed a motion for leave to allow Schottenstein to file a counterclaim and to allow Joshua to file an amended counterclaim. The matters were briefed, and on June 5, 2009, the trial court rendered a decision denying appellants' motion for leave, denying Schottenstein's motion for summary judgment, and granting appellee's motion for partial summary judgment. Thereafter, the parties stipulated to damages resulting in final judgment being awarded in favor of appellee and against Joshua and Schottenstein jointly and severally in the amount of

$259,487.61, plus interest from the date of judgment at the rate of five percent per annum.

{¶7} Appellants timely appealed and bring the following three assignments of error for our review:

> I. The trial court erred when it denied Appellants' Motion for Leave for Appellant Eric J. Schottenstein to File a Counterclaim and Joshua Investment Company's to File an Amended Counterclaim.
>
> II. The trial court erred when it denied Appellant Eric J. Schottenstein's Motion for Summary Judgment.
>
> III. The trial court erred when it granted Plaintiff 84 Lumber Company, L.P.'s Motion for Partial Summary Judgment.

{¶8} In their first assignment of error, appellants contend denying their motion for leave to file counterclaims and amended counterclaims was in error. Civ.R. 15 governs a motion to amend the pleadings, and provides:

> (A) Amendments.
>
> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within twenty-eight days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party. Leave of court shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within fourteen days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

{¶9} In denying appellant's motion for leave to amend, the trial court noted the motions were filed one and one-half years after the case had been filed and after the expiration of both the dispositive motions and discovery deadlines. The trial court also

noted that multiple continuances occurred in this case, and the fact that appellants were only able to file the motion to amend because the trial court continued the matter for additional time to consider dispositive motions. The trial court stated that the court's continuance of the trial date "was not meant to act as a vehicle for [appellants] to assert new counterclaims that could have been raised much earlier." (Decision, 2.) The trial court also rejected appellants' argument that they learned for the first time at Broderick's deposition, held on February 2, 2009, that he acted without authority because appellants actually relied on this fact in both their memorandum contra to appellee's motion for partial summary judgment and Schottenstein's motion for summary judgment. Additionally, the trial court found appellee would have been unduly prejudiced by the amendment at such a late date.

{¶10} An appellate court reviews a trial court's decision of whether to grant or deny a motion to amend under an abuse of discretion standard. *Bachtel v. Jackson*, 10th Dist. No. 08AP-714, 2009-Ohio-1554, ¶26. The term abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶11} The trial court gave multiple reasons and a full explanation for its denial of appellants' motion for leave to amend; thus, we cannot find the trial court acted either arbitrarily or unconscionably. Further, the record does not support a finding that the trial court acted unreasonably in denying the motion for leave to amend. On appeal, as in the trial court, appellants assert they could not have sought leave sooner because they were unaware Broderick lacked authority to sign the Agreement and Rider until after they took his deposition on February 2, 2009. As found by the trial court, Broderick's lack of

authority was argued not only in Schottenstein's motion for summary judgment, but also in appellants' memorandum contra to appellee's motion for partial summary judgment. Therefore, the trial court's finding that appellants could have sought leave to amend at an earlier time is not unreasonable. Accordingly, we cannot say the trial court abused its discretion in denying appellants' motion for leave to file and to amend counterclaims, and we overrule appellants' first assignment of error.

{¶12} Because they are interrelated, appellants' second and third assignments of error will be addressed together. In these assigned errors, appellants contend it was error for the trial court to deny Schottenstein's motion for summary judgment and to grant summary judgment in favor of appellee.

{¶13} Summary judgment under Civ.R. 56(C) may be granted only when there remains no genuine issue of material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, that conclusion being adverse to the party opposing the motion. *Tokles & Son, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St.3d 621, 629, citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64. Additionally, a moving party cannot discharge its burden under Civ.R. 56 simply by making conclusory assertions that the nonmoving party has no evidence to prove its case. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. Rather, the moving party must point to some evidence that affirmatively demonstrates that the nonmoving party has no evidence to support his or her claims. Id.

{¶14} An appellate court's review of summary judgment is de novo. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588; *Bard v. Society Natl. Bank, nka KeyBank* (Sept. 10, 1998), 10th Dist. No. 97APE11-1497. Thus, we conduct an

independent review of the record and stand in the shoes of the trial court. *Jones v. Shelly Co.* (1995), 106 Ohio App.3d 440, 445. As such, we must affirm the trial court's judgment if any of the grounds raised by the movant at the trial court are found to support it, even if the trial court failed to consider those grounds. See *Dresher; Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

{¶15} We begin with a review of the Application executed on September 30, 2003. The Application provided that it was governed by Pennsylvania law, and under Pennsylvania law, "[g]uaranty contracts are subject to the same rules of interpretation as other contracts, and the principles guiding our review of a contract's interpretation are settled." *Meeting House Lane, Ltd. v. Melso* (1993), 427 Pa.Super. 118, 125-26, citing *Pennsylvania House, Inc. v. Barrett* (M.D.Pa.1991), 760 F.Supp. 439. "The paramount goal of contractual interpretation is to ascertain and give effect to the intent of the parties. In determining the intent of parties to a written agreement, the court looks to what they have clearly expressed, for the law does not assume that the language of the contract was chosen carelessly." Id., citing *PBS Coals, Inc. v. Barnham Coal Co.* (1989), 384 Pa.Super. 323, 328. Furthermore, the parties have the right to make their own contract, and it is not the function of a court to rewrite it or to give it a construction in conflict with the accepted and plain meaning of the language used. Id., citing *Amoco Oil Co. v. Snyder* (1984), 505 Pa. 214, 221; *Hagarty v. William Akers, Jr. Co.* (1941), 342 Pa. 236, 239.

{¶16} The Application provided that it constituted the entire agreement between the parties and that it could be amended only by written document signed by both Applicant and the 84 Credit Department. Further, the Application provided that that no

other documents shall be binding "unless approved and signed by the 84 Credit Department." (Application at Term 11.) It is further undisputed that Broderick was the manager of appellee's Pataskala, Ohio store and was not a member of the 84 Credit Department. Nonetheless, appellants argue Schottenstein's personal guaranty was discharged by the subsequent execution of the Agreement and the Rider, of which neither contained a personal guaranty. The basis for this argument is appellants' allegation that Broderick had actual or apparent authority to take the actions he did. We find these arguments unavailing.

{¶17} First, we note it is undeniable that Broderick did not have actual authority to execute contracts as even Broderick acknowledged at his deposition that he was not permitted to do so. Secondly, "[w]ithout regard to the extraordinary nature of a transaction, a disclosed or partially disclosed principal cannot be bound on the doctrine of apparent authority by virtue of the extra-judicial representations of an agent as to the existence or extent of his authority or the facts upon which it depends." *Jennings v. Pittsburgh Mercantile Co.* (1964), 414 Pa. 641, 644-45, citing Restatement (2d), Agency § 168 (1958). "An agent cannot, simply by his own words, invest himself with apparent authority." Id. See also *Turnway Corp v. Soffer* (1975), 461 Pa. 447. Under an apparent authority analysis, it is the acts of the principal rather than the agent that must be examined.

{¶18} In the case sub judice, the record is void of any evidence that appellee represented to appellants that Broderick was a member of the 84 Credit Department or otherwise authorized to execute the Agreement and the Rider. Thus, there is no merit to appellant's argument that Broderick was acting with apparent authority when he signed

the Agreement or the Rider and, pursuant to the Application, neither the Agreement nor the Rider are binding documents. Because the Agreement and the Rider are not binding documents, the Application is the controlling contract, and the personal guaranty remains in effect. In accordance with this determination, we find that the trial court did not err in denying Schottenstein's motion for summary judgment and granting summary judgment in favor of appellee, and we overrule appellants' second and third assignments of error.

{¶19} For the foregoing reasons, appellants' three assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

TYACK, P.J., and SADLER, J., concur.

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