[Cite as *Buckeye Hoya, L.L.C. v. Brown Gibbons Lang & Co., L.L.C.*, 2023-Ohio-2177.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

BUCKEYE HOYA, LLC, :

Plaintiff-Appellant, :

No. 111982

v. :

BROWN GIBBONS LANG & COMPANY LLC, ET AL., :

Defendants-Appellees. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: June 29, 2023

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-20-939285

Appearances:

Cooper & Elliot, LLC, Barton R. Keyes, and Jonathan N. Bond, *for appellant*.

Frantz Ward LLP and James B. Niehaus, *for appellees*.

KATHLEEN ANN KEOUGH, P.J.:

{¶ 1} Plaintiff-appellant, Buckeye Hoya, LLC, appeals the trial court's decision entering summary judgment in favor of defendants-appellees, Brown Gibbons Lang & Company, LLC, Brown Gibbons Lang & Company, Inc., and Brown Gibbons Lang & Company Securities, Inc. d.b.a. Brown Gibbons Lang & Company

(collectively "BGL"), and denying Buckeye Hoya's motion for summary judgment. For the reasons that follow, this court affirms the trial court's judgment.

I. Factual Background

{¶ 2} In September 2010, Joseph Concheck ("Concheck") and Anthony Calabrese ("Calabrese") founded Buckeye Hoya — a transactional advisory business that provided services related to mergers and acquisitions, tax-credit transactions, and other real estate business deals. Concheck and Calabrese each owned 50 percent of the business at the time of its formation.[1]

{¶ 3} In late 2010, Concheck learned that National Entertainment Network ("NEN") needed an advisor because it was looking to sell part of its business. Calabrese contacted Nico Bolzan ("Bolzan"), a prior associate who now worked for BGL, an independent investment bank and financial advisory firm, which provided services relating to mergers and acquisitions, capital markets, financial restructuring, valuations and opinions, real estate, and other advisory services. Bolzan connected Concheck with BGL's founder, Mike Gibbons ("Gibbons"), to facilitate a potential business relationship. As a result, on December 16, 2010, Buckeye Hoya entered into a Consulting Agreement ("the Agreement") with BGL.

{¶ 4} Calabrese, a licensed attorney at the time, drafted the Agreement on behalf of Buckeye Hoya. The scope of the Agreement provided that "services shall be limited to assisting [BGL] in making introductions to certain entities that may

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[1] *See North Hill Holdings v. Concheck*, 8th Dist. Cuyahoga No. 108168, 2019-Ohio-5119, ¶ 9. ("*North Hill*")

engage [BGL's] services, including, but not limited to, [NEN] and its affiliates." The Agreement provided that in exchange for Buckeye Hoya's performance, "[BGL] shall pay to [Buckeye Hoya] twenty percent (20.0%) of any amounts paid to [BGL] relating to any introduction to any entity that engages [BGL]." Pursuant to its terms, either party could terminate the Agreement "immediately upon written notice to the other Party," but Buckeye Hoya would still "receive any compensation it is owed" calculated in accordance with the Agreement. Gibbons signed the Agreement on behalf of BGL. It is undisputed that Concheck was an authorized member of Buckeye Hoya and thus, signed the Agreement on behalf of Buckeye Hoya. No other member of Buckeye Hoya signed the Agreement.

{¶ 5} After entering into the Agreement, Buckeye Hoya connected BGL to NEN, with NEN retaining BGL to assist with the sale of its business. BGL's managing director, John Tilson, oversaw the NEN transaction and worked closely with Concheck during this time. In fact, it is undisputed that during the course of the deal with NEN, Concheck was the sole contact between the parties and even worked closely with NEN during the transaction.

{¶ 6} On September 5, 2012, Tilson sent an email to Concheck regarding the "Referral Agreement." He expressed BGL's concern, stating that BGL believed "that you would need to be registered as a broker dealer in order to receive payment from BGL Securities for your services on the NEN transaction. We understand that NEN will be paying you for your services on this transaction." Tilson, with the assistance of legal counsel, sent another email hours later to Concheck with the

subject line: "National Entertainment Network," reiterating exactly what the prior email stated, with the exception of two additional sentences — "Therefore, we cannot make a payment *to your company* since *you* are not a registered broker. * * * Please consider this email as notice that our [Agreement] dated December 16, 2010 between BGL Securities and Buckeye Hoya LLC is null and void." (Emphasis added.)

{¶ 7} Conchek testified at deposition that he interpreted these emails to mean that BGL could not honor the Agreement because it arguably violated FINRA regulations, and that BGL would not pay Buckeye Hoya directly.[2] Tilson testified at deposition that he meant to convey in his second email that BGL would not pay Buckeye Hoya directly despite the terms of the Agreement. He stated that out of an abundance of caution and upon the advice of legal counsel, it was his intention to have NEN pay Buckeye Hoya directly. (Tilson deposition tr. 56.) Tilson testified further that the email terminating the Agreement or indicating a direct payment by NEN did not absolve BGL of having to pay a finder's fee to Buckeye Hoya — "we were going to still make sure that they received their money. It was going to happen through the funds flow rather than in a wire transfer or check coming from BGL." (Tilson deposition tr. 60-61.)

{¶ 8} In anticipation of the NEN transaction closing, on September 17, 2012, Tilson emailed Concheck requesting that he submit an invoice to NEN for

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[2] FINRA is an acronym for Financial Industry Regulatory Authority.

$230,581 for "consulting services" and not "finder's fee." On that same day, Concheck sent NEN an invoice for "Advisory fee/Consulting Services" in the amount of $230,581, and provided wiring instructions, including his name, account number, and bank routing number. Concheck admitted that this information was his personal banking information, not Buckeye Hoya's account information.[3]

{¶ 9} On September 24, 2012, NEN sold most of its business to Monitor Clipper Partners for approximately $57 million. As result of the sale, BGL requested payment from NEN for its services in the amount of $1,152,907. Pursuant to the Agreement, BGL was required to pay Buckeye Hoya 20 percent of this amount, or approximately $230,581.

{¶ 10} On September 26, 2012, the NEN transaction closed, and NEN paid BGL by wire transfer from the closing escrow funds 80 percent or $922,326 of the invoice amount. Additionally, NEN paid Concheck by virtue of a wire transfer out of the same closing escrow funds flow the invoiced amount of $230,581. The NEN closing documentation breaks down these payments under "Sellers Transaction Expenses." It lists "BGL and Consulting Fee" and then itemizes the expenses as "BGL" in the amount of $922,326, and "Joe Concheck (Consulting Fee)" in the amount of $230,581, for a "Total" of $1,152,907.

{¶ 11} It is undisputed that Concheck accepted and received $230,581 from NEN. Concheck testified at deposition that he deposited an unknown portion of the

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[3] Concheck's motivation for providing his personal banking information is uncertain from the record, but his reasoning is not pertinent to deciding whether BGL breached the Agreement.

funds he received from the NEN transaction into Buckeye Hoya's Huntington Bank account. (Concheck deposition tr. 105-106.)

{¶ 12} In November 2012, Calabrese and North Hill Holdings, L.L.C.[4] learned that BGL had not paid Buckeye Hoya for the NEN transaction and expressed their concern to Paul Garofolo, a friend of Calabrese and Gibbons. Tilson learned of the concern and emailed Gibbons and Garofolo that BGL terminated the Agreement because Buckeye Hoya was not a registered broker-dealer, but that BGL honored the Agreement when Concheck accepted the contracted-for payment directly from NEN. In the email, Tilson explained the situation and stated that at the time of the Agreement, "we had no idea that [Concheck] had partners in [Buckeye Hoya]."[5] (Tilson deposition tr. 72; July 10, 2013 email.). Tilson further explained his hope that if Calabrese understood that Concheck was paid the full amount by NEN, Calabrese would not pursue legal action. *Id.*

{¶ 13} In 2014, North Hill filed a lawsuit against Concheck and Buckeye Hoya, contending that it was a 50 percent member of Buckeye Hoya, and thus, was entitled to a portion of the money Concheck and/or Buckeye Hoya received in connection with NEN Transaction. *North Hill*, 8th Dist. Cuyahoga No. 108168, 2019-Ohio-5119, at ¶ 1-4. In 2016, relating to that litigation, Calabrese provided

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[4] North Hill Holdings, L.L.C., was solely owned by Calabrese's wife, Maria Calabrese. *See North Hill*, 8th Dist. Cuyahoga No. 108168, 2019-Ohio-5119, at ¶ 2.

[5] The record contains affidavits from NEN executives who averred that they did not authorize NEN to pay Anthony or Maria Calabrese ("the Calabreses") or any company involving them any fees in connection with the NEN transaction.

deposition testimony during which he acknowledged that NEN paid Concheck the fee that BGL owed Buckeye Hoya under the Agreement. (Calabrese deposition, June 9, 2016, tr. 285-286.) In fact, he stated that Concheck, not BGL, owed the money to Buckeye Hoya. *Id.* at tr. 286-287.[6] ("Joe Concheck owes the money to Buckeye Hoya, not [BGL].")

{¶ 14} In July 2020, the Calabreses and Concheck entered into a Confidential Settlement Agreement ("Settlement Agreement"). Among the terms of the Settlement Agreement, Concheck assigned his 50 percent membership interest in Buckeye Hoya to North Hill and the Calabreses.

II. Procedural History

{¶ 15} On November 2, 2020, Buckeye Hoya filed an amended complaint against BGL asserting causes of action for (1) breach of contract; (2) promissory estoppel; (3) unjust enrichment; and (4) accounting. The complaint alleged that pursuant to the Agreement, BGL owed Buckeye Hoya approximately $184,400, which purportedly represented 20 percent of the monies paid to BGL by NEN for services rendered in connection with NEN transaction.

{¶ 16} BGL filed its answer denying the allegation but averring that it paid Buckeye Hoya its "commission in full compliance and satisfaction of its obligations" pursuant to the Agreement. According to BGL, payment was directed and received

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[6] In *North Hill*, this court affirmed the trial court's decision finding that at the time of the Agreement, North Hill was not a 50 percent member of Buckeye Hoya and thus, it lacked standing to assert its claims against Concheck and Buckeye Hoya. *North Hill* at ¶ 21.

by Buckeye Hoya, upon the instructions of its member and agent, Concheck, who had the authority to directly act on behalf of Buckeye Hoya. Specific to Buckeye Hoya's cause of action for breach of contract, BGL averred that it paid Buckeye Hoya in accordance with the Agreement. Regarding affirmative defenses, BGL raised payment, performance under the contract, unjust enrichment, and the doctrines of waiver, estoppel, laches, and unclean hands, and other equitable defenses.

{¶ 17} The parties filed cross-motions for summary judgment, with the exhibits supporting each motion filed under seal. Buckeye Hoya asserted it was entitled to judgment as a matter of law because BGL did not directly pay Buckeye Hoya under the terms of the Agreement. BGL contended that summary judgment was proper in its favor because Buckeye Hoya was paid its full commission under the Agreement when NEN paid the contracted-for percentage under the Agreement to Concheck, a member and authorized agent of Buckeye Hoya.

{¶ 18} The trial court agreed with BGL, finding that no breach of contract occurred because Concheck received payment from NEN to satisfy the amounts BGL would have paid if permissible under the Agreement. The trial court concluded that the dispute is between the Calabreses or Buckeye Hoya and Concheck; not with BGL. Accordingly, the trial court granted summary judgment in favor of BGL, while also denying Buckeye Hoya's motion for summary judgment.

{¶ 19} Buckey Hoya now appeals, raising as its sole assignment of error that the trial court erred by granting BGL's motion for summary judgment while also denying its motion for summary judgment.

III. Summary Judgment

A. Standard of Review

{¶ 20} We review the trial court's decision on a motion for summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Summary judgment is appropriate when, construing the evidence most strongly in favor of the nonmoving party, (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can only reach a conclusion that is adverse to the nonmoving party. *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 369-370, 696 N.E.2d 210 (1998).

{¶ 21} The party moving for summary judgment bears the burden of demonstrating that no material issues of fact exist for trial. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). The moving party has the initial responsibility of informing the trial court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential elements of the nonmoving party's claims. *Id.* After the moving party has satisfied this initial burden, the nonmoving party has a reciprocal duty to set forth specific facts by the means listed in Civ.R. 56(C) showing that there is a genuine issue of material fact. *Id.*

{¶ 22} Buckeye Hoya's only claim on appeal is that the trial court erred in granting summary judgment in favor of BGL on its breach-of-contract claim in connection with the NEN transaction.

B. Breach of Contract

{¶ 23} To establish a breach of contract, a plaintiff must demonstrate (1) the existence of a contract; (2) that the nonbreaching party performed on the contract; (3) that the breaching party failed to perform its contractual obligations without legal excuse; and (4) the breaching party suffered damages as a result of the breach. *Telecom Acquisition Corp. I v. Lucic Ents.*, 2016-Ohio-1466, 62 N.E.3d 1034, ¶ 23 (8th Dist.).

{¶ 24} The trial court issued a written decision entering summary judgment in favor of BGL on the breach-of-contract claim, finding that "Buckeye's breach of contract claim fails because the Consulting Agreement was illegal and is void; BGL terminated the contract pursuant to its terms; and despite the lack of a contractual relationship, still performed its duty under the contract."

{¶ 25} Buckeye Hoya contends that the trial court improperly sua sponte raised and relied on the affirmative defense of illegality to award summary judgment in favor of BGL. It further contends that the trial court's decision finding that Concheck acted as an authorized agent to accept payment on behalf of Buckeye Hoya was inadequately pleaded in BGL's answer, and even if it were adequate, BGL did not satisfy its burden of proving agency to warrant an award of summary judgment. Finally, Buckeye Hoya maintains that the evidence is uncontroverted that BGL did not pay Buckeye Hoya pursuant to the Agreement, and thus, summary judgment in favor of BGL and against Buckeye Hoya was improper.

1. Illegality of the Consulting Agreement

{¶ 26} BGL did not raise illegality as an affirmative defense, and it did not raise this argument as justification for granting summary judgment in its favor. Nevertheless, the trial court found that BGL was entitled to summary judgment on the breach-of-contract claim because the Agreement was illegal. According to the trial court, the Agreement was void because Buckeye Hoya and its active employees or members were not registered as brokers or dealers with the U.S. Securities and Exchange Commission, which would allow them to receive a commission for a sale of a publicly traded corporation.

{¶ 27} Buckeye Hoya contends that because BGL did not raise illegality as an affirmative defense as required by Civ.R. 8(C), or in its motion for summary judgment, BGL waived this argument and the trial court erred in sua sponte raising the defense on BGL's behalf. We agree.

{¶ 28} "Civ.R. 8(C) designates specific defenses that must be set forth in an answer or other responsive pleading, and the failure to do so constitutes a waiver." *State ex rel. Bey v. Bur. of Sentence Computation*, 166 Ohio St.3d 497, 2022-Ohio-236, 187 N.E.3d 526, ¶ 17. Specifically listed as an affirmative defense under Civ.R. 8(C), is "accord and satisfaction," * * * estoppel, * * * illegality, * * * payment, * * * release * * * statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense."

{¶ 29} This court has consistently held that "a trial court cannot sua sponte raise an affirmative defense on behalf of a defendant." *O'Brien v. Olmsted Falls*, 8th

Dist. Cuyahoga Nos. 89966 and 90336, 2008-Ohio-2658, ¶ 14, citing *Thrower v. Olowo*, 8th Dist. Cuyahoga No. 81873, 2003-Ohio-2049, ¶ 23; *see also State ex rel. Bey* at ¶ 17. Further, even if a defendant raises in its answer an affirmative defense, the defense must also be asserted in the motion for summary judgment. *O'Brien* at ¶ 13, citing *Leibson v. Ohio Dept. of Mental Retardation & Dev. Disabilities*, 84 Ohio App.3d 751, 761, 618 N.E.2d 232 (8th Dist.1992). In *O'Brien*, this court found that the trial court erred in sua sponte raising the affirmative defense of immunity when granting summary judgment in favor of defendants because it was not raised in their answer or argued in their motion for summary judgment. *Id.* at ¶ 14-15.

{¶ 30} In this case, the trial court found that BGL did not breach the Agreement because the contract was illegal.[7] The court supported its determination by relying on case law that prevents courts from enforcing illegal agreements. The trial court was correct that "Ohio courts may not enforce an illegal contract," *Snyder v. Snyder*, 170 Ohio App.3d 26, 2007-Ohio-122, 865 N.E.2d 944, ¶ 32 fn. 7 (11th Dist.), and that "a court will not lend its aid to any illegal contract, but on the contrary will leave the parties where it finds them and where they have placed themselves." *C.A. King & Co. v. Horton*, 116 Ohio St. 205, 211, 156 N.E. 124 (1927).

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[7] The effect of Buckeye Hoya or its members not being an authorized broker does not itself affect the legality of the entire Agreement. Buckeye Hoya's status as a nonbroker would only affect its ability to recover payment by BGL under the express terms of the Agreement as a "fee," not that the Agreement as a whole is rendered void or illegal. Buckeye Hoya's status merely limits enforceability. *See, e.g., Dobson v. Archibald*, 523 P.3d 1190, ¶ 29, 34 (Wash.2023) (a contractor's failure to comply with registration requirements does not render the underlying contract illegal or void, but rather "merely limits its enforceability for public policy reasons.").

See also Assn. of Cleveland Fire Fighters, Local 93 of the Internatl. Assn. of Fire Fighters v. Cleveland, 8th Dist. Cuyahoga No. 94361, 2010-Ohio-5597.

{¶ 31} However, BGL did not raise illegality as an affirmative defense, nor did it assert in its request for summary judgment or in defense against summary judgment that the Agreement was invalid or illegal. Accordingly, Buckeye Hoya was not afforded any opportunity to defend against this defense. In *N. Olmsted Auto Paint & Supply Co. v. Lettieri*, 9th Dist. Lorain No. 91CA005211, 1992 Ohio App. LEXIS 3835 (July 22, 1992), the Ninth District aptly stated:

> It is not the trial court's function to define and resolve the issues or to assert one party's personal defenses for him. * * * The unfairness of the trial court's action is highlighted by the fact that the trial court never permitted [the plaintiff] to respond to the unpled defense. [The plaintiff] must be given a fair opportunity to respond to an affirmative defense.

(Citations omitted). *Id.* at 9.

{¶ 32} Accordingly, we find that the trial court erred in sua sponte raising an affirmative defense on behalf of BGL and relying on that defense to award summary judgment. Nevertheless, this determination does not warrant a reversal of the trial court's decision in favor of BGL. A reviewing court is not authorized to reverse a correct judgment merely because erroneous reasons were assigned as the basis thereof. *Joyce v. Gen. Motors Corp.*, 49 Ohio St.3d 93, 96, 551 N.E.2d 172 (1990), citing *Agricultural Ins. Co. v. Constantine*, 144 Ohio St. 275, 284, 58 N.E.2d 658 (1944). "'[A]n appellate court must affirm the judgment if it is legally correct on other grounds, that is, it achieves the right result for the wrong reason, because such

an error is not prejudicial.'" *Shaut v. Roberts*, 2022-Ohio-817, 186 N.E.3d 302, ¶ 14 (8th Dist.), quoting *Reynolds v. Budzik*, 134 Ohio App.3d 844, 846, 732 N.E.2d 485 (6th Dist.1999).

2. Agency

{¶ 33} The trial court also found that Buckeye Hoya's breach-of-contract claim fails because even if the contract was valid, "performance under its terms is complete and no breach has occurred by BGL" because Concheck acted as Buckeye Hoya's authorized agent in accepting payment from NEN.

{¶ 34} Buckeye Hoya contends that the trial court erred in making this finding because BGL inadequately pleaded the theory of agency in its answer, and even if it were pleaded sufficiently, BGL failed to satisfy its burden of proving that Concheck was an authorized agent of Buckeye Hoya to warrant an award of summary judgment.

{¶ 35} BGL did not specifically list "agency" in its answer as a defense. However, it did not need to do so under either Civ.R. 8(C) or 12(B). Pursuant to Civ.R. 8(E), the averments made in a pleading need not be of any particular substance and Civ.R. 8(F) requires that pleadings are to be construed as to do substantial justice. *See MacDonald v. Bernard*, 1 Ohio St.3d 85, 86, 438 N.E.2d 410 fn 1, (1982), (pleadings shall also be construed liberally in order that the substantive merits of the action may be served).

{¶ 36} In *SMS Fin. XXVI, L.L.C. v. Waxman Chabad Ctr.*, 2021-Ohio-4174, 180 N.E.3d 730, ¶ 59 (8th Dist.), this court recognized that Civ.R. 8(C) provides a

nonexhaustive list of affirmative defenses and Civ.R. 8(E)(1) directs that "[e]ach averment of a pleading shall be simple, concise, and direct." Further, under Civ.R. 8(B), a defendant "shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies." *Jim's Steak House, Inc. v. Cleveland*, 81 Ohio St.3d 18, 688 N.E.2d 506 (1998). Pursuant to the liberal pleading requirements of Civ.R. 8, the pleadings of the parties to an action need only be in general terms. *Thompson Thrift Constr. v. Lynn*, 2017-Ohio-1530, 89 N.E.3d 249, ¶ 87 (5th Dist.), citing *New Lexington City School Dist. Bd. of Edn. v. Muzo Invest. Group*, 5th Dist. Perry No. 15-CA-00012, 2016-Ohio-1338. Further, a defendant's answer is subject to the same notice-pleading standards as a plaintiff's complaint, and an affirmative defense is generally adequate as long as the plaintiff receives fair notice of the defense. *Id.*

{¶ 37} BGL claimed in its answer:

> Defendants paid Plaintiff a commission in full compliance with and satisfaction of its obligations to Plaintiff under the Consulting Agreement, which payment was directed and received by the Plaintiff, Buckeye Hoya, LLC, upon the instructions of its member and agent, Joseph Concheck, who is a member of the LLC and as its agent had the power and authority to directly bind, and to act on behalf of, Plaintiff.

(BGL's Answer, paragraph No. 1, filed Jan. 29, 2021.) Based on this statement, this court finds that BGL sufficiently pleaded "agency" in its answer to give notice to Buckeye Hoya that it was asserting that Concheck, acting as an agent of Buckeye Hoya, accepted payment for the NEN transaction.

{¶ 38} Buckeye Hoya next contends that the trial court erred in granting summary judgment on a theory of agency because BGL did not satisfy its burden of proof that Concheck was an authorized agent of Buckeye Hoya.

{¶ 39} In *North Hill*, 8th Dist. Cuyahoga No. 108168, 2019-Ohio-5119, this court concluded that because Buckeye Hoya, a limited liability company, did not have an operating agreement, R.C. Chapter 1705 sets forth the rights and responsibilities of the members. *Id.* at ¶ 14-15. It is undisputed that Concheck was a 50 percent member of Buckeye Hoya at the time of the formation of the Agreement and when he received payment from NEN.

{¶ 40} Accordingly, under former R.C. 1705.25(A),[8]

> (1) Every member is an agent of the company for the purpose of its business, and the act of every member, including the execution in the company name of any instrument for apparently carrying on in the usual way the business of the company binds the company, unless the member so acting has in fact no authority to act for the company in the particular matter, and the person with whom he is dealing has knowledge of the fact that he does not have that authority.
>
> (2) Unless the act is authorized by the other members, an act of a member that is not apparently for the carrying on the business of a limited liability company in the usual way does not bind the company.

{¶ 41} Buckeye Hoya contends that BGL failed to prove that when Concheck accepted the NEN payment he acted (1) with authority, or (2) for the carrying on the

[8] In 2022, the General Assembly repealed Revised Code Chapter 1705, and enacted Chapter 1706, "Ohio Revised Limited Liability Company Act." *See* 2020 S.B. No. 276, effective February 11, 2022.

business of an LLC in the usual way, as required by former R.C. 1705.25(A). We disagree.

{¶ 42} The parties do not dispute that Concheck acted as Buckeye Hoya's authorized and actual agent when he alone signed the Agreement with BGL. In fact, Calabrese knew of the contractual relationship between Buckeye Hoya and BGL because he drafted the Agreement, including the fact that only Concheck signed the agreement on behalf of Buckeye Hoya. The evidence is therefore irrefutable that Concheck was an authorized agent of Buckeye Hoya.

{¶ 43} Even if Concheck was not an "actual agent" of Buckeye Hoya in accepting payment under the Agreement, he was an apparent agent of Buckeye Hoya. In order to establish apparent agency, the evidence must show that the principal held the agent out to the public as possessing sufficient authority to act on his behalf and that the person dealing with the agent knew these facts, and acting in good faith had reason to believe that the agent possessed the necessary authority. *DeFranco v. Shaker Square*, 158 Ohio App.3d 105, 2004-Ohio-3864, 814 N.E.2d 93, ¶ 11 (8th Dist.), citing *Master Consol. Corp. v. BancOhio Natl. Bank*, 61 Ohio St.3d 570, 575 N.E.2d 817 (1991), syllabus. Under an apparent-authority analysis, an agent's authority is determined by the acts of the principal rather than by the acts of the agent. The principal is responsible for the agent's acts only when the principal has clothed the agent with apparent authority and not when the agents own conduct has created the apparent authority. *Master Consol.* at 576-577.

{¶ 44} No genuine issue of material fact exists that Buckeye Hoya publicly held out Concheck as an authorized agent. Concheck was the only member who signed Buckeye Hoya's articles of organization with Ohio's Secretary of State.[9] Moreover, if Concheck was an authorized agent to legally bind Buckeye Hoya on the Agreement with BGL, both NEN and BGL had a reasonable belief that Concheck was an authorized agent to accept payment on behalf of Buckeye Hoya. We agree with the trial court's finding that Concheck acted as Buckeye Hoya's authorized agent — whether with actual or apparent authority — in accepting payment from NEN for services rendered in connection with the NEN transaction and as provided for in the Agreement. Accordingly, this court finds that BGL did not breach the Agreement because Buckeye Hoya, through its agent Concheck, was paid the exact amount contracted for pursuant to the Agreement.

3. Satisfaction — Payment

{¶ 45} Buckeye Hoya's final challenge on appeal pertains to the trial court's decision granting summary judgment in favor of BGL. It contends that the trial court erred because the evidence is uncontroverted that BGL, itself, did not pay Buckeye Hoya pursuant to the Agreement. While this fact is technically true, BGL honored the Agreement by ensuring that payment was issued to Buckeye Hoya via

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[9] *See North Hill* at ¶ 2 ("Anthony Calabrese prepared and filed [Buckeye Hoya's] articles of organization with the Ohio Secretary of State. The company's articles of organization was signed by Concheck alone and no other signature appears on the document. While there is no indication whether Concheck signed * * * as a member, manager, or other representation, it is undisputed by the parties that Concheck was a 50 percent managing member of Buckeye [Hoya].")

Concheck in accordance with the Agreement. The record supports that BGL acted under a reasonable belief that it could not pay Buckeye Hoya directly without subjecting itself to legal scrutiny. Arguably, BGL's failure to strictly comply with its contractual obligations under the Agreement is justified by legal excuse. Nevertheless, Buckeye Hoya through Concheck received payment under the Agreement for the NEN transaction.

{¶ 46} In fact, Calabrese stated his understanding about the payment under the Agreement in his June 9, 2016 deposition:

> My understanding is [BGL] directed NEN to make the payment that they owed to Buckeye Hoya at the closing, so the amount that was owed by [BGL] was actually paid by NEN. So it had the same effect as if [BGL] had paid the funds. * * * I'm assuming there is some sort of agreement between [BGL] and [NEN] that the $230,000 and some odd cents that is owed to Buckeye Hoya be paid by NEN for [BGL]. My assumption is that that exact amount was paid at closing to Joe Concheck.

(Calabrese deposition, June 9, 2016, tr. 285-286).

{¶ 47} Calabrese was further asked, "[I]f Buckeye Hoya is owed by [BGL] and [BGL] does not pay that money, is there some agreement that shifts the agreement * * * that makes NEN responsible to pay Buckeye Hoya?" Calabrese responded, "Joe Concheck owes the money to Buckeye Hoya, not [BGL]." *Id.* at tr. 286-287.

{¶ 48} Buckeye Hoya contends that Calabrese's deposition should not be considered, or at least creates an issue of fact, because, as he explained in his subsequent affidavit, at the time he provided this deposition testimony he did not

have a complete understanding of what occurred between BGL and Concheck. He averred that he now believes that either "NEN paid Concheck for independent services or that BGL colluded with Concheck to cut Buckeye Hoya out." The record belies Calabrese's new belief because Buckeye Hoya concedes that "within a few months of closing, Calabrese and North Hill learned that BGL had cut Buckeye Hoya out of closing." (Appellant's Brief, p. 13.) Accordingly, Calabrese knew as early as November 2012 that BGL did not pay Buckeye Hoya directly.

{¶ 49} Moreover, under either of Calabrese's now-beliefs, the constant is Concheck — Concheck, whether personally or on behalf of Buckeye Hoya, received the funds that Buckeye Hoya was entitled to receive under the Agreement. Accordingly, Calabrese's 2016 understanding is correct — any issue is with Concheck, not NEN or BGL. Whether Buckeye Hoya or Calabrese can bring an action against Concheck is not before this court, but the record contains a Settlement Agreement and an admission by Calabrese that based on the Settlement Agreement, Concheck may be released from these claims. *See* Calabrese 2021 deposition, tr. 119-120.

{¶ 50} Accordingly, there are no genuine issues of material fact and BGL is entitled to judgment as a matter of law because reasonable minds can come to but one conclusion that BGL satisfied its obligation under the Agreement when it honored the spirit and intent of the Agreement by ensuring that Buckeye Hoya was compensated for its services. It is undisputed that Concheck received payment in the exact amount Buckeye Hoya would have been entitled to under the Agreement.

Accordingly, and as Calabrese admitted, Concheck, and not BGL, would have owed the money to Buckeye Hoya. Viewing the evidence in favor of Buckeye Hoya, this court finds no genuine issues of material fact and that BGL is entitled to judgment as a matter of law. Having found that summary judgment was properly granted in favor of BGL, we further find that the trial court did not err when it denied Buckeye Hoya's motion for summary judgment contending that BGL breached the Agreement by failing to pay it for the NEN transaction.

{¶ 51} The assignment of error is overruled.

{¶ 52} Judgment affirmed.

It is ordered that appellee recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KATHLEEN ANN KEOUGH, PRESIDING JUDGE

EILEEN T. GALLAGHER, J., and
SEAN C. GALLAGHER, J., CONCUR