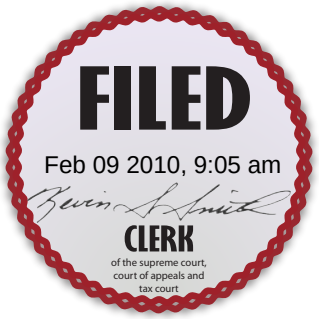

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IN THE
COURT OF APPEALS OF INDIANA

A&M FARM CENTER, INC.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 64A03-0908-CV-394
	)	
AGCO FINANCE, LLC f/k/a AGRICREDIT ACCEPTANCE COMPANY, D/B/A AGRICREDIT ACCEPTANCE,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable William Alexa, Judge
Cause No. 64D02-0408-CC-7525

February 9, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BARNES, Judge

Case Summary

A&M Farm Center, Inc., ("A&M") appeals the trial court's grant of summary judgment to AGCO Finance, LLC ("AGCO"). We reverse and remand.

Issue

A&M raises two issues, which we consolidate and restate as whether the trial court properly granted summary judgment to AGCO.

Facts

AGCO is a Delaware limited liability company with its principal office in Johnston, Iowa. AGCO is a financier of various equipment and machinery for customers throughout the United States. A&M is an agricultural equipment dealer located in Valparaiso, Indiana. Louis Abbett is the president of A&M. Dennis Leek was the manager of A&M, and in 1994, he became a shareholder and vice-president. Leek was responsible for the day-to-day operations of A&M.

Most of A&M's business involves selling and leasing John Deere equipment. Approximately ten percent of A&M's business is leasing equipment. Many of A&M's customers financed their purchases through AGCO. As part of the financing arrangement, in June 1986, A&M entered into a Retail Financing Agreement with AGCO, which provided, in part:

> **1. Application**
> Contracts submitted to [AGCO] by [A&M] shall be subject to the terms and conditions of this Agreement and the applicable provisions of the then current published Agricredit Acceptance Corporation Financing Plans and Programs manual. . . .

* * * * *

> **5. Recourse**
> The recourse provisions applicable to Contract are set forth in the associated Recourse Supplement, which supplement shall form a part of this Agreement; however if in [AGCO's] opinion, the credit risk related to a Contract is excessive, or the Contract has not been received within sufficient time to allow for first priority filing of public record, [AGCO] may require as an additional condition of acceptance that such Contract be assigned with full recourse notwithstanding any provision of the Recourse Supplement providing for lesser obligation.

* * * * *

Appellant's App. p. 76. The Recourse Supplement provided, in part:

> **1. Recourse Agreement**
> a. In the event the debtor defaults in the performance of any obligation under a Contract, [AGCO] may reassign to [A&M] and [A&M] shall accept the Contract and possession of any equipment secured thereby which [AGCO] may have repossessed and pay [AGCO] a sum equal to the then due indebtedness. . . .

Id. at 79. The Recourse Supplement limited A&M's recourse liability for each fiscal year and established a reserve account. Additionally, the Recourse Supplement provided: "[AGCO] shall have full authority to determine which defaulted Contracts shall be reassigned to [A&M]." Id. Both the Retail Financing Agreement and Recourse Supplement were signed by Abbett as president of A&M.

In October 1994, A&M provided AGCO with a Corporate Dealer's Resolution Certificate, which provided that Leek, Abbett, and Janice Sampson were:

> authorized to execute on behalf of and in the name of [A&M] any and all agreements, assignments, transfers, endorsements,

> security documents, negotiable instruments or other documents necessary to the conduct of the affairs of [A&M] and any and all other documents to which [AGCO] is a party or in respect to or concerned with the wholesale and retail finance or lease plans of [AGCO]. The powers vested in the said named persons shall continue in full force and effect until written notice of rescission or modification thereof has been received by [AGCO] and [A&M] shall save harmless [AGCO] for any loss suffered or liability incurred by it in reliance on this resolution after revocation or termination by operation of law or otherwise, in the absence of such notice.

Id. at 74. AGCO and A&M transacted business for several years with Leek signing all of the contracts and agreements on behalf of A&M. Leek signed over one hundred Variable Rate Loan Contracts and Security Agreements or related financing documents with AGCO on behalf of A&M.

At some point, while still employed by A&M, Leek began another business, Cable Tech, Inc. In late 2000, Cable Tech entered into three leases with A&M for equipment and financed the leases through AGCO. The leases were signed by Leek on behalf of A&M and Phil Norman, president of Cable Tech. Each of the leases also contained a letter, which provided:

> This letter is to certify that I am engaged in a bona fide agricultural and/or industrial operation, and the equipment covered by the attached Lease Agreement is for my personal use in the operation.
>
> Please accept this Lease Agreement with full recourse, notwithstanding any provision of our Retail Financing Agreement Recourse Supplement.

Id. at 219, 228, 236. The letters were signed by Leek on behalf of A&M. While processing the lease finance applications, AGCO received credit reports that erroneously

indicated Leek was a former employee of A&M. Leek was, in fact, still employed at A&M.

On May 1, 2001, and May 2, 2001, Cable Tech converted the leases into three Variable Rate Loan Contract and Security Agreements with AGCO for the equipment in the amounts of $217,718.12, $50,294.36, and $144,791.37. The agreements were signed by Leek and Norman as borrowers. Additionally, the agreements contained letters signed by Leek on behalf of A&M, which provided:

> This letter is to certify that I am engaged in a bona fide agricultural and/or other industrial operation, and the equipment covered by the attached Retail Contract is for my personal use in the operation.
>
> * * * * *
>
> Please accept this Retail Contract with full recourse, notwithstanding any provision of our Retail Financing Agreement Recourse Supplement.

Id. at 87, 92.[1]

Abbett was unaware of Cable Tech's agreements and full recourse agreements with AGCO until 2002. Cable Tech defaulted on the agreements in mid-2002, and AGCO declared all amounts immediately due and payable. Cable Tech was indebted to AGCO for principal and interest in the amount of $276,123. AGCO demanded that A&M accept the reassignment of the Cable Tech agreements under the full recourse

[1] A&M repeatedly argues that it had never entered into a recourse agreement with AGCO prior to the Cable Tech agreements. However, the designated evidence demonstrates that A&M had entered into a limited recourse agreement with AGCO in 1986.

agreements, which A&M failed or refused to do. On January 31, 2003, Leek resigned his positions as director, officer, shareholder, and employee of A&M.

In 2004, AGCO filed a complaint against A&M, Abbett, and Cable Tech. A default judgment was entered against Cable Tech. AGCO filed a motion for summary judgment against A&M and Abbett, arguing that A&M was liable to AGCO under the recourse agreements, that Leek had actual, apparent, or inherent authority to enter into the Cable Tech contracts, and that Abbett was liable pursuant to a personal guarantee. A&M argued that there were genuine issues of material fact regarding whether AGCO's belief in Leek's authority to enter into the agreements was reasonable. A&M contended that Leek was acting adversely to A&M when he entered into the agreements. Additionally, Abbett argued that his signature had been forged on the personal guarantee. The trial court granted AGCO's motion for summary judgment against A&M, but denied the motion for summary judgment against Abbett. The trial court ordered A&M to pay $276,123 plus attorney fees of $51,432.47. The trial court later entered a nunc pro tunc order finding that there was "no just reason for delay." Id. at 32.

Analysis

The issue is whether the trial court properly granted AGCO's motion for summary judgment against A&M. Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); Mangold v. Ind. Dep't of Natural Res., 756 N.E.2d 970, 973 (Ind. 2001). All facts and reasonable inferences drawn from those facts are construed in favor of the nonmovant. Mangold, 756 N.E.2d at 973. Our review of a summary

judgment motion is limited to those materials designated to the trial court. Id. We must carefully review a decision on summary judgment to ensure that a party was not improperly denied its day in court. Id. at 974.

"In general, a principal will be bound by a contract entered into by the principal's agent on his behalf only if the agent had authority to bind him." Heritage Dev. of Indiana, Inc. v. Opportunity Options, Inc., 773 N.E.2d 881, 888 (Ind. Ct. App. 2002). An agent's authority to enter into a contract on his principal's behalf will typically be actual, apparent, or inherent. Gallant Ins. Co. v. Isaac, 751 N.E.2d 672, 675 (Ind. 2001). The question of whether an agency relationship exists and of the agent's authority is generally a question of fact. Heritage Dev., 773 N.E.2d at 888. A&M contends that genuine issues of material fact exist regarding whether Leek had actual, apparent, or inherent authority to enter into the Cable Tech agreements with AGCO.

A. Actual Authority

Actual authority is created "by written or spoken words or other conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's account." Menard, Inc. v. Dage-MTI, Inc., 726 N.E.2d 1206, 1210 (Ind. 2000) (quoting Scott v. Randle, 697 N.E.2d 60, 66 (Ind. Ct. App. 1998), trans. denied). The focus of actual authority is the belief of the agent. Scott, 697 N.E.2d at 66.

A&M argues that it did not give Leek actual authority to enter into the Cable Tech agreements or full recourse agreements. A&M points out that Abbett had previously financed personal equipment through AGCO, that Abbett did not sign the documents on

behalf of A&M, and that A&M did not sign a full recourse agreement regarding the transaction. AGCO counters that Leek had actual authority as a result of A&M's 1994 Corporate Dealer's Resolution Certificate, which gave Leek the authority to enter into "any and all agreements, assignments, transfers, endorsements, security documents, negotiable instruments or other documents necessary to the conduct of the affairs of [A&M]" and "any and all other documents to which [AGCO] is a party or in respect to or concerned with the wholesale and retail finance or lease plans of [AGCO]."[2] Appellant's App. p. 74. Leek, in fact, signed hundreds of AGCO documents on A&M's behalf.

We conclude that genuine issues of material fact exist regarding whether Leek had actual authority to enter into the Cable Tech agreements. The focus here is whether Leek himself believed that he had actual authority to enter into the agreements based upon A&M's conduct. See Scott, 697 N.E.2d at 66. Leek testified in his deposition that he thought he had authority to enter into the contracts. Although A&M had given Leek authority to sign agreements on its behalf with AGCO, there is no indication that A&M gave Leek actual authority to enter into contracts that were adverse to A&M but beneficial to Leek. On a previous occasion, Abbett had entered into financing agreements with AGCO to purchase equipment for one of his other businesses. Abbett did not sign those agreements on behalf of A&M and did not have A&M enter into full recourse provisions on those agreements. Prior to the Cable Tech agreements, A&M had not previously entered into a financing agreement with a full recourse provision. Despite

[2] AGCO also argues that A&M waived this issue by failing to argue lack of actual authority to the trial court. Although A&M's response brief does not specifically mention actual authority, A&M addressed the issue at the summary judgment hearing. Consequently, we conclude that the issue was not waived.

the unusual nature of the Cable Tech agreements, Leek did not inform Abbett of the agreements. Under these circumstances, we conclude that genuine issues of material fact exist regarding Leek's actual authority.

B. Apparent Authority

Apparent authority refers to a third party's reasonable belief that the principal has authorized the acts of its agent; it arises from the principal's indirect or direct manifestations to a third party and not from the representations or acts of the agent. Gallant, 751 N.E.2d at 675. "The necessary manifestation is one made by the principal to a third party, who in turn is instilled with a reasonable belief that another individual is an agent of the principal." Id. at 676. "[B]ecause an agent's apparent authority emanates not from the agency itself but from the principal' s indirect and direct manifestations, . . . a third party is required under the rule of law to 'use reasonable diligence and prudence to ascertain' the extent of any limitations of which he or she has become aware." Id. at 1216 n.10 (quoting 3 AM.JUR.2D Agency § 83 (1986)). "[I]t is critical to the application of the doctrine that the party dealing with the agent reasonably believes that the agent is acting with authority. Where he knows, or should know, the agent is exceeding his authority, the principal will not be bound." Grosam v. Laborers' Int'l. Union of North America, Local 41, 489 N.E.2d 656, 658 (Ind. Ct. App. 1986), trans. denied.

A&M argues that AGCO's belief that Leek had authority to enter into the Cable Tech agreements with their full recourse provisions was unreasonable. AGCO was aware that Leek was both a vice-president of A&M and a principal of Cable Tech. Further,

A&M had not previously entered into full recourse provisions. The Cable Tech agreements contained letters signed by Leek on behalf of A&M, which provided:

> This letter is to certify that I am engaged in a bona fide agricultural and/or other industrial operation, and the equipment covered by the attached Retail Contract is for my personal use in the operation.
>
> * * * * *
>
> Please accept this Retail Contract with full recourse, notwithstanding any provision of our Retail Financing Agreement Recourse Supplement.

Id. at 87, 92. Thus, Leek was modifying the prior limited recourse agreement entered into by Abbett on behalf of A&M. Leek was, in effect, having A&M guarantee the debt of his other company. Moreover, when Leek entered into the Cable Tech leases, a credit check performed by AGCO indicated, although incorrectly, that Leek was no longer employed at AGCO.

Under the totality of the circumstances, genuine issues of material fact exist regarding whether AGCO knew or should have known that Leek was exceeding his authority.[3] We conclude that genuine issues of material fact exist as to whether Leek had apparent authority to enter into the Cable Tech agreements on A&M's behalf.

C. Inherent Authority

Inherent authority refers to acts done on the principal's account that accompany or are incidental to transactions the agent is authorized to conduct if, although they are

[3] AGCO relies upon AutoXchange.com, Inc. v. Dreyer & Reinbold, Inc., 816 N.E.2d 40, 48-49 (Ind. Ct. App. 2004), for the proposition that Leek had apparent authority. However, AutoXchange is distinguishable because there was no evidence in AutoXchange that the agent was engaging in self-dealing or that the third party was aware of such self-dealing.

forbidden by the principal, the third party reasonably believes that the agent is authorized to do them and has no notice that the agent is not so authorized. Menard, 726 N.E.2d at 1212. "'Inherent agency power is a term used . . . to indicate the power of an agent which is derived not from authority, apparent authority or estoppel, but solely from the agency relation and exists for the protection of persons harmed by or dealing with a servant or other agent.'" Id. at 1211 (quoting Koval v. Simon Telelect, Inc., 693 N.E.2d 1299, 1304 (Ind. 1998)). In Menard, our supreme court observed, based upon the Restatement (Second) of Agency § 161, comment a (1958) that, "if one appoints an agent to conduct a series of transactions over a period of time, it is fair that he should bear losses which are incurred when such an agent, although without authority to do so, does something which is usually done in connection with the transactions he is employed to conduct." Id. at 1212.

Leek had inherent authority here if: (1) first, Leek acted within the usual and ordinary scope of his authority as vice-president and manager of A&M; (2) second, AGCO reasonably believed that Leek was authorized to enter into the Cable Tech agreements; and (3) third, AGCO had no notice that Leek was not authorized to enter into the Cable Tech agreements with their full recourse provisions without Abbett's approval. See id. at 1212-13. Again, we conclude that genuine issues of material fact exist regarding whether Leek had inherent authority to enter into the Cable Tech agreements with their full recourse provisions.

Although Leek was authorized to sign AGCO agreements on behalf of A&M, A&M had not previously entered into a full recourse provision. Further, Leek was a

principal of Cable Tech and the vice-president/manager of A&M. AGCO was aware that Leek was participating on both sides of the transaction, and the full recourse provision was clearly adverse to A&M's interests.[4] Under these circumstances and those discussed above, we conclude that genuine issues of material fact exist regarding whether Leek had inherent authority.[5]

Conclusion

We acknowledge that our supreme court has held: "if one of two innocent parties must suffer due to a betrayal of trust – either the principal or the third party – the loss should fall on the party who is most at fault. Because the principal puts the agent in a position of trust, the principal should bear the loss." Menard, 726 N.E.2d at 1216 (quoting Koval, 693 N.E.2d at 1304). A jury may very well determine that A&M is the most at fault and should suffer the loss here. However, a jury may alternatively determine that, despite the fact that Leek was, no doubt, processing AGCO agreements in his capacity as vice-president and manager of A&M, several key differences exist in the personal transactions he conducted with AGCO, which we highlighted and discussed. Because genuine issues of material fact exist regarding whether Leek had actual, apparent, or inherent authority to enter into the Cable Tech agreements with their full

[4] Again, AGCO relies upon AutoXchange, 816 N.E.2d at 49, for the proposition that Leek had inherent authority. However, AutoXchange is distinguishable because there was no evidence in AutoXchange that the agent was engaging in self-dealing or that the third party was aware of such self-dealing.

[5] AGCO also argues that, even without the full recourse provisions, the Cable Tech agreements are still subject to the limited recourse agreement signed in 1984. However, the issue here is whether Leek had authority to enter into the Cable Tech agreements on behalf of A&M at all, not just the full recourse provisions of the agreements.

recourse provisions on behalf of A&M, we conclude that the trial court erred by granting summary judgment to AGCO. We reverse and remand.

Reversed and remanded.

MATHIAS, J., and BROWN, J., concur.