RENDERED: JANUARY 29, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002152-MR

TBA, INC. APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARTIN F. MCDONALD, JUDGE
ACTION NO. 01-CI-008051

CUYAHOGA SUPPLY & TOOL, INC. APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND DIXON, JUDGES; HENRY,[1] SENIOR JUDGE.

CAPERTON, JUDGE: The Appellant, TBA, Inc. (TBA), appeals the August 8, 2008, Findings of Fact, Conclusions of Law, and Judgment of the Jefferson Circuit Court in favor of the Appellee, Cuyahoga Supply & Tool, Inc. (Cuyahoga), following a bench trial, in which it found that Cuyahoga did not owe a sum of

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

$13,360.16 to TBA because (1) the piping at issue was defective, (2) Cuyahoga complied with the requirements of the Uniform Commercial Code (UCC), and (3) the unrebutted alleged assertion that an agent of TBA advised Cuyahoga it would receive a credit for the defective pipe. Having reviewed the arguments of the parties, the record, and the applicable law, we affirm.

TBA is a Kentucky corporation in the business of manufacturing and supplying PVC piping and other materials to the construction industry. Cuyahoga is an Ohio corporation, in the business of supplying construction materials to contractors primarily in Ohio. According to the brief of TBA, the two companies had a good business relationship from May of 1995 to July of 2001. Thereafter, the relationship between TBA and Cuyahoga apparently deteriorated.[2]

In June of 2001, TBA had shipped two truckloads of PVC pipe to Cuyahoga's client, Allegra Construction Company (Allegra), at its Cleveland-Hopkins International Airport worksite. The parties agree that the cost of the piping was $13,636.16.

[2]According to TBA, the difficulties in the matter *sub judice* apparently began when Chris Muzzin, the vice-president at Cuyahoga, purchased a Rolls Royce, which belonged to Tom Brooks, president of TBA. The Rolls Royce had apparently been totaled, and after accepting delivery of the car, Muzzin requested that Brooks provide him with title to the car. Brooks asserted that he was unable to do so because the car was not in working condition at the time it was sold. Thereafter, the relationship between TBA and Cuyahoga apparently deteriorated, leading TBA to believe that Cuyahoga refused to make payments on the subject invoices in an attempt to recoup money paid for the aforementioned Rolls Royce.

We note that at trial, neither Brooks nor Muzzin provided any testimony regarding this issue. Indeed, the only suggestion of a connection between these two disputes was made by counsel for TBA. Accordingly, we shall not address this issue further in the course of this appeal, nor reference it in reaching our decision.

TBA uses what it claims are independent, outside sales representatives to conduct its sales activities, and acknowledges that Sam Phillips was its Ohio sales representative, a fact also acknowledged by Cuyahoga. Cuyahoga apparently regularly routed its orders to TBA through Phillips, after which TBA would then ship the orders directly to Cuyahoga or its customers. Cuyahoga does acknowledge that it occasionally placed phone or fax orders directly with TBA.[3]

In the matter *sub judice*, Muzzin testified that Allegra notified Cuyahoga that they were rejecting the pipe at issue, although TBA asserts that Muzzin provided no proof of rejection. Muzzin further testified that he went to the construction site and noted that the pipe was brittle and advised Phillips of same. According to Muzzin, Phillips met him at the airport construction site, inspected the pipe, agreed that some of the pipe was defective, and advised that Cuyahoga would be entitled to a credit on its account with TBA. In the bench trial below, the court found that TBA did not rebut Muzzin's testimony that the piping was in fact defective. The piping was apparently also rejected at the jobsite by the Federal Aviation Administration official in charge of the project. Thereafter, as an accommodation to Allegra, Muzzin moved the piping to Cuyahoga's place of business.

Muzzin further testified that Phillips prepared a return material authorization (RMA) request form to get authorization to return the pipe for credit.[4]

[3] In so noting, we recognize that at the time this suit was initially filed, there was a dispute between the parties as to whether or not the trial court had personal jurisdiction over Cuyahoga. We shall briefly address that issue, *infra*, herein.

[4] At this point in the trial, TBA's attorney objected to what it described as ongoing hearsay.

TBA states that the RMA form was filled out by Phillips, and was a request for authority to return the allegedly defective material. TBA further states that on its face, the RMA form instructed Cuyahoga to contact Amy Tracy, and provided her address, phone number, and extension accordingly, as well as providing a fax number. TBA asserts that Cuyahoga was familiar with, and had utilized TBA's return material procedure on prior occasions, including an instance in 1999 in which Cuyahoga followed the return procedures and received a full refund, plus costs. In that situation, Cuyahoga did return the defective pipe.

Muzzin testified that he believed that Phillips gave the RMA form to TBA. Further, he testified that Phillips already knew the value of the pipe, that he had looked at the pipe and assumedly made an estimate, and that Muzzin was aware of no other information that Phillips needed to complete and submit the form.

Thereafter, the defective pipe remained in storage with Cuyahoga for over a year. Cuyahoga asserts that on multiple occasions, Muzzin reminded Phillips to arrange for the pipe to be picked up by TBA, or requested that TBA give Cuyahoga other instructions as to its disposition, and that on many occasions, TBA was given the opportunity to inspect the pipe and haul it back to Louisville. Muzzin testified that for reasons unknown to him, TBA did not pick up the pipe nor issue a credit, and that because the pipe was defective, Cuyahoga could not resell it. Muzzin further testified that Phillips never advised him that TBA would

not issue a credit because of incomplete paperwork. Muzzin testified that he was not aware until this lawsuit was filed nor that TBA did not intend to issue a credit.

Cuyahoga also introduced audiotapes of telephone conversations between Muzzin and Phillips, which document ongoing discussions concerning the defective pipe shipments. Cuyahoga asserts that in those tapes, Phillips acknowledges both the defectiveness of the pipe, as well as TBA's receipt of notice of the defect. Phillips further stated that TBA would be issuing a credit to Cuyahoga.

Muzzin also testified that in the past, when Cuyahoga requested credits for defective shipments of pipe, Phillips would handle all of the details to obtain a credit, including filling out any necessary paperwork and submitting it to TBA. Muzzin stated that prior to the present dispute, Cuyahoga received several credits for defective shipments through the submission of claims by Phillips, and that Phillips would handle any problems that Cuyahoga had with any TBA orders, including the necessary paperwork.

According to the testimony of Amy Tracy, she was the person in charge of claims, and in charge of TBA's procedures for authorizing return material, billing, and for crediting accounts receivable. Tracy acknowledged that she did not personally see or inspect the defective pipe, and had no personal knowledge of its condition. Tracy testified that she had no first-hand knowledge that Cuyahoga was seeking a credit until November of the next year, and further, that she had never received the necessary paperwork to process the claim. She had

no recollection of calling anyone at Cuyahoga to inform them that TBA had not received the necessary paperwork to process the refund.

Tracy also conceded that a TBA customer would not be required to pay for defective pipe, and that a customer who received a shipment of defective pipe would be entitled to a refund or credit. Tracy testified that the proper procedure for obtaining a refund or resolving problems with an account was for the customer to contact its inside or outside sales representative. Tracy further stated that Phillips could not have, was not, nor would have been authorized to assure a refund, as he was simply a sales representative, but did concede that he was responsible for gathering the necessary documentation.

According to Tracy, Phillips was, and still is, TBA's sales representative in Ohio, that he was assigned to the Cuyahoga account, and that he regularly handled that account during the relevant time period. Tracy testified that she never told Phillips it was beyond his authority to attempt to resolve the dispute with Cuyahoga, and agreed that "to some extent," Phillips had authority to resolve claims. Although Tracy denied that Phillips had complete authority to settle claims on his own, she nevertheless conceded that neither she nor, to her knowledge, anyone else from TBA ever advised Cuyahoga that Phillips lacked authority to settle claims or issue refunds.

Tracy further stated that Phillips was aware that TBA's policy was to pick up defective pipe before issuing a refund, although she had no recollection of any conversations with Phillips about picking up the defective pipe from

Cuyahoga. Tracy stated that she had no personal knowledge concerning conversations between Phillips and Muzzin, and that she never spoke with Muzzin herself concerning the defective pipe.

TBA also presented the testimony of Joyce Hare, who handles collection issues on TBA's accounts receivable. Hare acknowledged that she did not personally see or inspect the defective pipe, and had no personal knowledge of its condition. Hare testified concerning TBA's general procedures for past due accounts, and stated that based upon those procedures, she believes she would have made two calls per month to Cuyahoga's accounting department in an attempt to obtain payment on the account during the 60-day period that payment was overdue. Hare had no specific recollection of any conversations with a Cuyahoga representative, but did recall having at least one conversation with Phillips, as a result of which she was aware of the ongoing dispute between TBA and Cuyahoga concerning the shipment in question.

TBA also called Tim Biery, its sales director for Ohio, as a rebuttal witness. Biery testified that he met Muzzin at Cuyahoga in Bedford Heights, Ohio, when he accompanied Phillips on a sales call. Biery's testimony was apparently offered, over the objection of Cuyahoga, to impeach Muzzin, who testified that he did not recall having met or dealt with any TBA representative other than Phillips over the course of time that he had been doing business with TBA. Biery did not testify concerning the defective pipe or the dispute between TBA and Cuyahoga.

This case came before the circuit court, who heard the matter by bench trial on April 18, 2005. Thereafter, on August 8, 2008, the court entered the aforementioned findings of fact and conclusions of law in this matter. TBA subsequently filed a motion to alter, amend, or vacate pursuant to CR 60.02, which was denied. It is from that order that TBA now appeals to this Court.

At the outset, we briefly address the issue of the jurisdiction of the court below to decide this issue. In its brief to this Court, Cuyahoga asserts that this Court should affirm the court below, but nevertheless maintains its argument that the court lacked personal jurisdiction to decide these issues. In its arguments below, Cuyahoga asserted that the court lacked personal jurisdiction, as it was a nonresident buyer, and lacked the necessary minimum contacts with the state of Kentucky.[5]

In response, TBA asserted that pursuant to KRS 425.210(2)(a)(1), the court did have personal jurisdiction. Specifically, TBA stated that over the course of the business relationship, Cuyahoga would at times call its orders in directly to the TBA office in Louisville, and further, that there were various times when the TBA representative in Ohio would fax Cuyahoga orders from Ohio to the TBA office in Kentucky.

On June 3, 2003, the trial court issued an opinion and order finding that it had personal jurisdiction to hear this matter. In so finding, the court found

[5] Specifically, Cuyahoga asserted that it has no place of business in Kentucky; has no land here; that no one from Cuyahoga has been to Kentucky on business; that TBA initiated the business relationship in Ohio; and that all supplies were shipped to Cuyahoga in Ohio.

that TBA met its burden of proof in establishing personal jurisdiction. The court found that since the relationship between the parties began in 1991, the parties had engaged in a series of transactions which constituted an extended business relationship involving substantial amounts of money. Based thereon, and in reliance upon applicable precedent, the court found that Cuyahoga's actions caused a consequence in the state of Kentucky, and that Cuyahoga had a substantial enough connection to the state to make the exercise of personal jurisdiction reasonable.

Having reviewed the opinion of the trial court and the applicable law, we are compelled to agree. We note that *de novo* review is appropriate when the lower court is alleged to be acting outside of its jurisdiction, as jurisdiction is generally a question of law. *See Grange Mutual Insurance Co. v. Trude*, 151 S.W.3d 803 (Ky. 2004). In so noting, we have reviewed the law, and believe the trial court's interpretation of applicable precedent to be correct.

Pursuant to *Tube Turns Division of Chemetron Corporation v. Patterson Company, Inc.*, 562 S.W.2d 99 (Ky.App. 1978), the court below correctly stated that it would be unreasonable for Kentucky to exercise jurisdiction over a non-resident purchaser where the purchaser's only contact within the state was negotiation by telephone and mail culminating in a single order.

Nevertheless, the court found, and we believe correctly, that the parties in this instance have engaged in more than an isolated transaction. Indeed, the record shows that since 1991, Cuyahoga and TBA have engaged in repeated

and prolonged transactions, constituting substantial sums of money, some of which were conducted by phone, others by facsimile. We believe that the nature of these transactions and the sum of money involved were substantial enough to establish the requisite transaction of business within the state.

As we have previously held in *First National Bank of Louisville v. Shore Tire Co.*, 651 S.W.2d 472 (Ky.App. 1982), the repeated placing of orders by a nonresident with a Kentucky resident constituted the transaction of business in Kentucky, and that the extended business relationship between the two and the substantial amount of money involved established the necessary minimum contacts to make the exercise of jurisdiction reasonable. Accordingly, we affirm the ruling of the lower court on this issue.

Having addressed issues of jurisdiction, we turn now to the merits of the dispute between the parties. In reviewing this matter, we note that this case was tried to the court below on both the law and the facts. It is the law of this Commonwealth that findings of fact issued by the trial court will not be set aside on appeal unless those findings are clearly erroneous. *See Frances v. Frances*, 266 S.W.3d 754 (Ky. 2008). Certainly, this Court may not substitute its own judgment for that of the trial court on the weight of the evidence, unless that decision is unsupported by substantial evidence. *See Castle v. Castle*, 266 S.W.3d 245 (Ky.App. 2008). Substantial evidence is evidence of a probative value that a reasonable person would accept as adequate to support a conclusion. *See Moore v.*

Asente, 110 S.W.3d 336 (Ky. 2003). We now review this matter with those standards in mind.

As its first basis for appeal, TBA asserts that Cuyahoga did not properly reject its shipment. In support of that argument, TBA states that on prior occasions, it had furnished shipments and had been paid in full, and that occasionally, it had furnished pipe which Cuyahoga had rejected by utilizing the proper procedures, including the use of TBA's RMA form. TBA states that on those occasions, Cuyahoga had returned the pipe, and received full credit for it, including reimbursement for out of pocket expenses.

TBA asserts that other than the statement from Muzzin that he had visited the job site and seen the defective pipe, the remainder of his testimony was hearsay from the FAA, Allegra, and Phillips. TBA asserts that via the RMA form which it submitted as an exhibit in this claim, Cuyahoga was on notice of the proper procedure to follow to make the claim and initiate the process of returning the defective pipe for credit. Further, TBA relies upon Tracy's testimony that she had no first-hand knowledge that Cuyahoga was seeking a credit until November of the following year, and that she had never received the paperwork to process the claim or authorize an RMA.

Accordingly, TBA argues that Cuyahoga accepted the goods, as it failed to reject the shipment within a reasonable time after delivery pursuant to KRS 355.2-602 and KRS 355.2-606. TBA asserts that even given the most favorable interpretation of the facts, Cuyahoga attempted, over a year after their

acceptance, to revoke the acceptance. Thus, TBA asserts that Cuyahoga, as the buyer, has the burden to establish any breach with respect to the goods accepted pursuant to KRS 355.2-607. TBA asserts that there is no proof in the record that the goods were in fact defective aside from Muzzin's own testimony.

In response, Cuyahoga asserts that Muzzin's unrefuted testimony established that Cuyahoga made a timely, rightful, and effective rejection of the defective pipe supplied by TBA, and that Cuyahoga took all necessary steps to comply with the requirements of KRS 355.2-602(1). We note that KRS 355.2-602(1) provides that:

> (1) Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.

Cuyahoga asserts that the lower court was correct in finding that it rejected the goods within a reasonable time after delivery by immediately notifying Phillips of the condition of the pipe. Cuyahoga further argues, and we believe correctly, that KRS 355.2-602(1) makes no requirement as to specifically whom the notice must be given. In this instance, given that the testimony of all parties establishes that Cuyahoga routinely and primarily dealt with Phillips, it logically follows that he would be the individual to whom notice was provided.

Our review of the record establishes that notice was given to Phillips, that he was given an opportunity to inspect the pipe, and that he was advised that Cuyahoga did not find the condition of the pipe to be satisfactory. While Cuyahoga may have moved the pipe to its facility as a courtesy to its customer, the

record indicates that it made clear to Phillips on multiple occasions that the pipe needed to be picked up, or otherwise disposed of. Certainly, under the UCC a supplier of non-conforming goods cannot turn a rightful rejection into an untimely one simply by refusing to pick up the non-conforming goods.

Further, we are not persuaded by TBA's arguments concerning the missing paperwork needed to process the refund for Cuyahoga. Having reviewed the record, we are of the opinion that it clearly indicates that the necessary paperwork was given to Phillips and, further, that this was the customary method in which Cuyahoga normally made its returns. For reasons set forth herein below, we believe Phillips to have been an agent with, at the very least, apparent authority on behalf of TBA. We believe that Cuyahoga's actions in providing the RMA to Phillips, just as it had done on previous occasions, constituted an effective and seasonable rejection of the defective pipe.

Having found that Cuyahoga seasonably and effectively rejected the shipment, we need not address TBA's second argument concerning whether Cuyahoga's rejection of the defective pipe should be treated as a revocation of acceptance under KRS 355.2-607, rather than a rejection of non-conforming goods under KRS 355.2-602(1). Accordingly, we now turn to the second basis of appeal asserted by TBA.

As its second basis for appeal, TBA argues that the court below erred in finding that Phillips had apparent authority to inspect the pipe and advise Cuyahoga that it was defective, and that Cuyahoga was entitled to a credit. While

TBA acknowledges that in this Commonwealth, a principal is bound by the acts of an agent acting within the scope of his authority, it disputes ever granting that agency to Phillips. TBA argues that when apparent authority is claimed, we must look to the acts or statements of the principal for the requisite foundation, and not to those of the agent. Further, TBA argues that the principal must affirmatively hold the agent out to the public as possessing sufficient authority to modify the contract or to permit the agent to act as if he has the required authority.

Accordingly, TBA asserts that there is no evidence to indicate that it did anything to imply or to give Cuyahoga the impression that Phillips was anything other than a sales agent, and states that Cuyahoga's one piece of evidence, the RMA form purportedly completed by Phillips, specifically informed Cuyahoga that they must contact Tracy in order to secure an RMA.

Having reviewed the record, we are compelled to disagree. As the court below correctly held, it is the well-settled law in this Commonwealth that a principal is bound by the acts of an agent who is acting within the scope of his apparent authority. *See Clark v. Burden*, 917 S.W.2d 574 (Ky. 1996). Our courts have defined an apparent agent as one whom the principal, either intentionally or by want of ordinary care, induces third persons to believe to be his agent, although he has not, either expressly or by implication, conferred authority upon him. *See CSX Transportation Inc. v. First Natl. Bank of Grayson,* 14 S.W.3d 563, 568 (Ky.App. 1999) (quoting *Middleton v. Frances*, 257 Ky. 42, 77 S.W.2d 425 (Ky.App. 1934)).

In so stating, we do acknowledge that apparent authority is based upon the representation or conduct of the principal, not of the agent. *See Enzweiler v. People's Deposit Bank*, 742 S.W.2d 569, 570 (Ky.App. 1987). In this instance, if not intentionally, then at the very least by want of ordinary care in not advising Cuyahoga to the contrary despite repeated dealings with the company, TBA vested Phillips with that authority.

Cuyahoga argues, and we agree, that at a minimum the record via the testimony of both Muzzin and Tracy establishes that under general agency principles Phillips had apparent authority to handle all aspects of the Cuyahoga account. This includes the authority to act as a liaison between TBA and Cuyahoga to obtain refunds for defective shipments of pipe. Testimony established, and TBA did not refute, that on prior occasions, Cuyahoga had returned shipments of pipe and had utilized Phillips as its agent from the beginning to the end of the procedure.

Our review of the record reveals no evidence that TBA ever informed Cuyahoga that Phillips was not its agent and in fact, testimony from Tracy establishes she never told Phillips it was beyond his authority to attempt to resolve the dispute with Cuyahoga. More importantly, Tracy agreed that "to some extent" Phillips had authority to resolve claims. Further, Tracy conceded that neither she nor, to her knowledge, anyone else from TBA ever advised Cuyahoga that Phillips lacked authority to settle claims or issue refunds. In light of all of the actions

Phillips took on behalf of TBA that would in fact indicate agency authority, it was certainly incumbent upon TBA to inform Cuyahoga if this were not the case.

Because we believe that the lower court correctly concluded that Phillips was an agent of TBA, we believe it also correctly admitted Muzzin's testimony concerning statements made to him by Phillips. As an agent, Phillips was one whose statements constitute binding admissions under KRE 801A(b)(3) and (b)(4). Accordingly, Phillips's statements concerning the defectiveness of the pipe, and the promised credit, as well as the statements made by Phillips on the audiotapes admitted into evidence in this matter, constitute binding admissions by TBA that the pipe in question was defective and that Cuyahoga was entitled to a refund or credit for those shipments.

Having found that these statements are admissible, we must likewise find that TBA failed to produce any evidence to rebut that which was put forth by Cuyahoga to establish the defectiveness of the pipes and the notice given to Phillips of same. Certainly, TBA could have called Phillips to the stand to explain or refute the audiotapes, or to impeach the testimony of Muzzin. It chose not to do so, nor to submit any other evidence which might refute the assertions made by Cuyahoga in this regard. Accordingly, we affirm.

Finally, we address Cuyahoga's request for costs and attorney fees. In making this request, Cuyahoga argues that TBA made this appeal without a good faith basis, and failed to call any witnesses with actual personal knowledge of the condition of the defective pipe, or of the conversations between Muzzin and

Phillips. We cannot agree. Having reviewed the record and the arguments of the parties in detail, we simply cannot find that TBA brought this appeal without any belief in its merit. While we ultimately affirm the lower court in its rulings, we are of the opinion that TBA presented some evidence on its own behalf which had merit. Accordingly, we deny Cuyahoga's request for attorney fees and costs.

Wherefore, for the foregoing reasons, we hereby affirm the August 8, 2008, Findings of Fact, Conclusions of Law, and Judgment of the Jefferson Circuit Court, the Honorable Martin F. McDonald, presiding.

ALL CONCUR.

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