STATE OF MICHIGAN

COURT OF APPEALS

J. GORDON GAINES, INC.,

Plaintiff-Appellant/Cross-Appellee,

v

221, INC., d/b/a INTERSTATE EXCESS, INC., and LORI MOTHERSBAUGH,

Defendants/Cross-Defendants,

and

AMGRO, INC.,

Defendant/Third-Party Plaintiff-Appellee,

and

VESTA INSURANCE CORPORATION and LIBERTY NATIONAL FIRE INSURANCE COMPANY,

Third-Party Defendants-Appellants/Cross-Appellees,

and

INTERSTATE HEALTHCARE UNDERWRITERS OF PROFESSIONAL LIABILITY INSURANCE AGENCY, INC. and CHARLES MARLIN,

Defendants/Cross Plaintiffs-Appellees/Cross-Appellants,

UNPUBLISHED
May 5, 2000

No. 208867
Oakland Circuit Court
LC No. 95-500108-CK

and

POWERS AGENCY, INC., d/b/a POWERS CARLSON ASSOCIATES, and ADLER'S FOOD TOWN, INC.,

Defendants-Appellees.

AMGRO, INC.,

Plaintiff-Appellee,

v

No. 208930
Oakland Circuit Court
LC No. 96-528062-CK

ADLER'S FOOD TOWN, INC.,

Defendant/Third-Party Plaintiff-Appellee,

and

J. GORDON GAINES, INC., and VESTA INSURANCE CORPORATION,

Third-Party Defendants-Appellants,

and

LORI MOTHERSBAUGH, 221, INC., d/b/a INTERSTATE EXCESS, INC., INTERSTATE HEALTHCARE UNDERWRITERS OF PROFESSIONAL LIABILITY INSURANCE AGENCY, INC. and CHARLES MARLIN,

Third-Party Defendants.

Before: Kelly, P.J., and Holbrook, Jr. and Griffin, JJ.

PER CURIAM.

Plaintiff J. Gordon Gaines, Inc. (Gaines) is joined by third-party defendants Vesta Insurance Corp. (Vesta) and Liberty National Fire Insurance Co. (Liberty National) in appealing as of right the grant of declaratory relief to defendants Adler's Food Town, Inc. (Adler's) and Amgro, Inc. (Amgro). Gaines also challenges the grant of summary disposition to defendants Charles Marlin (Marlin) and Interstate Healthcare Underwriters of Professional Liability Insurance Agency, Inc. (Interstate Healthcare) on his claims for conversion, breach of contract, and fraud. Defendants Marlin and Interstate Healthcare cross-appeal the denial of their motion for entry of judgment and the denial of their motion for costs and attorney fees under MCR 2.403(O). We affirm in part, reverse in part and remand.

Gaines was the underwriting manager for Vesta and its predecessor, Liberty National. Marlin is a licensed agent in Michigan for surplus and resident property lines and was a registered resident agent of Vesta. Marlin was the president and sole shareholder of Interstate Excess, Inc., an entity with which Gaines had a brokerage agreement. Under the brokerage agreement, Interstate Excess, Inc., through Marlin, agreed to send Gaines the premium for any policies Gaines placed for Interstate Excess, Inc.

On October 12, 1994, Marlin sold some of the assets of Interstate Excess, Inc. to 221, Inc., whose president and sole shareholder was Lori Mothersbaugh. The sale included the right to use the name Interstate Excess. Marlin and Mothersbaugh agreed not to disclose the sale for two years, and Marlin agreed to assist Mothersbaugh in the underwriting and marketing of renewal business for one year. Marlin changed the name of his corporation to Interstate Healthcare. Both corporations continued to operate at the same address.

One of the accounts included in the sale was the Adler's Food Town policy with Vesta, which was up for renewal in late 1994. Adler's secured insurance through its agent, Powers Carlson Agency, and financed its premiums through Amgro. As he had for renewals of this policy before the asset sale, Marlin personally dealt with Wayne Carlson of the Powers Carlson Agency and negotiated with Ronald Dauphinee, who was either a Gaines or Vesta employee, in placing the policy with Vesta. Marlin did not disclose the changed circumstances to either of these people. In March 1995, Amgro issued a premium check for the renewal policy to Powers Carlson, who deducted its commission and mailed a check to "Interstate Excess." An Interstate Healthcare underwriter testified that she saw the check when it arrived and that Marlin directed that the check be placed in the "in-box" for 221, Inc. and Lori Mothersbaugh. On June 13, 1995, Dauphinee notified Marlin that the Adler's premium was overdue. Marlin promised that the premium would soon be forwarded to Vesta. Vesta eventually canceled the policy for nonpayment of the premium.

The parties filed numerous complaints in an effort to determine their rights and obligations in relation to each other following the cancellation of Adler's Vesta policy. It is not disputed that Mothersbaugh deposited the check in her company's bank account but used this and other premium payments for her personal use.

I

On appeal, Gaines is joined by Vesta and Liberty National in appealing the trial court's rulings that Amgro paid the Adler's premium to Vesta's apparent agent and, therefore, Vesta's cancellation of the Adler's policy was wrongful, that neither Vesta nor Gaines is due any money under the policy, and that Amgro is entitled to the return of the unearned portion of the premium. Appellants argue that, whether an apparent agency existed is a question of fact and, therefore, summary disposition on this issue was inappropriate.

While the existence of an apparent agency is usually a question of fact for the jury, where the facts are either admitted or undisputed as to the existence of the principal-agent relationship and as to the scope of the agent's authority, the trial court may properly rule on the existence of apparent authority. *Duncan v Michigan Mutual Liability Co*, 67 Mich App 386, 388-389; 241 NW2d 218 (1976). "The authority of an agent to bind the principal may be either actual or apparent." *Meretta v Peach*, 195 Mich App 695, 698; 491 NW2d 278 (1992).

> Apparent authority may arise when acts and appearances lead a third person reasonably to believe that an agency relationship exists. . . . Apparent authority must be traceable to the principal and cannot be established by the acts and conduct of the agent. . . . In determining whether an agent possesses apparent authority to perform a particular act, the court must look to all surrounding facts and circumstances. [*Id.* at 698-699.]

"Whenever a principal has placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in assuming that such agent is authorized to perform in behalf of the principal the particular act, and such particular act has been performed, the principal is estopped from denying the agent's authority to perform it." *Id.* at 699-700, quoting *Central Wholesale Co v Sefa*, 351 Mich 17, 26-27; 87 NW2d 94 (1957).

The trial court, in granting summary disposition, stated:

> Charles Marlin, President of Interstate Excess, Inc., the entity with which Vesta had an agency relationship, maintained the same business address as "Interstate Excess" after the sale of assets to Mothersbaugh. Interstate Excess, Inc. and Charles Marlin did have the authority to accept payment and to bind policies on behalf of Vesta. After the sale of some of its assets to Mothersbaugh, Marlin conducted "business as usual" with regard to various accounts including the Adler's Food Town account. Marlin negotiated the renewal of the Adler's Food Town account with Powers Carlson and when the check from Powers Carlson made payable to "Interstate Excess" was received in the office, he advised Kathy Morosan, the Underwriting Manager for Interstate Healthcare, to place the check with Mothersbaugh's mail. No distinction had historically been made between "Interstate Excess" and "Interstate Excess, Inc." Marlin always operated under "Interstate Excess". Additionally, the check from Powers Carlson arrived with an invoice from "Interstate Excess" noting the Adler's Food Town account.

> An ordinarily prudent person operating in the insurance industry would be justified in assuming that "Interstate Excess" had the authority to accept payment on behalf of Vesta. Payment was accepted and Vesta is estopped from denying "Interstate Excess" authority to accept payment. *Meretta v Peach*, 195 Mich App 695, 699-700[; 491 NW2d 278] (1992), citing *Central Wholesale Co v Sefa*, 351 Mich 17[; 87 NW2d 94] (1957).
>
> Vesta's cancellation for non-payment was improper in that their apparent agent received payment for the premium. Accordingly, Plaintiff is not entitled to any additional payments and Amgro is entitled to return of unearned premium from Vesta.

The trial court did not err in holding as a matter of law that Marlin and an entity known as Interstate Excess had actual authority to bind Vesta and to accept payments for it before the sale of assets and apparent authority after the sale. The pertinent facts are not in dispute. As the court noted, the company known as Interstate Excess appeared unchanged to the appellants' insured, Adler's, Adler's agent, Powers Carlson Associates, and the premium financing company, Amgro. Marlin negotiated the policy with Powers Carlson and with appellants' agent, Dauphinee. Marlin's signature appeared on the policy's declaration sheet. Marlin continued to use Interstate Excess stationery, and facsimile memos sent to Powers Carlson under Interstate Excess letterhead were signed Charles Marlin, President. The authority of Marlin and Interstate Excess to bind appellants was originally granted by appellants, who did nothing to rescind that authority. Appellants' insured sent its premium payment to the company name and address registered with the state as a registered agent of Vesta. These facts are sufficient to indicate that Marlin and Interstate Excess were Vesta's apparent agents for receipt of the policy premium. The premium payment did in fact arrive at the office of Interstate Excess and was directed either by Marlin or one of his employees to the "in-box" of 221, Inc.

Under these facts, the insured should not be penalized by cancellation of its policy and forfeiture of its premium because appellants' agent, Marlin, did not disclose to his principals the sale of the insured's account or because the buyer diverted the premium payment to her personal use.

II

Gaines also appeals the trial court's grant of summary disposition on its claim for conversion against Marlin and Interstate Healthcare. Conversion is any distinct act of dominion wrongfully exerted over another's personal property that is in denial of or inconsistent with the other's rights in the property. *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992); *Trail Clinic, PC v Bloch*, 114 Mich App 700, 705; 319 NW2d 638 (1982). Conversion may also be committed "by actively aiding or abetting or conniving with another in such an act." *Trail Clinic*, *supra* at 706. One may be liable for conversion even though acting innocently. *Id*. Because conversion is an intentional tort, the defense of "good faith" is not available to the defendant. *Willis v Ed Hudson Towing, Inc*, 109 Mich App 344, 349; 311 NW2d 776 (1981).

The trial court found no genuine issue of material fact that Interstate Healthcare and Marlin "never deposited the money at issue in an account over which they had control. There is no question

that the check was deposited in Mothersbaugh and 221, Inc.'s account." The court stated that Gaines had presented no evidence that Marlin participated in Mothersbaugh's acts or inured any benefit from her actions. We agree with the trial court that Marlin's act of placing the check in Mothersbaugh's "in-box" was a routine office management task and did not amount to conversion of the check. No evidence was presented that Marlin intended to do an act contrary to any possessory interest that either Gaines or Vesta might have had in the check. Plaintiff also failed to establish that Marlin aided, abetted, or connived with Mothersbaugh in her conversion of the premium. Although Marlin actively worked to keep the sale of Interstate Excess secret, no evidence was presented that he was aware that Lori Mothersbaugh was not forwarding insurance premiums appropriately. Because we find that there was no act of conversion, it is not necessary to discuss whether the check could properly be the subject of a conversion claim brought by plaintiff.

III

Next, Gaines argues that the trial court erred in granting summary disposition to Marlin and Interstate Healthcare on its claim for breach of contract. The Producer Record and Brokerage Agreement obligates Interstate Excess, Inc. to guarantee premium payment for policies placed by Gaines on Interstate Excess, Inc.'s behalf, and to hold Gaines harmless for payment of an unearned premium to a finance company. Marlin signed the agreement in his capacity as president of Interstate Excess, Inc. The trial court dismissed Gaines' claim because it adopted Marlin's argument that the policy was negotiated by Ronald Dauphinee on behalf of Vesta.

We find that the evidence raises a triable issue of fact concerning which entity was Dauphinee's principal when he negotiated the terms of the Adler's policy with Marlin. Contrary to the trial court's holding, Russell Crouch, Vesta's Director of Insurance Operations, testified in his deposition that Gaines was Vesta's underwriting manager and he did not know what role Gaines played in issuing the policy to Adler's. Further, he testified that he did not know if Dauphinee was an employee of Vesta or Gaines. Dauphinee testified in his deposition that he was directly employed by Gaines and received his pay from Gaines. Gaines supplied Vesta with employees for various functions. Dauphinee also testified that neither Vesta nor Gaines would deal with an agent who did not have a brokerage agreement.

This testimony was sufficient to survive the motion for summary disposition on Gaines' breach of contract claim brought by Marlin and Interstate Healthcare. Dauphinee acknowledged that he was Gaines' employee and received his paychecks through Gaines. Thus, the trial court erred in finding no disputed fact that the policy was not placed by Gaines, and we reverse its grant of summary disposition on Gaines' breach of contract claim. Whether the brokerage agreement was properly assigned to 221, Inc. in the sale of assets was not decided by the trial court and should be considered on remand.

IV

Gaines also appeals the grant of summary disposition to Marlin and Interstate Healthcare on its claim for fraud. In order to prove fraud, a plaintiff must establish:

> (1) a material representation; (2) that is false; (3) that defendant made knowing it to be false or that it made recklessly without any knowledge of its truth and as a positive assertion; (4) with the intent that it should be acted upon by the plaintiff; (5) that it was acted upon by the plaintiff; and (6) resulted in the plaintiff's injury. [*Clement-Rowe v Michigan Health Care Corp*, 212 Mich App 503, 507; 538 NW2d 20 (1995).]

The false representation needed to establish fraud may be satisfied by the failure to divulge facts that the defendant has a duty to disclose to the plaintiff. *Id.* at 508. "In order for the suppression of information to constitute silent fraud there must be a legal or equitable duty of disclosure." *US Fidelity & Guaranty Co v Black*, 412 Mich 99, 125; 313 NW2d 77 (1981). "[O]ne who remains silent when fair dealing requires him to speak may be guilty of fraudulent concealment." *Id.* at 127, quoting *Nowicki v Podgorski*, 359 Mich 18, 32; 101 NW2d 371 (1960).

In granting summary disposition to Marlin and Interstate Healthcare on Gaines' claim for fraud, the trial court found that Gaines had no involvement in the issuance of the Adler's policy, there was no evidence that Vesta would not have issued the policy if they had known of the sale, and the brokerage agreement contained no duty to disclose the sale.

We again find that summary disposition was inappropriate. First, as noted above, we find a triable issue of fact regarding which entity was Dauphinee's principal for the placement of the Adler's policy. Dauphinee testified that when he bound coverage on the Adler's renewal policy he believed that a brokerage agreement with Marlin was still in effect. He would not have been able to negotiate terms with a producer who did not have a written agreement with Gaines or Vesta. Thus, the sale of this account to 221, Inc. was material to the insurers. Finally, although the trial court was correct in finding that the brokerage agreement contained no specific duty to disclose the sale, an ongoing contractual relationship existed between Interstate Excess, Inc. and Gaines that spanned a period beginning in March 1986, when Marlin and a Gaines' representative signed the brokerage agreement, through the sale of assets in October 1994. If both Dauphinee and Marlin were agents of the same principal, Gaines, their prior dealings with each other and with their principal may have created a duty to disclose the sale. We reverse the trial court's grant of summary disposition and remand for a determination of plaintiff's breach of contract and fraud claims.

V

On cross-appeal, Marlin and Interstate Healthcare first argue that the trial court erred in denying their motion for entry of judgment. This argument has no merit. "A court speaks through its orders, and the jurisdiction of this Court is confined to judgments and orders." *Lown v JJ Eaton Place*, 235 Mich App 721, 725-726; 598 NW2d 633 (1999). In this case, the circuit court spoke through a series of documents entitled "Opinion and Order." These entries by the court were not simply opinions but were also orders. Cross-appellants have presented no evidence that the court was required to enter further documents entitled "judgments."

Next, Marlin and Interstate Healthcare argue that the trial court erred in denying their motion for costs and attorney fees as mediation sanctions pursuant to MCR 2.403(O).[1] We review the trial court's decision whether to award mediation sanctions for an abuse of discretion. *Michigan Basic Property Ins Assoc v Hackert Furniture Distributing Co, Inc*, 194 Mich App 230, 234; 486 NW2d 68 (1992).

The trial court denied the motion for sanctions because the motion was not brought within twenty-eight days of the entry of the orders disposing of the matters between the parties. Marlin and Interstate Healthcare contend that a final judgment had not been entered and, therefore, their motion could not be untimely. As we have already noted, this argument is without merit. These entries were not simply opinions but also orders. As such, they come within the definition of "verdict" in MCR 2.403(O)(2)(c), which is "a judgment entered as a result of a ruling on a motion after rejection of the mediation evaluation." The first motion for sanctions was filed more than twenty-eight days after the orders and, therefore, was not timely. Further, the trial court had discretion in determining whether to award sanctions because these orders were based on motions for summary disposition, rather than a verdict after a trial, MCR 2.403(O)(11), and because the verdict included an award of equitable relief, MCR 2.403(O)(5).

In sum, we affirm the grant of declaratory relief to Adler's and Amgro on Gaines' request for declaratory relief, and we affirm the grant of summary disposition to Marlin and Interstate Healthcare on plaintiff's claim for conversion. We reverse the grants of summary disposition to Marlin and Interstate Healthcare on plaintiff's claims for breach of contract and fraud, and remand to the trial court for further proceedings on these claims. In the cross-appeal, we affirm the trial court's denial of the motions brought by Marlin and Interstate Healthcare for mediation sanctions and for entry of judgment.

Affirmed in part, reversed in part and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Donald E. Holbrook, Jr.
/s/ Richard Allen Griffin

[1] We note Gaines' argument that, under MCR 7.203(A)(1), this Court does not have jurisdiction to hear an appeal of right from postjudgment orders, such as the order denying mediation sanctions. Our jurisdiction to review this issue is provided by MCR 7.207(A)(1), which states that when an appeal of right is filed or this Court grants leave to appeal, any appellee may file a cross-appeal.