

STATE OF MICHIGAN
COURT OF APPEALS

TD LAND COMPANY, INC., and T & T CONEY
ISLAND, INC.,

UNPUBLISHED
December 27, 2002

Plaintiffs-Appellants,

v

No. 236573
Wayne Circuit Court
LC No. 99-931902-NM

PHILIP R. SEAVER TITLE COMPANY, INC.,

Defendant,

and

CARSON, KIOUSIS & MCKEEVER, P.L.C., and
CHARLES J. CARSON,

Defendants-Appellees.

Before: Whitbeck, C.J., and Zahra and Murray, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting defendants' motion for summary disposition. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

In approximately 1985, defendant began to represent a coney island restaurant operated by Costas and Theofonia Dedes. In 1993 and 1994, Theofonia Dedes and Tina Dedes, the daughter-in-law of Costas and Theofonia Dedes, incorporated plaintiff corporations. Theofonia was the majority stockholder of both corporations. TD Land Company, Inc. ("TD Land"), acquired the real property related to the restaurant and T & T Coney Island, Inc. ("T & T"), acquired the personal property related to the restaurant. Although Tina Dedes became the president of TD Land for a time, she was removed from office on November 23, 1996. Theofonia Dedes, as the majority stockholder, then elected her son (and Tina Dedes' husband), Vasilios Gus Dedes, to become the president of TD Land. Theofonia Dedes remained the vice president, secretary, and treasurer of the company.

On August 29, 1997, Nua Vuljaj offered to purchase the restaurant from plaintiffs for \$390,000 (\$370,000 for the real property from TD Land and \$20,000 for the personal property from T & T). Tina Dedes signed a purchase agreement as president of TD Land¹ and Theofonia Dedes signed the agreement as vice president of TD Land. Before the transaction could close, the restaurant received negative media publicity about its sanitary conditions. As a result, Vuljaj stated that he wanted to lower the price of the restaurant and its fixtures and offered to buy the property for a reduced price of \$300,000. On October 9, 1997, Theofonia Dedes signed certificates authorizing the president of TD Land to sell the real property related to the restaurant for at least \$300,000 and authorizing the president of T & T to sell the personal property of the restaurant for at least \$100. Defendants did not inform Vasilios Dedes of the certificates allowing the property to be sold for at least \$300,100. The next day, Tina Dedes, acting as president for plaintiffs, signed agreements selling the real property for \$300,000 and the personal property for \$100.² Defendants represented plaintiffs through all of these transactions.

Plaintiffs filed a complaint alleging breach of fiduciary duty and legal malpractice against Carson, Kiouis & McKeever, P.L.C., and Charles J. Carson and alleging civil conspiracy and slander of title against Philip R. Seaver Title Company, Inc. (“Seaver Title”).³ Plaintiffs’ claims against Seaver Title were resolved through case evaluation and plaintiffs’ civil conspiracy and slander claims were dismissed by stipulation. Plaintiffs’ remaining legal malpractice claim alleged that defendants were not authorized to sell the property for less than \$390,000. The trial court granted summary disposition for defendants, concluding that Tina Dedes was an ostensible agent for plaintiffs and was specifically authorized to approve a sale of the property for \$300,100.

It appears that the trial court granted defendants’ motion for summary disposition under MCR 2.116(C)(10). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002). A motion for summary disposition may be granted when, except in regard to the amount of damages, there is no genuine issue in regard to any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. MCR 2.116(C)(10), (G)(4); *Veenstra, supra* at 164. The moving party is entitled to a judgment as a matter of law when the proffered evidence fails to establish a genuine issue as to any material fact. *Id.* The decision whether to grant a motion for summary disposition is a question of law that is reviewed de novo. *Id.* at 159.

Plaintiffs argue that the trial court erred in granting defendants’ motion for summary disposition because Vasilios Dedes’ affidavit shows that defendants knew that Tina Dedes was not authorized to act on behalf of plaintiffs and that defendants were not authorized allow to the property to sell for less than \$390,000. We agree. In his affidavit, Vasilios Dedes swore that both he and Theofonia Dedes instructed defendants that all transactions relating to the corporations had to be approved by Vasilios Dedes and that Tina Dedes did not have any

¹ As discussed, Tina Dedes was no longer the president of TD land at this point.

² Vasilios Dedes was in Pennsylvania at the time and was unable to be at the closing.

³ Theofonia Dedes and Costas Dedes died before the commencement of this action.

authority to act on behalf of plaintiffs. Vasilios Dedes also told defendants that they did not have the authority to close the transaction for less than \$390,000. In deciding a motion for summary disposition, the trial court must consider affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in a light most favorable to the nonmoving party. *Veenstra, supra* at 164. The trial court may not engage in factfinding, but must take affidavits submitted by the nonmoving party at face value. *Huron Tool and Engineering Co v Precision Consulting Services, Inc*, 209 Mich App 365, 377; 532 NW2d 541 (1995).

Plaintiffs argue that defendants were negligent by allowing Tina Dedes to close the sale of the property for \$300,100 when she did not have the apparent authority to do so. The authority of an agent to bind a principal may be either actual or apparent. *Meretta v Peach*, 195 Mich App 695, 698; 491 NW2d 278 (1992). The trial court determined that Tina Dedes had apparent authority to act on behalf of plaintiffs.

Apparent authority may arise when acts and appearances lead a third person reasonably to believe that an agency relationship exists. 3 Am Jur 2d, Agency, § 19, p 524.

Apparent authority must be traceable to the principal and cannot be established by the acts and conduct of the agent. *Smith v Saginaw Savings & Loan Ass'n*, 94 Mich App 263, 271; 288 NW2d 613 (1979). In determining whether an agent possesses apparent authority to perform a particular act, the court must look to all surrounding facts and circumstances. *Id.* [*Meretta, supra* at 698-699.]

The question in the present case is whether an ordinarily prudent person in defendants' position would be justified in assuming that Tina Dedes had the authority to sell plaintiff's property for \$300,100. See *id.* at 699. The principal is not bound when the agent exceeds the scope of his apparent authority and the third party actually knows the limitation of the agent's authority. *Modern Globe, Inc v Lake Drive Corp* 340 Mich 663, 667; 66 NW2d 92 (1954). "Any question relating to the existence and scope of an agency relationship is a question of fact." *Hertz Corp v Volvo Truck Corp*, 210 Mich App 243, 246; 533 NW2d 15 (1995).

In the present case, Theofonia Dedes signed certificates stating that the board of directors for TD Land and T & T had approved resolutions allowing the president of the corporations to sell the property related to the restaurant for at least \$300,100. However, the transaction was not completed by Vasilios Dedes, the president of TD Land, but was completed by Tina Dedes. According to Vasilios Dedes' affidavit, defendants knew that Tina Dedes was not the president of TD Land and knew that Tina Dedes was not authorized to act on behalf of plaintiffs. Furthermore, defendants knew that they were required to obtain Vasilios Dedes' approval before making any transactions and that the restaurant property should not be sold for less than \$390,000. Under these circumstances, we conclude that a question of fact exists regarding whether a reasonable person in defendants' position would have concluded that Tina Dedes had the apparent authority to sell the property for \$300,100.

Defendants argue that, even if the trial court erred in granting defendants' motion for summary disposition on apparent authority grounds, the trial court should have granted their motion for summary disposition under MCR 2.116(C)(7) because plaintiffs were judicially

estopped from claiming that Tina Dedes lacked the authority to approve the property sale. The trial court rejected defendants' judicial estoppel argument, concluding that Tina Dedes' statements in a different suit were irrelevant because she was not a party in the present case. "[A]n appellee need not file a cross appeal in order to argue an alternative basis for affirming the trial court's decision, even if that argument was considered and rejected by the trial court." *Kosmyna v Botsford Community Hosp*, 238 Mich App 694, 696; 607 NW2d 134 (1999).

In reviewing a motion for summary disposition under MCR 2.116(C)(7), this Court must consider and accept as true the plaintiff's well-pleaded factual allegations, affidavits, or other documentary evidence and construe them in the plaintiff's favor. *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 77; 592 NW2d 112 (1999). A motion under this subsection should be granted only if no factual development could provide a basis for recovery. *Skotak v Vic Tanny International, Inc*, 203 Mich App 616, 617; 513 NW2d 428 (1994).

The judicial estoppel doctrine was discussed by our Supreme Court in *Paschke v Retool Industries*, 445 Mich 502, 509-510; 519 NW2d 441 (1994):

Under this doctrine, a party who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding. Under the "prior success" model, the mere assertion of inconsistent positions is not sufficient to invoke estoppel; rather, there must be some indication that the court in the earlier proceeding accepted that party's position as true. Further, in order for the doctrine of judicial estoppel to apply, the claims must be wholly inconsistent. [Citations and emphasis omitted.]

The doctrine of judicial estoppel is an extraordinary remedy that should be applied with caution. *Opland v Kiesgan*, 234 Mich App 352, 363-364; 594 NW2d 505 (1999). Judicial estoppel is an equitable doctrine invoked by the courts to prevent parties from intentionally manipulating the court system. *Id.* at 364-365.

In *Detroit Edison Co v Public Service Comm*, 221 Mich App 370, 382-383; 562 NW2d 224 (1997), this Court held that the judicial estoppel doctrine did not apply to two of the defendants when an organization, of which the two defendants were members, alleged a possibly inconsistent position in a previous litigation. The judicial estoppel doctrine did not prevent the defendants from asserting an inconsistent position in the later litigation because, while the defendants were members of the organization involved in the previous litigation, they were not the same party as the organization. *Id.* at 383.

Tina Dedes was a defendant in the previous suit brought by Vuljaj. However, she is not a party in the present case. Defendants have not presented any applicable authority indicating that plaintiffs are estopped from taking a position inconsistent with the position taken by Tina Dedes in the previous litigation. Therefore, we conclude that the trial court did not err in rejecting defendants' judicial estoppel argument.⁴

⁴ We do not express an opinion regarding whether the judicial estoppel doctrine would have applied if Tina Dedes would have been a party in the present case.

Reversed and remanded. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Brian K. Zahra

/s/ Christopher M. Murray