STATE OF MICHIGAN

COURT OF APPEALS

VERIZON DIRECTORIES SERVICES,

Plaintiff-Appellee,

v

ALLIED HOME MORTGAGE CAPITAL CORPORATION, d/b/a ALLIED MORTGAGE CAPITAL CORPORATION COAST TO COAST,

Defendant-Appellant.

UNPUBLISHED
August 11, 2009

No. 284577
Oakland Circuit Court
LC No. 2006-074197-CK

Before: Saad, C.J., and Sawyer and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment entered in favor of plaintiff following a bench trial in Oakland Circuit Court. For the reasons set forth in this opinion, we affirm.

In 1999, Anderson entered contracts to advertise Allied Home Mortgage's services in Verizon Directories' yellow pages. Defendant tendered payment to plaintiff from November 2, 1999 through January 21, 2003, but thereafter became delinquent in their account, prompting plaintiff to file a complaint requesting $194,958.15 against defendant for advertising services provided from December 2003 through April 2006. Defendant contended, among other defenses, that Anderson had no authority to enter into the agreements and his employment agreement with defendant was strictly forbidden from entering into such agreements.

The trial court issued an opinion and order enforcing 24 contracts in favor of plaintiff, finding the following: (1) Michael Anderson, defendant's branch manager, signed contracts and orally consented to unsigned contracts, (2) Anderson contracted for advertising services that were incidental to his daily business operations, (3) the purchase price under the contracts was not large enough to awaken suspicion regarding Anderson's authority to enter into the contracts, and (4) defendant tendered payments to plaintiff from its corporate office in Houston, Texas. The trial court, therefore, concluded that plaintiff established defendant's liability on the basis of Anderson's apparent authority to enter into contracts on its behalf.

On appeal, defendant argues two issues. First, defendant contends that the trial court erred in admitting Hollie Canalito's and Michael Kovich's (then plaintiff's employees) deposition testimony into evidence contrary to MRE 804(b)(5). Second, defendant argues that its branch manager, Mike Anderson, lacked the actual authority to enter into the agreements with

plaintiff and the trial court's ruling that Anderson had the apparent authority to bind the principal, constitutes reversible error.

I. Admissions of Deposition Testimony.

A trial court's "decision whether to admit or exclude evidence is reviewed for an abuse of discretion." *Elezovic v Ford Motor Co*, 472 Mich 408, 419; 697 NW2d 851 (2005) (citing *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999)). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

In *Barnett v Hidalgo*, 478 Mich 151, 174; 732 NW2d 472 (2007), the Michigan Supreme Court examined the admission of deposition testimony, where the deponent is unavailable, pursuant to MRE 804(b)(5) as follows:

> Testimony given as a witness in a deposition taken in compliance with law in the course of the same or another proceeding, [is admissible as an exception to the hearsay rule] if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

A deponent is unavailable, pursuant to MRE 804(b)(5)(A), if he is located farther than 100 miles away from the trial court, "unless it appears that the absence of the witness was procured by the party offering the deposition." *Lombardo v Lombardo*, 202 Mich App 151, 155; 507 NW2d 788 (1993).

From the outset we note that defendant's trial counsel did not object to the admission of Canalito's and Kovich's depositions.[1] Based on counsel's failure to object, plaintiff contends

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[1] The transcript of the proceedings reveals the following exchanges between the trial court and counsel for the respective parties when the deposition testimony was introduced:

Mr. Baxter: There were a couple [of] depositions taken in this case, they were both submitted to the [trial court]. I think [Allied Home Mortgage] indicated they wanted the depositions made part of the record and we would ask that both [] depositions and the exhibits be made part of this record. Both of the witnesses, your Honor, I believe live in the State of Texas. Under the applicable Rule of Evidence, I would point to Rule of Evidence 804, both . . . witnesses are beyond 100 miles from the court and their depositions were taken, and we would ask that both of the transcripts be admitted into evidence.

The Court: Any objections?

(continued…)

that defendant has waived this issue on appeal. Defendant contends that plaintiff failed to establish that the witnesses were unavailable and that by allowing their deposition testimony into evidence defendant was denied its right to cross-examination.

Following the telephone depositions of the witnesses, plaintiff filed the deposition transcripts with the trial court together with a notice that pursuant to MCR 2.302(H)(1), the deposition transcripts would be used at trial. Defendant does not argue that the transcripts were not properly filed with the court or that defendant was not properly served with a copy of the transcripts. See, MCR 2.302(H)(1)(b). Rather, defendant argues it was denied the opportunity to cross-examine the witnesses. The fact that defense counsel did not object to the admission of the deposition transcripts as evidence during trial belies this argument, but even if we were to discard defense counsel's lack of an objection, we find that defense counsel had an opportunity to cross-examine the witnesses during their telephone depositions. Furthermore, the Confrontation Clause of the Sixth Amendment to the United States Constitution does not protect civil litigants. *In re Brock*, 442 Mich 101, 108; 499 NW2d 752 (1993); *Durant v Stahlin*, 375 Mich 628, 649; 135 NW2d 392 (1965). Accordingly, defendant has failed to demonstrate how it was denied an opportunity to cross-examine the contested witnesses.

Defendant also contends that plaintiff failed to establish that the witnesses were unavailable, either by demonstrating that they were more than 100 miles form the court or by plaintiff acting in a manner to procure their absences. Whether Canalito and Kovich were both located in Texas, or Kovich was located in Illinois at the time the trial was conducted, the record before us leads us to conclude that the witnesses were farther than 100 miles away from the court. Therefore, the witnesses were unavailable pursuant to MRE 804(b)(5)(A). See *Lombardo*, *supra* at 155. Despite defendant's assertion that plaintiff procured the witnesses' absences, defendant does not cite to any such evidence in the record and were unable to find any evidence to support defendant's argument.

Even if the trial court erred in admitting Canalito's and Kovich's deposition testimony, any error was harmless. *Lukity*, *supra* at 495-496. Error in the admission of evidence is not a ground for "disturbing a judgment or order," unless failure to take action would be inconsistent with substantial justice. *Temple v Kelel Distributing Co, Inc*, 183 Mich App 326, 330; 454 NW2d 610 (1990); MCR 2.613(A). Without Canalito's and Kovich's deposition testimony, the evidence supported the trial court's conclusion that defendant was bound by the contracts entered into by *Anderson*, its branch manager, under the doctrine of apparent authority, discussed, *infra*.

(…continued)

Mr. Seeberger:	No. Well, frankly, your Honor, I [am] the one who submitted the depositions, therefore - -
The Court:	Is that a no, then?
Mr. Seeberger:	Well, no. I mean, I do object. I [am] just telling the Court I [am] the one who submitted the depositions. While those witnesses do live outside the radius that is described, they are or were employees of . . . Verizon Director[ies].

II. Apparent Authority of Agent.

Citing *Cutler v Grinnell Bros*, 325 Mich 370, 378; 38 NW2d 893 (1949), defendant contends that plaintiff could not rely on Anderson's statements as proof of his authority. Our standard of review as to a trial court's findings of fact in a bench trial is made under the clearly erroneous standard. "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made." *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 98-99; 535 NW2d 529 (1995). In this case, plaintiff did not simply rely on the statements of Anderson in ascertaining his authority. Defendant tendered payment on the contracts for over three years, thereby ratifying the actions of its agent. Thus, by tendering payment to plaintiff defendant "cloak[ed] [its] agent with apparent authority to do an act not actually authorized, the principal is bound thereby." *Cutler*, *supra* at 376. "Under fundamental agency law, a principal is bound by an agent's actions within the agent's actual or apparent authority." *James v Alberts*, 464 Mich 12, 15; 626 NW2d 158 (2001). "Apparent authority arises where the acts and appearances lead a third person reasonably to believe that an agency relationship exists. However, apparent authority must be traceable to the principal and cannot be established only by the acts and conduct of the agent." *Alar v Mercy Mem Hosp*, 208 Mich App 518, 528; 529 NW2d 318 (1995); see also, *VanStelle v Macaskill*, 255 Mich App 1, 10; 662 NW2d 41 (2003).

Sandra Wiley, defendant's senior vice-president in charge of national training, testified that defendant paid plaintiff for advertising expenses incurred by the Anderson's branch without prior approval. Defendant tendered payments to plaintiff for advertising services from November 2, 1999, through January 21, 2003, until a check was returned in December of 2003, for insufficient funds. The Supreme Court, in *David v Serges*, 373 Mich 442, 444; 129 NW2d 882 (1964), discussed contract ratification as follows:

> When an agent purporting to act for his principal exceeds his actual or apparent authority, the act of the agent still may bind the principal if he ratifies it. The Restatement of Agency 2d, § 82, defines ratification thusly:
>
> > Ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him.
> >
> > Affirmance is defined in § 83 of the Restatement:
> >
> > Affirmance is either
> >
> > (a) a manifestation of an election by one on whose account an unauthorized act has been done to treat the act as authorized, or
> >
> > (b) conduct by him justifiable only if there were such an election.

However defendant now characterizes the scope of Anderson's authority, there is no dispute that defendant ratified the actions of Anderson by making payments on the contracts for over three

years. As a result, plaintiff was reasonable in its reliance on Anderson's apparent authority to enter into contracts for advertising on behalf of defendant.

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Stephen L. Borrello