

STATE OF MICHIGAN
COURT OF APPEALS

SHALER INTERIORS,

Plaintiff/Counter-Defendant-
Appellee,

v

MKK TECHNOLOGIES, INC.,

Defendant/Cross-Defendant-
Appellant,

and

ASTRO ACQUISITION CORPORATION, d/b/a
ASTRO BUILDING PRODUCTS OF HOWELL,
and SHEPHERD ENTERPRISES INC.,

Defendants/Cross-Defendants,

and

MASCO CONTRACTORS SERVICE D, d/b/a
GALE INSULATION OF DETROIT,

Defendant/Cross-Plaintiff/Third-
Party Plaintiff,

and

DIAMOND WINDOW COMPANY,

Third-Party Defendant,

and

LAUREN D. HONET,

Intervening Plaintiff.

UNPUBLISHED

January 19, 2010

No. 287214

Lenawee Circuit Court

LC No. 07-002789-CK

Before: Wilder, P.J., and O'Connell and Talbot, JJ.

PER CURIAM.

Defendant MKK Technologies, Inc., (MKK) appeals by leave granted¹ the circuit court's order denying its motion for dismissal pending arbitration in this commercial litigation action. MKK argues that Shaler Interiors' claims are barred because of an agreement to arbitrate included in the original contract entered into between the parties, and that the circuit court's decision was erroneous. We reverse.

MKK was the general contractor overseeing a student housing project at Siena Heights University. Shaler Interiors, whose principal is David Shaler, is involved in drywall work. Rick Schneider, a professional acquaintance of Shaler,² was aware that MKK was seeking a subcontractor to perform drywall work on the Siena Heights project, but Schneider could not take the job himself because he was a union member and the job was nonunion. Shaler, however, was not a union member. Consequently, Schneider and Shaler agreed that Schneider would arrange to obtain the drywall job for Shaler Interiors, apparently in exchange for a portion of the proceeds.³

Schneider subsequently made the arrangements to obtain the drywall subcontract. Significantly, Schneider signed a subcontract with MKK for the drywall work on behalf of Shaler Interiors.⁴ Shaler did not sign the subcontract. Shaler testified that he knew that Schneider was getting the subcontract for Shaler Interiors and that he agreed to it. The subcontract contained an arbitration agreement requiring that all "claims, disputes and other matters in question arising out of or relating to this Subcontract" would be decided by arbitration, unless MKK elected otherwise.

Shaler subsequently executed a change order (referred to as "Change Order 2") for the project on behalf of Shaler Interiors, increasing the subcontract price by over \$150,000. The change order stated: "Change Order 2 shall become part of the original subcontract agreement including all terms and conditions without exception." Shaler Interiors also submitted to MKK sworn statements regarding work done in order to receive payment from MKK. Schneider signed some of the sworn statements on behalf of Shaler Interiors, referring to himself as an "agent" on the forms. Shaler Interiors also submitted to MKK a partial unconditional release of

¹ *Shaler Interiors v MKK Technologies Inc.*, unpublished order of the Court of Appeals, issued December 4, 2008 (Docket No. 287214).

² It is undisputed that Schneider was not an employee of Shaler Interiors.

³ Schneider and Shaler agreed that Schneider would get 33 percent of the proceeds and Shaler the rest.

⁴ The subcontract indicates that Schneider signed under the "Shaler Interiors" name.

lien, signed by Shaler, which expressly acknowledged the contract between Shaler Interiors and MKK.

After Shaler Interiors completed the project, it initiated this cause of action, claiming that MKK owed it approximately \$59,500 for unpaid work. After substantial litigation, MKK filed a motion for dismissal pending arbitration. MKK argued that discovery had shown that Schneider acted as an actual or apparent agent of Shaler Interiors, that Shaler Interiors ratified his acts, and that in any event, Shaler signed Change Order 2, which adopted and incorporated the original signed subcontract containing the arbitration clause. In response, Shaler Interiors admitted that Schneider facilitated obtaining the job for Shaler Interiors, but denied that he was authorized to enter into contracts for the company. The circuit court denied MKK's motion, apparently concluding that the evidence was equivocal.⁵ MKK now argues that the circuit court erred in denying its motion to dismiss pending arbitration. We agree.

The determination of the arbitrability of a dispute is a question of law subject to de novo review. *Madison Dist Pub Schools v Myers*, 247 Mich App 583, 594; 637 NW2d 526 (2001). "The existence of an arbitration agreement and the enforceability of its terms are judicial questions for the court rather than for the arbitrators," and these questions are reviewed de novo. *Watts v Polaczyk*, 242 Mich App 600, 603; 619 NW2d 714 (2000).

An agent's authority to bind a principal may be actual or apparent, and actual authority may be either express or implied. *Alar v Mercy Mem Hosp*, 208 Mich App 518, 528; 529 NW2d 318 (1995). "Implied authority is the authority that an agent believes the agent possesses." *Id.*

Here, MKK presents evidence that Schneider believed he had authority to bind Shaler Interiors. In particular, Schneider repeatedly signed documents on behalf of Shaler Interiors, and negotiated on behalf of the company. These actions by Schneider suggest that Schneider believed he had authority to act for Shaler Interiors. Because the evidence indicates that Schneider believed that he could sign a contract on behalf of Shaler Interiors, and because there is no testimony suggesting that Schneider harbored any doubts concerning whether he could do

⁵ It is unclear whether the record captured the entirety of the trial court's remarks regarding its reason for denying MKK's motion for dismissal pending arbitration. The relevant portion of the transcript of the July 14, 2008, hearing states as follows:

[*Defense Counsel*]. Your Honor, could I respectfully request the Court indicate its basis for denying the motion to dismiss based on the arbitration provision?

[*The Court*]. I think there's a very serious question involved there, but I think that you can both quote portions of the transcript that, taken out of context, would indicate substanti—substantiate your position. I don't think that they do. That's—

(At 10:45 a.m., proceedings concluded.)

so, there is no genuine issue of material fact that Schneider had implied actual authority to act on behalf of Shaler Interiors when he signed the subcontract with MKK.

There is also strong evidence that Schneider had apparent authority to act on behalf of Shaler Interiors. “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.” *Id.*

The evidence provided by the parties does not conflict, and it indicates that Schneider was given apparent authority to act on behalf of Shaler Interiors. Shaler testified as follows in his deposition:

Q. Okay. Who entered into the contract with MKK Technologies on behalf of Shaler Interiors?

A. Rick Schneider.

Q. And at that time who was Rick Schneider?

A. He was just a guy who was in the business that I was in who needed somebody to do the job for him because he couldn't do it. And we were introduced to each other and we had no affiliation other than the fact that he needed somebody to do this job for him and I—we had some mutual acquaintances and we were hooked up together and then I did the job for him.

Q. So you entered into an agreement with Rick Schneider to do a job that he obtained from MKK?

A. Correct.

Q. And at the time did you know that he had obtained this job from MKK?

A. I knew in the fact that he told me that he had this job and he needed somebody to do it for him. So basically, I was subcontracting it from them.

Q. So you were subcontracting it from Rick Schneider or his company?

A. No, subcontracting from MKK. He made all the arrangements. The checks were written to my company.

Q. But you knew that he was making those arrangements, is that correct?

A. Yes.

Q. And you authorized him to make those arrangements on your behalf, is that correct, on behalf of Shaler Interiors?

A. He made all the arrangements with MKK. I was basically—he asked me if I could do the job for “X” amount of dollars and I said yes, I can. You know, I went down and looked at it and said yes, I can do that. And he had a relationship before that with MKK and he couldn’t do the job because he was union and I was nonunion and the job was nonunion. So he was looking for somebody to do the job for him.

Q. So is the answer to my question that you knew he was going to contract with MKK on your behalf, is that correct?

A. Yes.

Thus, Shaler admitted that he *knew* Schneider would enter into a contract with MKK on behalf of Shaler Interiors, yet Shaler did nothing to dispel the notion that Schneider had the authority to do so. These actions by Shaler would lead an observer to reasonably believe that Schneider was authorized to bind Shaler Interiors. *Alar, supra* at 528. By doing nothing to dispel that notion, Shaler misled MKK.

Further, Dale Tusek, an employee of MKK, stated in an affidavit that both Schneider and Shaler represented to him that they would be working on the project on behalf of Shaler Interiors. In answers to interrogatories, Shaler admitted that “[m]ost interactions with MKK were through Rick Schneider who assisted Shaler in getting the job.” Thus, Schneider was Shaler Interiors’ “point man” for dealings with MKK.

There is no conflicting evidence. All the evidence indicates that Shaler, through his actions and inaction, led MKK to believe that Schneider had the authority to enter into the subcontract on behalf of Shaler Interiors. Accordingly, there was no genuine issue of material fact regarding Schneider’s apparent authority to act on behalf of Shaler Industries, and Shaler Industries was bound by the arbitration provision in the subcontract with MKK.

We also agree with MKK that Shaler ratified Schneider’s acts. An agent’s unauthorized acts may still bind the principal if the principal ratifies them. *Echelon Homes, LLC v Carter Lumber Co*, 261 Mich App 424, 431; 683 NW2d 171 (2004), rev’d in part on other grounds 472 Mich 192 (2005). The principal ratifies the agent’s act when the principal accepts the benefits of the unauthorized act, with knowledge of the material facts. *Id.* at 432; *Hutton v Roberts*, 182 Mich App 153, 162; 451 NW2d 536 (1989).

Shaler Interiors accepted payments from MKK for the job obtained by Schneider, and Shaler clearly had knowledge of the material facts surrounding Schneider’s efforts on their mutual behalf. Shaler admitted in his deposition that he knew that Schneider was obtaining the job for Shaler Interiors. The evidence is not conflicting, and there is no genuine issue of material fact.

We also agree with MKK that Shaler Interiors also agreed to be bound by the provisions of the contract, including the arbitration agreement, when Shaler signed Change Order 2. Michigan courts enforce contracts according to their terms in order to uphold the parties’ liberty of contract. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007). Unambiguous terms in a contract are enforced as written. *Id.* Furthermore, “[i]n a written

contract a reference to another writing, if the reference be such as to show that it is made for the purpose of making such writing a part of the contract, is to be taken as a part of it just as though its contents had been repeated in the contract.” *Forge v Smith*, 458 Mich 198, 207 n 21; 580 NW2d 876 (1998), quoting *Whittlesey v Herbrand Co*, 217 Mich 625, 628; 187 NW 279 (1922).

The unambiguous terms of Change Order 2 provide that the change order “shall become part of the original subcontract agreement including all terms and conditions without exception.” Thus, the parties to Change Order 2 unambiguously intended to make it part of the original subcontract. By assenting to Change Order 2, Shaler Interiors agreed to all provisions in the original subcontract, including the arbitration agreement.

For all these reasons, Shaler Interiors legitimately entered into the subcontract with MKK for drywall work and was bound by the terms of this subcontract, including the arbitration agreement. Accordingly, arbitration is the appropriate forum for settlement of Shaler Interiors’ claim, and the trial court erred when it denied MKK’s motion for dismissal pending arbitration.

Reversed.

/s/ Kurtis T. Wilder
/s/ Peter D. O’Connell
/s/ Michael J. Talbot