NO. COA11-302
NORTH CAROLINA COURT OF APPEALS

Filed: 1 November 2011

JMK, INC. d/b/a WINDOW & DOOR PROS,
Plaintiff,

v. Mecklenburg County
No. 09 CRS 14688

McALLISTER COMMERCIAL CONSTRUCTION COMPANY,
Defendant.

Appeal by Defendant from order and judgment entered 1 December 2010 by Judge Timothy S. Kincaid in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 September 2011.

Hamilton, Stephens, Steele & Martin, PLLC, by Adam L. Horner and George S. Sistrunk, for Plaintiff-appellee.

Helms, Henderson & Associates, P.A., by David L. Henderson and H. Parks Helms, and Anderson Terpening, PLLC, by William R. Terpening, for Defendant-appellant.

HUNTER, JR., Robert N., Judge.

McAllister Commercial Construction Company ("Defendant") appeals from the trial court's order granting summary judgment

in favor of JMK, Inc. d/b/a Window & Door Pros ("Plaintiff"). After careful review, we hold that Defendant has failed to demonstrate the existence of a genuine issue of material fact concerning Jacob Phelps's actual authority to order labor and materials from Plaintiff on Defendant's behalf. Accordingly, we affirm the trial court's order.

I. Factual & Procedural Background

On 23 April 2003, Defendant, a North Carolina corporation, was incorporated under the name McAllister Group Construction Company. Defendant performed general contracting work on construction projects in North Carolina. Lawrence C. McAllister, III ("LCM") was Defendant's principal officer, director, and shareholder. Plaintiff is a Virginia corporation with its principal place of business located in Mecklenburg County, North Carolina. Plaintiff is in the business of selling and installing windows and doors for commercial and residential construction projects.

On 29 November 2005, Defendant opened an account with Plaintiff for the purchase of labor and materials from Plaintiff on credit by executing a Confidential Credit Application (the "Credit Agreement"). In the Credit Agreement, Defendant identified itself as "The McAllister Group—Residential," and

listed LCM as President. The Credit Agreement named LCM, Jacob Phelps, and John Oldham as "Agents authorized to sign" on behalf of Defendant.

In 2006, Defendant modified its corporate identity from the McAllister Group Construction Company to "McAllister—Obsessive Construction."[1]

On 1 January 2007, LCM resigned from his positions as officer, director, and shareholder of Defendant. On 21 February 2007, LCM incorporated Defendant's former residential division under the name of The McAllister Group, Inc. ("McAllister Group"). LCM was the sole shareholder, director, and officer of McAllister Group. Subsequent to February 2007, Defendant's new residential projects were conducted through LCM's McAllister Group.

Defendant did not notify Plaintiff of the formation of McAllister Group, nor did it notify Plaintiff that Mr. Phelps was no longer authorized to act on behalf of Defendant pursuant to the Credit Agreement. However, LCM asserts in his sworn affidavit that Plaintiff was aware of the new entity through Plaintiff's meetings with McAllister Group and its representatives. LCM states that he met twice with Plaintiff's

[1] On or about 14 January 2009, Defendant changed its name to McAllister Commercial Construction Company.

sales representative, Michael Harig——once in April 2007, and again in May 2007——at McAllister Group's new office, and he informed Mr. Harig of his departure from McAllister and the formation of McAllister Group at that time. He further states that Mr. Harig made many visits to McAllister Group's new office to meet with employees, including Mr. Phelps who was working as a project manager for the new company. According to LCM, Mr. Harig offered to sell him discounted materials to use in the construction of McAllister Group's new space.

In May 2007, McAllister Group opened an office located at 2010 South Tryon Street, Suite 1B, in Charlotte, and conducted its business from that location. Defendant continued conducting its commercial construction operations out of its offices located at 2020 and 2030 South Tryon Street.

In June of 2008, Mr. Phelps began placing orders for materials with Mr. Harig for four residential projects—the Epley, Curry, Cavanaugh, and Tate projects (collectively, the "Projects"). Mr. Harig states in his affidavit he "did not know and had not been informed that [Mr. Phelps] was working for a separate company." Mr. Harig further states he believed all orders placed by Mr. Phelps for the Projects were placed pursuant to Mr. Phelps's authority under the Credit Agreement.

Plaintiff sent invoices for these orders to McAllister Group's offices at 2010 South Tryon Street where they were received and signed by Mr. Phelps. McAllister Group never paid for these orders and ultimately filed for dissolution.[2]

On 25 June 2009, Plaintiff filed a complaint stating seven claims for relief against Defendant, McAllister Group, and LCM. Plaintiff subsequently dismissed all of its claims except for its "CLAIM ONE," against Defendant. Plaintiff's "CLAIM ONE" asserts that Plaintiff issued invoices to Defendant on 14 November 2008 (Tate Project), 1 October 2008 (Epley Project), 12 September 2008 (Curry Project), and 29 August 2008 (Cavanaugh Project). Plaintiff claims it is entitled to an award of damages against Defendant in the amount of $91,833.50, plus pre-judgment and post-judgment interest and attorney's fees.

Defendant denies responsibility for this debt. Defendant asserts that this debt was the sole responsibility of McAllister Group and that Plaintiff knew LCM had incorporated Defendant's residential division under the name McAllister Group, an entity separate and distinct from Defendant. In his sworn affidavit, Defendant's Chief Financial Officer, Michael Kasper, states that "Other than receiving copies of the invoices on the Projects

[2] The record does not indicate the precise date upon which McAllister Group filed for dissolution.

attached as exhibits to the Complaint, [Defendant] never received any invoices, statements of account or other documents related to the Plaintiff's claims . . . ." Mr. Kasper also states that Defendant had no communications with Plaintiff concerning the Projects or any amounts claimed to be due thereon. According to Mr. Kasper, Defendant received none of the goods or services that McAllister Group and Mr. Phelps ordered, nor did it benefit financially from the residential projects for which these goods and services were used.

Plaintiff denies knowledge of the creation of McAllister Group. Plaintiff also denies knowledge that the materials ordered from Plaintiff were not ordered by Defendant. In addition to the two sworn affidavits provided by Mr. Harig, Plaintiff's president and owner, James White, also stated in a sworn affidavit that he never knew LCM was attempting to purchase orders from an account unrelated to the Credit Agreement, nor did he know of the existence of McAllister Group. Mr. White states he "did not know that a new corporation had been formed until meeting with [his] attorney about the overdue amounts and being informed that [LCM] had created [McAllister Group]."

On 19 October 2010, Plaintiff moved for summary judgment with respect to its claim for relief against Defendant. On 1 December 2010, Judge Kincaid entered order and judgment granting summary judgment in favor of Plaintiff. Defendant timely filed its Notice of Appeal with this Court on 29 December 2010.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b), as Defendant appeals from the Superior Court's final judgment as a matter of right.

III. Analysis

Defendant contends the trial court erroneously concluded there was no genuine issue of material fact as to whether Phelps was acting as its agent under the Credit Agreement when he ordered the labor and materials for the Projects. We disagree.

Summary judgment is appropriately granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009). A "genuine issue" is one that can be maintained by substantial evidence. *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000). "The rule

is designed to eliminate the necessity of a formal trial where only questions of law are involved and a fatal weakness in the claim of a party is exposed." *Dalton v. Camp*, 353 N.C. 647, 650, 548 S.E.2d 704, 707 (2001). "The party moving for summary judgment has the burden of establishing the lack of any triable issue." *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). This Court must review the entire record, viewing all evidence in the light most favorable to the non-moving party. *Id.*

Our Supreme Court has stated that "[a]n agent is one who acts for or in the place of another by authority from him." *Trust Co. v. Creasy*, 301 N.C. 44, 56, 269 S.E.2d 117, 124 (1980). "Two factors are essential in establishing an agency relationship: (1) [t]he agent must be authorized to act for the principal; and (2) [t]he principal must exercise control over the agent." *Johnson v. Amethyst Corp.*, 120 N.C. App. 529, 532-33, 463 S.E.2d 397, 400 (1995). Typically, the agency question is a factual determination that must be made by the jury; however, "[i]f only one inference can be drawn from the facts then it is a question of law for the trial court." *Vares v. Vares*, 154 N.C. App. 83, 87, 571 S.E.2d 612, 615 (2002)

(citation, quotations, and brackets omitted) (alteration in original).

A principal is bound by a contract executed by its agent in three situations: when the agent has actual authority, when the agent acts in the scope of his apparent authority, and when the principal ratifies the contract. *Bell Atl. Tricon Leasing Corp. v. DRR, Inc.*, 114 N.C. App. 771, 774, 443 S.E.2d 374, 376 (1994). "Actual authority is that authority which the agent reasonably thinks he possesses, conferred either intentionally or by want of ordinary care by the principal." *Harris v. Ray Johnson Constr. Co.*, 139 N.C. App. 827, 830, 534 S.E.2d 653, 655 (2000). Actual authority may be either express or implied. *Vaughn v. North Carolina Dep't Of Human Resources*, 37 N.C. App. 86, 91, 245 S.E.2d 892, 895 (1978).

The Credit Agreement executed by Defendant on or about 29 November 2005 expressly authorized Mr. Phelps to "sign for" Defendant. This vested Mr. Phelps with actual authority to place orders for materials and labor with Plaintiff on Defendant's behalf. Viewing the evidence in the light most favorable to Defendant, we must find (1) Plaintiff knew that LCM had incorporated Defendant's residential division as a separate entity, McAllister Group, and (2) Mr. Phelps was employed by

McAllister Group at the time he ordered labor and materials for the Projects. Defendant's first point is irrelevant. The formation of McAllister Group and Plaintiff's knowledge thereof is immaterial to the question of whether Mr. Phelps retained authority pursuant to the Credit Agreement. Defendant's second point similarly misses the mark. The fact that Mr. Phelps worked as a project manager for McAllister Group does not signify that Defendant terminated Mr. Phelps's employment and/or deprived Mr. Phelps of his authority under the Credit Agreement.

Defendant asserts there is "substantial material in the record" indicating that Mr. Phelps no longer worked for Defendant at the time he placed orders for the Projects. However, Defendant fails to offer any factual support for this assertion. Defendant emphasizes that Mr. Phelps worked as a project manager for McAllister Group but offers no evidence indicating that Mr. Phelps no longer worked for Defendant. We cannot conclude that Mr. Phelps was not employed by Defendant simply because he was employed by McAllister Group.

Defendant further argues that "the Record makes it difficult to see how [Plaintiff] could have failed to note that Phelps moved to the new company." Even assuming Defendant was aware of Mr. Phelps's employment with McAllister Group, this

evidence, as explained *supra*, fails to address the issue of whether Mr. Phelps retained his actual authority under the Credit Agreement. Construing the evidence in the light most favorable to Defendant does not require this Court to pile inference upon inference to find support for Defendant's conclusory assertions.

Furthermore, this Court's exhaustive review of the record indicates that the incorporation of McAllister Group was a change in form, not in substance. As LCM explained in his sworn affidavit, McAllister Group consisted of the same personnel and performed the same functions as Defendant's former residential division and was created "due to [] growth of [of Defendant's] residential division." Absent evidence to the contrary, it would be unreasonable for this Court to assume that this change in form deprived Mr. Phelps of his authority to act pursuant to the Credit Agreement. Defendant has failed to present such evidence. Quite the opposite, Defendant concedes that the Credit Agreement is still valid and in effect. The only reasonable inference that can be drawn from this evidence is that Mr. Phelps's actual authority to act pursuant to the Credit Agreement was not terminated. Because Defendant has failed to raise any issue of material fact concerning Mr. Phelps's actual

authority, this Court need not address the question of whether Mr. Phelps acted with apparent authority.

IV. Conclusion

For the foregoing reasons, we hold that Defendant has failed to demonstrate the existence of a genuine issue of material fact concerning Mr. Phelps's actual authority pursuant to the Credit Agreement. Accordingly, we affirm the order of the trial court granting Plaintiff's motion for summary judgment.

Affirmed.

Judges MCGEE and ELMORE concur.

Report per Rule 30(e).