STATE OF MICHIGAN

COURT OF APPEALS

ANTONIO SICILIANO and SICILIANO'S CLASSIC CARS OF AMERICA,

Plaintiffs-Cross-Defendants-Appellees/Cross-Appellants,

V

ULRICH MUELLER,

Defendant-Third-Party-Plaintiff-Cross-Plaintiff-Appellant/Cross Appellee,

and

NINETEEN FIFTY NINE CADILLAC ELDORADO #59E067699, NINETEEN FIFTY NINE CADILLAC ELDORADO #59E012792, NINETEEN FIFTY EIGHT CADILLAC ELDORADO #58E057676, NINETEEN FIFTY SEVEN CADILLAC ELDORADO #5762063280, NINETEEN FIFTY FIVE CADILLAC ELDORADO #556290005,

Defendants/Cross-Defendants,

and

ONE HUNDRED FORTY THOUSAND DOLLARS,

Defendant,

and

BERNERT HANS,

Third-Party-Plaintiff/Cross-Plaintiff,

and

UNPUBLISHED
December 28, 2001

No. 222258
Jackson Circuit Court
LC No. 96-077820-CK

MIKE SICILIANO,

Cross-Defendant,

and

ROBERT MYERS, RM CLASSIC CAR PRODUCTIONS and CLARK FERGUSON,

Third-Party Defendants.

Before: Markey, P.J., and Talbot and Owens, JJ.

PER CURIAM.

Defendant Ulrich Mueller,[1] a German citizen and resident ["defendant" herein], appeals by right from a January 25, 1999 judgment, following a bench trial, and an August 24, 1999 order awarding plaintiffs Antonio Siciliano and Siciliano's Classic Cars of America ["plaintiff" herein] $156,416 for debts defendant owed plaintiff for vehicles that defendant either purchased or took on consignment from plaintiff for resale to defendant's clients in Germany. Plaintiff cross appeals by right from the trial court's determination in its January 6, 1999 and August 24, 1999 orders that plaintiff was entitled to retain possession of only two of five vehicles purchased by defendant at a 1996 auction to which plaintiff claimed a right of an equitable setoff against defendant for outstanding debts owed to plaintiff. We affirm, but remand.

I

Defendant argues that the trial court improperly dismissed his October 5, 1998 cross-claim and third-party complaint where the pleading fully complied with the case scheduling order entered by the court on August 5, 1998 that stated that pleadings could be amended without leave of the court for two months from the date of the order. We disagree.

In dismissing defendant's cross-claim and third-party complaint, the court noted that plaintiff's action was started more than two years before, that discovery had been completed in May 1998, and that a bench trial was set for December 29, 1998. The court further noted that defendant was attempting to add a new party to the case as a third-party plaintiff. The court noted that defendant would not lose his right to bring suit and obtain relief against the named third-party defendants, apart from consolidation with the instant action, and could therein request a jury trial. The court dismissed the cross-claim and third-party complaint, concluding that it was "well beyond a point of reasonableness in having these parties added as defendants or a third-party plaintiff" where trial would be delayed for more than another year.

We conclude that the trial court did not abuse its discretion in not allowing defendant to

---

[1] The other named defendants are five vintage Cadillacs and a sum of money that were the subject of an in rem action by plaintiff against defendant Mueller.

"amend" its pleadings to add new claims and new parties, despite the language in the scheduling order. A counterclaim or cross-claim must be filed with an answer or filed as an amendment pursuant to MCR 2.118. MCR 2.118(A)(2) provides that leave to amend a pleading "shall be freely given when justice so requires." However, amendment may be denied where it would cause undue delay, was brought in bad faith or with a dilatory motive, or would cause undue prejudice to the opposing party. *Weymers v Khera*, 454 Mich 639, 658-659; 563 NW2d 647 (1997). The Court in *Weymers* noted that amendment should not be countenanced where the moving party seeks to make substantive amendments just before trial and after discovery has been closed. *Id.* at 659-660. Here, the "amendment" was substantive; it added new parties to the action, one from Germany and two from Canada who were not under the jurisdiction of the court. Defendant knew of the parties long before discovery closed and could easily have added them earlier. In fact, defendant's attorney was the same attorney who would represent Bernert, even though he recognized a potential conflict in interest in representing both of them.

Further, the cross-claim and third-party complaint was not merely an "amendment" to a pleading but was a separate pleading. It did not need to be raised by amendment, it could be litigated separately, and it would be subject to the rules for filing these pleadings. See MCR 2.110(A), 2.111, and 2.203(E). The instant court did note that the proposed claims could constitute an independent action. A separate trial of cross-claims and third-party claims is appropriate if it would help avoid prejudice to a party. MCR 2.505(B). Delay of trial for more than a year was potentially very prejudicial to plaintiff where Antonio Siciliano was extremely ill and discovery would entail deposing three parties who lived outside the United States and who were not subject to the court's jurisdiction. Defendant Mueller and Bernert were not prejudiced by the court's dismissal of their cross-claim and third-party complaint where their cross-claims and third-party claims were not dismissed with prejudice, and they were not denied the right to have their claims litigated. Finally, Bernert was not prejudiced by the court's refusal to allow him to join as a third-party plaintiff because the instant trial court awarded him the three cars that he purchased at the auction.

II

Defendant asserts that the trial court erred in holding that the business relationship between defendant and plaintiff was a running open account rather than a series of separate individual sales contracts. Defendant further asserts that the court erred in finding that defendant owes plaintiff $113,724 for five cars plaintiff consigned to defendant between 1989 to 1993.

Regarding defendant's first argument, we conclude that the trial court did not clearly err in finding that a running open account existed between plaintiff and defendant pertaining to their initial business relationship between 1989 and 1993, and that defendant's purchase of the Siciliano vehicles at the 1996 auction was part of an ongoing commercial relationship between the parties.

One definition of "account" is "a record or course of business dealings between parties." Black's Law Dictionary (6th ed), p 18. "Open account" is defined as "[a]n account which has not been finally settled or closed, but is still running or open to future adjustment or liquidation. Open account, in legal as well as in ordinary language, means an indebtedness subject to future adjustment, and which may be reduced or modified by proof." *Id*;. see, also, *A. Krolik & Co v Ossowski*, 213 Mich 1, 7; 180 NW 499 (1920) ("[a]n open account is one which consists of a

series of transactions and is continuous or current, and not closed or stated"). A "running account" is defined as "[a]n open unsettled account, as distinguished from a stated and liquidated account. Running accounts mean mutual accounts and reciprocal demands between the parties, which accounts and demands remain open and unsettled." Black's Law Dictionary (6th ed), p 1333.

The existence of an ongoing open account in this case is evidenced by the year-end statements prepared by defendant's German accountants that reflected the balance carried forward from the previous year, the invoices for cars shipped by plaintiff to defendant and payments made by defendant to plaintiff in the respective year, and the current balance owing between the parties at the end of each respective year. Defendant testified that the "invoice" amounts showing on the year-end statements were subject to future adjustment. Similarly, documents plaintiff prepared each year listed all the cars currently being held and/or that defendant had sold on consignment, a listing of the payments plaintiff received from defendant against the total amount owing, without the payments being specifically assigned to a particular vehicle, and the "grand total" due as of the date the particular statement was prepared. Defendant has not shown that the trial court clearly erred in finding that the totality of the circumstances demonstrated that a running open account existed between the two parties in 1989 to 1993.

Defendant has also not shown that the trial court clearly erred in finding an "ongoing commercial relationship involving the shipment of vehicles to Germany for resale" concerning the transactions that occurred in 1989 to 1993 between the two parties, and defendant's purchase of the Siciliano vehicles at the 1996 auction. In both instances, defendant purchased vehicles owned by plaintiff for resale to his German clients. This was the essence of the business relationship between plaintiff and defendant. The court correctly noted that the fact that a different *method* was used, in the first instance with the vehicles being shipped to Germany on consignment for resale to defendant's German clients and the amount due Siciliano to be paid upon sale of the vehicles in Germany, and in the second instance with defendant purchasing the vehicles here in the United States on behalf of German clients whereby an initial down payment was made and the balance due to be paid before shipment to Germany, is a distinction without a difference as to the essence of the relationship.

However, regarding defendant's second argument, it appears that the trial court may have clearly erred by double-counting in arriving at the figure of $113,724 as the amount defendant owed plaintiff for the vehicles defendant took on consignment from 1989 to 1993.

Damages awarded in a bench trial are reviewed for clear error. *Meek v Dept of Transportation*, 240 Mich App 105, 121; 610 NW2d 250 (2000). This Court may not set aside the award merely on the basis of a difference of opinion. *Id.* Damages need not be ascertained with mathematical precision, but a reasonable basis must exist for the computations. *Berrios v Miles, Inc*, 226 Mich App 470, 478; 574 NW2d 677 (1997).

Defendant's accountants prepared a 1993 year-end statement, as they had for each of the previous years in the initial business relationship between plaintiff and defendant, that showed that the amount of $70,100 was owing to plaintiff as of December 31, 1993 for cars that defendant had taken on consignment. Defendant expressly admitted that at the end of 1993, he

owed Anthony Siciliano $70,100.[2] However, the evidence is murky on exactly what the year-end statements reflect.

It is undisputed that the year-end statements show invoice dates and amounts in columns on the left and show the dates and amounts of payments defendant made to plaintiff in columns on the right. Defendant explained that the word "credit" on the statements actually meant the amount that defendant owed. This comported with Michael Siciliano's understanding of the statements. However, Michael Siciliano testified that he did not know anything about these year-end statements other than what was reflected on their face. The only evidence on this issue came in through defendant's testimony. Plaintiff's counsel attempted to have defendant clarify exactly what the various items on the year-end statements reflected. Mueller testified:

> It [i.e., the 1993 year-end statement] was prepared by my CPA. He always did this, and I recall that this was done and this is the final thing we made up in '93. It was the last year that we have this because this figure was then standing in my books for all the time, this $70,l00.
>
> * * *
>
> At the end of the year we always recall—we [Mueller and Anthony Siciliano] talked on the phone about the different cars and if there were some problems with either one and of the four that were sold, and this was just the final thing of each year.
>
> And due to the numbers and figures we had our CPA make something—made this up, and all the figures that were paid and all the cars were received on the other hand. And then that is what we had at the end of the year owing, and that's what I owed Tony on what is there on cars, including the cars there, all cars delivered and everything paid against to each other.

On further questioning by plaintiff's counsel as to exactly what the "invoices" on the year-end statements reflected, defendant answered as follows:

> *Q.* My question is when would the invoice be created, when the car was sold?
>
> *A.* The invoice they were created at the final year-end statements we were talking about all the invoices and all these things and they were put in this thing from the CPA. So, the CPA gets all this knowledge and puts it in here.
>
> *Q.* I'm asking you where did that information come from? Was there an invoice somewhere that says 10-12—I can't read that first number. . . .
>
> . . . When would that invoice have been sent by Mr. Siciliano?

---

[2] We note that defendant subsequently stated that the amount he owed Siciliano at the end of 1993 was $68,100; however, he did not explain the discrepancy.

A. It would have been sent when it was needed for bringing the cars into Germany, so it was sent along or shortly after receipt of the cars.

Defendant testified that there was never a second invoice prepared to show the actual sale price of a car. On questioning by the trial court, defendant stated that the same invoice governed everything, no matter what the final sale price. Defendant then testified that although the actual sale prices might later be adjusted up or down by defendant and Siciliano,[3] the "invoice" amounts on the year-end statements reflected the "invoiced" anticipated sales price for each car plaintiff shipped to defendant.

The trial court noted that making a determination "with regard to money owing on open account is fraught with difficulties in determining dollar amounts," but the court apparently concluded that the year-end statements were statements of the balance owing from defendant to plaintiff for cars that defendant had actually *sold*. However, defendant's testimony suggests that the year-end statements reflected the amount owing, or at least the anticipated amount owing pending future price adjustments, for *all* cars shipped to defendant in Germany, whether sold or being held for future sale. Thus, we conclude that a remand is necessary so that the trial court can clarify or correct its finding and if needed, take further evidence on this issue to resolve exactly what the 1993 year-end accounting statement reflects—whether it is the amount owing for all cars--sold and unsold--shipped to defendant in Germany or whether it reflects the amount owing only for those cars actually sold--not those held for future sale--by defendant.

We conclude that the trial court may have miscalculated damages because the court then added amounts that it determined represented the value of cars that defendant held for sale, but had not yet sold, as of the end of 1993 to the figure of $70,100, reflected on the 1993 year-end statement. Thus, if the 1993 year-end statement already included the value of these retained but unsold cars (as reflected in "invoice" amounts for these cars), then the court in fact double-counted these cars.

Assuming arguendo that the trial court did not "double-count" the value of the cars defendant retained but had not sold, we agree that the record supports the values that the court assigned to these "unsold" cars, i.e., $12,500, $19,774 and $11,350, for a total of $43,624.

At trial, Michael Siciliano claimed that defendant still owed plaintiff payment on the open running account for five cars taken on consignment from 1989 to 1993 for which Siciliano claimed that no payment had been received.[4] Defendant admitted that after 1993 he had in his possession at least two cars that he had taken on consignment and for which he still owed plaintiff money. Michael Siciliano testified that all cars shipped to Germany were for defendant. Of the five cars claimed by Michael Siciliano to have been shipped to defendant between 1989 and 1993, there was no documentary proof in the form of dock receipt or a bill of lading to show that more than three cars had in fact been shipped to Germany. In other words, plaintiff presented dock receipts or bills of lading for three of the cars to show that they had been shipped

---

[3] Defendant testified that "adjustments" in sales prices were made by adjusting the base prices of cars that came into Germany at a later time.

[4] Based on the fact that no profit or loss was shown in the "police book" for these cars.

to Germany during the relevant time period. He had no such documentation for the other two cars. Thus, there was evidence in the record to support the trial court's determination that defendant had the designated three cars in his possession at the end of 1993. The police book, admissible as a business record pursuant to MRE 803(6), showed that the respective values assigned to these cars were $12,500, $19,774, and $11,350, and that no payment had been received from a sale of these cars. Thus, there was competent evidence to support the trial court's determination of the outstanding amount due from defendant to plaintiff for cars that defendant had in his possession as of the end of 1993 but had not yet sold as of that date. However, as previously noted, it needs to be clarified whether the value of these cars was already included in the 1993 year-end statement prepared by defendant's accountants, which the court used as the amount owing solely for cars already sold for which defendant still owed payment to plaintiff.

III

Defendant asserts that the trial court abused its discretion in admitting the police book into evidence under the vital statistics exception to the hearsay rule, MRE 803(9) because the police book is essentially a used car record book and is not a record of vital statistics, i.e., a vital record of a birth, adoption, death, marriage or divorce as outlined by the rule. Although we agree that the police record book was not admissible into evidence under MRE 803(9), the vital records exception, it was admissible into evidence under MRE 803(6), the business records exception.

Under MRE 803(6), a business record is admissible where the record was made at or near the time in question by, or from information transmitted by, a person with knowledge, in the course of a regularly conducted business activity, proven by the testimony of the custodian of the record or other qualified person. See, generally, *Solomon v Shuell*, 435 Mich 104, 114-129 (Archer, J.); 457 NW2d 669 (1990). Moreover, the rule provides that records kept in the course of a regularly conducted business activity are not to be excluded unless the source of information or method or circumstances of preparation indicate a lack of trustworthiness. MRE 803(6); *Price v Long Realty, Inc*, 199 Mich App 461, 467; 502 NW2d 337 (1993). There was no evidence that plaintiff's police book lacked trustworthiness. Michael Siciliano testified that the records were accounting records kept for governmental reporting purposes and were maintained for all of plaintiff's used cars in the regular course of business at or near the times of the business transactions. As such, they were admissible under MRE 803(6). See *People v Safiedine*, 152 Mich App 208, 215-219; 394 NW2d 22 (1986), and *Joba Construction Co v Burns & Roe, Inc*, 121 Mich App 615, 627-629; 329 NW2d 760 (1982). The records were also properly authenticated by Michael Siciliano, as a person who helped prepare the documents, who was familiar with the documents, and who was responsible in part for their accuracy.

IV

Defendant next asserts that the trial court erred in determining that plaintiff was entitled to the right of equitable setoff. We disagree.

"Setoff is a legal or equitable remedy that may occur when two entities that owe money to each other apply their mutual debts against each other." *Walker v Farmers Ins Exchange*, 226 Mich App 75, 79; 572 NW2d 17 (1997). Setoff is generally a matter in equity, and the trial

court's decision whether to grant such equitable relief is reviewed de novo by this Court. *Id.* Generally, the setoff and the action must be between the same parties and in the same capacity or right, and the court can look through the transactions and nominal parties to determine the real parties in interest. 20 Am Jur 2d, Counterclaim, Recoupment, and Setoff, §§ 47, 48, pp 266-268. A setoff requires a mutuality of debt between the same real parties in interest, where the demands of the mutually indebted parties are set off against each other and only the balance recovered. *Id.,* § 6, pp 232-234. However, setoff rests on opposing claims that are enforceable in their own right. *Id.,* § 7, p 234, § 14, p 239. A claim for setoff need not arise out of the same transaction as that sued on. *Id.,* § 32, p 256. If the parties are mutually indebted, there may be a setoff regardless of whether the debt arises out of the same contract or transaction. *Id.,* § 32, p 256, § 37, p 259. Setoff is also allowable and applicable to in rem actions involving replevin, i.e., for recovery of personal property or the value of the property that has been retained by another. See 66 Am Jur 2d, Replevin, §34, p 522.

Plaintiff contended below that plaintiff was entitled to seize the five vehicles defendant purchased at auction to satisfy the previous debt defendant owed plaintiff arising out of the consignment of vehicles by plaintiff to defendant that occurred from 1989 to 1993. The court agreed that plaintiff was entitled to seize two of the five cars of which it had taken possession and for which ownership had vested in defendant at the fall of the gavel. The court noted, "[t]he practicalities of self-help being necessary with regard to property that is to be shipped overseas and with regard to an account that is owing from someone in a foreign country should, in and of itself, be a sufficient basis to give rise to a right of equitable set-off." The court found that the parties had an "ongoing commercial relationship" in 1989 to 1993 and again in 1996 all "involving the shipment of vehicles to Germany for resale." The court thus concluded that plaintiff was entitled to possession of the cars to use as a setoff for the prior debt defendant owed plaintiff. The court determined that the ownership of the other three vehicles defendant purchased at the 1996 auction was in Bernert and that plaintiff was not entitled to possession of those cars to satisfy any debt against defendant.

The court did not err in determining that the "real parties in interest" here were Mueller and Siciliano. Defendant dealt with plaintiff Anthony Siciliano in his early business dealings, but that was in Anthony's capacity as owner of Siciliano Classic Cars of America, which owned all of the cars and which was the entity reflected on the paperwork exchanged by the parties. At the auction, RM Classic Cars and Robert Myers auctioned the cars merely as the agent for Siciliano Classic Cars, which was the principal. Mueller knew that Siciliano Classic Cars was the owner of the cars that he was purchasing. Therefore, the trial court did not clearly err in determining, perhaps implicitly, that the earlier transactions and the 1996 transactions involved the same parties.

Further, the trial court did not err in determining that both transaction periods were part of an "ongoing commercial relationship involving the shipment of vehicles to Germany for resale." The earlier debt arose out of cars defendant held for ultimate resale to German clients and for which he did not pay plaintiff. The later debt arose from defendant's purchase of cars at auction for German clients. As noted in Issue II, *supra,* the essence of the business relationship between the parties was the same, despite differences in the method used. Plaintiff was entitled to maintain separate actions for recovery of monies owed for each period of transactions. Each action was enforceable in its own right, and certainly defendant had a right of action against

plaintiff for refusing to give up possession of the two cars of which ownership had passed to defendant at auction, after payment in full for the two cars was tendered to plaintiff and refused. Mutuality of debt existed in this case. The trial court did not clearly err in determining that plaintiff was entitled to the right of equitable setoff.

V

Defendant asserts that the trial court erred in denying his motion for new trial, or in the alternative to amend judgment, on the basis that the motion was untimely. We disagree.

Whether to grant a new trial is in the trial court's discretion, and its decision will not be reversed absent a clear abuse of that discretion. *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999); *Setterington v Pontiac General Hosp*, 223 Mich App 594, 608; 568 NW2d 93 (1997). If the reasons the trial court assigns for granting a new trial are legally recognized and those reasons are supported by any reasonable interpretation of the record, the trial court acted within its discretion. *Petraszewsky v Keeth (On Remand)*, 201 Mich App 535, 539; 506 NW2d 890 (1993). Generally, a motion for new trial or a motion to amend a judgment must be filed and served within twenty-one days after entry of the judgment. MCR 2.611(B); *In re Norwood Estate*, 178 Mich App 345, 347; 443 NW2d 798 (1989). Late motions are not favored. *People v Curry*, 142 Mich App 724, 730; 371 NW2d 854 (1985).

The trial court issued its opinion and order in this case on January 6, 1999, and judgment was entered on January 25, 1999. A request for clarification of the order was filed on February 2, 1999, and on February 4, 1999, the court issued an order of clarification. The request for and order of clarification concerned a typographical error in one of the vehicle numbers of one of the cars to be released to Hans Bernert. On February 17, 1999, defendant moved for a new trial or in the alternative to amend the "Order and Opinion dated January 6, 1999." Specifically, defendant requested that the court "reconsider its Opinion and Order holding that the auction transactions between Mueller and RM Classic Car Productions, Inc., is one and the same with what had been previously occurring between the parties, thereby giving plaintiffs a right to equitable setoff." Defendant's motion for new trial was filed February 17, 1999, more than twenty-one days after judgment was entered, and the motion specifically referenced the January 6, 1999 opinion and order, not the subsequent order of clarification. Moreover, the request for clarification, and the order clarifying the January 6, 1999 order, had no material relationship to either the January 6, 1999 order, the January 26, 1999 judgment, or the basis for defendant's motion for new trial. The trial court did not abuse its discretion in denying defendant's motion for new trial on the basis that the motion was untimely where the motion was filed more than twenty-one days after judgment was entered in this case.

VI

Defendant asserts that the trial court's August 24, 1999 order did not sufficiently dispose of the issue regarding the claims against third parties as initially raised by the Court of Appeals in its April 20, 1999 order. We disagree.

On August 6, 1999, this Court issued an opinion and order granting a complaint by defendant Mueller for superintending control to compel the trial court to enter an order to comply with a previous order of this Court to dispose of the third party complaint filed in this

case. On August 24, 1999, the trial court entered an order stating that as "full and complete actual and compensatory damages" sought in the third party complaint, three vehicles as specified were awarded to Hans Bernert. As for exemplary (punitive) damages, the trial court stated that no proofs had been submitted, "nor are any recoverable in this action."

There is no magic language that is required to dispose of a claim. Instead, the Court is required to look at the substance of what the trial court did. See *People v Mehall*, 454 Mich 1, 5; 557 NW2d 110 (1997). After reviewing what the trial court did as stated above, we conclude that the trial court's August 24, 1999 order disposes of the third party claims for compensatory and punitive (exemplary) damages; therefore, the trial court complied with this Court's orders.

VII

In his statement of issues presented, defendant raises two issues involving whether the trial court properly exercised jurisdiction over the vehicles named in the complaint and whether an award of interest should have been made on the $109,440 that was paid in May of 1997. Because defendant has not argued the merits of these issues in the body of his brief on appeal, we decline to address them. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998); *Richmond Twp v Erbes*, 195 Mich App 210, 220; 489 NW2d 504 (1992).

VIII

On cross appeal, plaintiff argues that the trial court erred in finding that an agency relationship existed between defendant and Bernert regarding three of the subject cars purchased at the 1996 auction and in finding that defendant did not have actual or apparent authority to purchase all five vehicles on his own behalf. We disagree.

The existence of an agency relationship is a question of fact that is reviewed for clear error. *St Clair Intermediate School Dist v IEA/MEA*, 458 Mich 540, 556-557; 581 NW2d 707 (1998); *Sackett v Atyeo*; 217 Mich App 676, 680; 552 NW2d 536 (1996). In determining whether an agency has been created, the court is to consider the relations of the parties as they exist under their agreements or acts. *Id.* at 557. An agency includes every relationship in which one person acts for or represents another by his authority. *Id.* An agent is a business representative whose function is to obtain, modify, affect, accept, or terminate contractual obligations between his principal and third parties. *Id.*

An agency relationship may arise when there is a manifestation by the principal that the agent may act on his behalf. *Stokes v Millen Roofing Co*, 245 Mich App 44, 60-61; 627 NW2d 16 (2001). "The authority of an agent to bind a principal may be either actual or apparent." *Alar v Mercy Memorial Hospital*, 208 Mich App 518, 528; 529 NW2d 318 (1995). "Apparent authority arises where the acts of the purported agent lead a third party to reasonably believe that an agency relationship exists." *Stokes, supra* at 61. However, the apparent authority must arise from the principal and cannot be established only through the acts of the agent. *Id.*

Plaintiff concedes that defendant testified regarding his agency relationship with Bernert, that a wire transfer was made from Bernert to RM Classic Cars for payment that expressly identified the cars defendant purchased on Bernert's behalf at the auction, and that a reconciliation statement prepared by RM Classic Cars reflects that three of the cars were

purchased by defendant on behalf of Bernert. Plaintiff argues, however, that that evidence was insufficient, and the court could not rely solely on this evidence in finding that an agency relationship existed between defendant and Bernert. Contrary to plaintiff's assertion, there is sufficient evidence on the record to support the trial court's finding that an agency existed between defendant and Bernert as to three of the cars purchased at the 1996 auction. The trial court also did not clearly err in determining that an agency relationship did not exist between defendant and Bernert regarding the remaining two cars when they were bought at auction and then placed in plaintiff's possession.

Defendant testified at trial that he was acting as Bernert's agent (and on behalf of others) at the 1996 auction. According to defendant, Bernert agreed to pay him 5,000 German marks for each car that defendant purchased for him at the auction and that before the auction, defendant gave Bernert photographs and brochures of the cars so that Bernert could determine which cars he wanted. Defendant testified and presented documentary evidence in support that before the auction, Bernert gave him 15,000 marks, or about $10,000, to use as a down payment for the cars, with the agreement that he would wire money after it was determined which cars he would purchase, up to a cap of about $100,000. Defendant testified that when he arrived at the auction, he advised Rob Myers that he was not buying on his own behalf but was acting as an agent for others and bidding on their behalf at the auction. Defendant further testified that when he purchased his bidder card, he also advised other RM Classic Car employees that he was bidding on behalf of others. Defendant testified that he successfully bid on three cars for Bernert and two cars for a Mr. Schultz, another German not in attendance. Defendant testified that after the auction, he told RM Classic Car employee Julie LaJoie which cars were Bernert's and arranged a wire transfer from Bernert to RM Classic Cars for the remaining balance of approximately $89,000 on the cars. Defendant stated that it was not until after the auction and after Bernert had arranged to send that wire transfer that he and Bernert discussed Bernert's also taking the two cars defendant purchased at the auction on behalf of Schultz, but for which Schultz reneged. Defendant testified that Bernert subsequently arranged to pay RM Classic Cars the balance of approximately $41,400 owing on the two cars, so long as he received them.

Documentary evidence was admitted showing that on or about May 3, 1996, RM Classic Cars received the wire transfer from Bernert in the amount of $89,440. Documentary evidence was also admitted that showed that RM Classic Cars apportioned payment of Bernert's wire transfer to the three cars defendant testified that he purchased on behalf of Bernert at auction. In addition, an auction buy-sell reconciliation statement prepared by RM Classic Cars notes that three of the cars purchased by defendant at auction were for Bernert. In addition, Amir Jabado, a client of defendant's who attended the auction, testified that he knew that defendant Mueller was acting as an agent on behalf of Bernert, as well as himself and someone else, at the 1996 auction.

Considering the above evidence, plaintiff has not shown that the trial court clearly erred in determining that defendant was acting as a business representative on behalf of Bernert in bidding upon the three vehicles at issue at the auction. *St Clair School Dist, supra* at 556-557. The evidence was sufficient to support the court's finding.

Moreover, the trial court did not clearly err in determining that at the time ownership vested in defendant at the fall of the gavel as to the remaining two cars, defendant was not acting as an agent on behalf of Bernert as to those cars. Defendant testified that when he successfully bid on the two cars, he believed that he was buying them for his German client Schultz, who

subsequently backed out of the deal. It was unclear from defendant's testimony exactly when Schultz backed out of the deal or when defendant learned of this. In any event, defendant was listed as the registered bidder for these two cars. While defendant apparently advised RM Classic Cars that he was acting as an agent for German clients, he did not expressly state to RM Classic Cars or to plaintiff that he was buying the two cars at issue as Schultz's agent. A person who contracts with a third party for either a partially disclosed or undisclosed principal becomes a party to the contract with the third party. 2 Restatement Agency, 2d, §§ 321 and 322, pp 70, 72; *Detroit Pure Milk Co v Patterson*, 138 Mich App 475, 478; 360 NW2d 221 (1984); see, also, 7A CJS, Auctions & Auctioneers, § 18, p 877. Here, the sale of the two cars was consummated when the gavel at the auction fell on defendant's bid, which made him liable as the purchaser. 1 Corbin on Contracts (rev ed, 1993), § 4.14, p 643; 7A CJS, Auctions & Auctioneers, §§ 8 and 18, pp 865, 876-877; see, also, *J & L Investment Co, LLC v Dep't of Natural Resources*, 233 Mich App 544, 551; 593 NW2d 196 (1999) (the "fall of the hammer" signifies acceptance of the bid). Defendant testified that it was not until at least the day after the auction, when the cars were shipped to the Siciliano warehouse for storage, that he approached Bernert about buying the cars that defendant had purchased on Shultz' behalf at the auction.[5] Finally, the bills of sale and the reconciliation statement RM Classic Cars prepared showed only that defendant had purchased these two cars. Therefore, the record supports the trial court's determination that these two cars became defendant's at the fall of the gavel and defendant owned them at the time that the cars were placed into plaintiff's possession at the warehouse.

IX

In summary, we affirm the following: (1) that portion of the trial court's judgment that determined that plaintiff was entitled to retain possession of two of the five vehicles purchased by defendant Mueller at auction to be held subject to the payment by defendant of $42,692 owing on the vehicles from the auction and upon the payment of the monies owed upon the open account, (2) the trial court's determination that plaintiff had a right of equitable setoff against defendant as to the two cars plaintiff rightfully retained for the debts defendant owed plaintiff, (3) the portion of the judgment and the court's August 24, 1999 order that awarded three of the vehicles to Hans Bernert, (4) the trial court's dismissal of defendant's cross-claim and third-party complaint, and (5) the court's denial of defendant's motion for a new trial or to amend judgment. However, we remand to the trial court for clarification and possible correction of the amount of damages to which plaintiff is entitled for monies owed on open account by defendant to Siciliano for vehicles defendant took on consignment between 1989 to 1993 that were sold or unsold by defendant and for which he still owed payment to Siciliano. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Michael J. Talbot
/s/ Donald S. Owens

[5] We note that Siciliano, as the seller of the cars, had a lien on the cars until the purchase price was paid in full, which was not tendered for about a month after the auction. 7A CJS, Auctions & Auctioneers, § 20, p 881.