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NO. COA00-1512

NORTH CAROLINA COURT OF APPEALS

Filed: 19 March 2002

EDITH A. RAETHER,  
Plaintiff-appellant,

v.

From Onslow County  
No. 00 CVS 254

PELICAN PROPERTIES, INC.,  
ZANDER GUY, BRADLEY B. MINCHEW,  
individually and d/b/a PELICAN  
PROPERTIES, and wife MARY NELL J.  
MINSHEW,  
Defendants-appellees.

Appeal by plaintiff from order entered 23 August 2000 by Judge Steve A. Balog in Onslow County Superior Court. Heard in the Court of Appeals 8 November 2001.

*Randolph J. Hill for plaintiff-appellant.*

*Warlick, Milsted, Dotson & Carter, by Marshall F. Dotson, Jr., for defendants-appellees Bradley B. Minshew individually and d/b/a Pelican Properties, and wife Mary Nell J. Minshew.*

BRYANT, Judge.

Plaintiff was a licensed psychologist in the state of Wisconsin. In addition, plaintiff was a successful applicant on the North Carolina Real Estate Examination although the parties dispute whether she ever became a licensed real estate agent. Plaintiff owned two ocean front properties in Onslow County, North Carolina that she was interested in selling. In August 1994, plaintiff visited the Pelican Properties, Inc. office to explore

listing her properties for sale with the office.

Defendant Bradley B. Minshew was the sole proprietor of Pelican Properties, and Zander Guy occupied a desk in the office. The parties dispute whether defendant Guy was an employee of Pelican Properties or was an independent, licensed real estate broker who worked out of the Pelican Properties office. In addition, Guy was the listing real estate agent for properties owned by Bradley and Mary Minshew which were for sale.

Plaintiff met with Guy to discuss selling her two properties. Allegedly based on Guy's representation that he could quickly sell the properties for profit, plaintiff purchased additional properties for resale. Several of the additional properties that plaintiff purchased through Guy were owned by Bradley and Mary Minshew. According to plaintiff, she actually realized a loss based on the purchase of the additional properties.

Plaintiff filed this action on 16 December 1998, alleging fraud, breach of contract and unfair or deceptive trade practices in violation of Chapter 75 of the North Carolina General Statutes. Defendants Bradley B. Minshew individually and d/b/a Pelican Properties, and wife Mary Nell J. Minshew (Defendants) filed their answer on 25 February 1999, and their motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure on 7 August 2000. Defendants' motion for summary judgment was granted by order filed 23 August 2000. Plaintiff filed notice of appeal on 21 September 2000. Guy is not a party to this appeal.

We note that when plaintiff gave notice of appeal to this

Court, a final judgment had not been reached as to all the issues and parties involved in this case. Specifically, plaintiff's case was only dismissed as against the Minshews and her case against Guy remained before the trial court. Plaintiff subsequently reached a settlement with defendant Guy. Therefore, a final judgment has been reached as to all the issues and parties involved, and this Court will reach the merits of this appeal.

On appeal, plaintiff argues that the trial court erred in granting summary judgment in favor of defendants Bradley B. Minshew individually and d/b/a Pelican Properties, and wife Mary Nell J. Minshew. We disagree.

Summary judgment is appropriate when "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 judgment as a matter of law." The evidence must be reviewed in the light most favorable to the party opposing summary judgment.

*Rowell v. North Carolina Equipment Co.*, \_\_\_ N.C. App \_\_\_, \_\_\_, 552 S.E.2d 274, 276 (2001) (citations omitted).

#### **Fraud**

Plaintiff alleges that Guy, as defendants' agent, made deceptive representations with the intent of inducing plaintiff to purchase additional properties for resale. Plaintiff therefore argues that there exists a genuine issue of material fact as to whether defendants committed fraud based on their agency relationship with Guy. We disagree.

"Two factors are essential in establishing an agency

relationship: (1) The agent must be authorized to act for the principal; and (2) The principal must exercise control over the agent." *Crist v. Crist*, 145 N.C. App. 418, 425, 550 S.E.2d 260, 266 (2001) (quoting *Johnson v. Amethyst Corp.*, 120 N.C. App. 529, 523-33, 463 S.E.2d 397, 400 (1995)). A principal may be liable for the actions of his agent if it is determined that the agent acted within either his actual or apparent authority to take said actions. *McGarity v. Craighill, Rendleman, Ingle & Blythe, P.A.*, 83 N.C. App. 106, 109, 349 S.E.2d 311, 313 (1986). Where a person, either by his words or conduct, represents or permits it to be represented that another person is his agent, he will be estopped from denying the existence of the agency relationship as against third parties who have dealt with the purported agent - - this is true even if no agency exists in fact. *Alamance County Bd. of Education v. Bobby Murray Chevrolet, Inc.*, 121 N.C. App. 222, 232, 465 S.E.2d 306, 313 (1996).

Pursuant to the doctrine of apparent authority, the principal's liability is to be determined by what authority a person in the exercise of reasonable care was justified in believing the principal conferred upon his agent. *Heath v. Craighill, Rendleman, Ingle & Blythe*, 97 N.C. App. 236, 242, 388 S.E.2d 178, 182 (1990). Where the third person deals in good faith and in reasonable prudence with an agent having apparent authority, the principal is bound by the agent's acts. *Foote & Davies, Inc. v. Arnold Craven, Inc.*, 72 N.C. App. 591, 595, 324 S.E.2d 889, 892 (1985). Whether the agent's acts are within the apparent scope of

his authority must be determined by what the *principal* does and not by the unauthorized act and contentions of the agent. *Wachovia Bank v. Bob Dunn Jaguar*, 117 N.C. App. 165, 172, 450 S.E.2d 527, 531-32 (1994).

Plaintiff argues two grounds to establish an agency relationship between defendants and Guy. Plaintiff first alleges that Guy was an employee of Pelican Properties, therefore, the defendants are liable for Guy's alleged deceptive representations. Plaintiff next alleges that defendants and Guy entered into a listing agreement wherein it was agreed that Guy would be the listing agent for several properties the Minshews owned that were for sale. Plaintiff argues that the defendants are therefore liable for Guy's alleged deceptive representations based on the agency relationship created pursuant to the listing agreement.

After carefully reviewing the parties' briefs and the record, this Court has determined that the plaintiff has failed to present any evidence to support her claim that Guy was an employee of Pelican Properties. Plaintiff has therefore failed to establish an agency relationship based on the existence of an employment relationship between defendants and Guy.

Defendants concede that pursuant to a listing agreement, Guy was granted actual authority to represent to third parties that the defendants had properties for sale. Plaintiff, however, has neither alleged nor argued that Guy's *actual* authority to list defendants' properties also encompassed the authority to make representations not limited to but including the resale value of

the Minshews properties that plaintiff purchased. Plaintiff has neither alleged nor argued that Guy had the *apparent* authority to make representations not limited to but including the resale value of the Minshews properties that plaintiff purchased. Even if plaintiff had alleged or argued that Guy had the apparent authority to make such additional representations, plaintiff's reliance on those representations would seem unreasonable - - especially in light of the fact that plaintiff had previously demonstrated sufficient knowledge of North Carolina real estate law and real estate agent responsibilities to become a successful applicant on the North Carolina Real Estate Examination. See *Capitol Funds, Inc. v. Royal Indemnity Co.*, 119 N.C. App. 351, 357, 458 S.E.2d 741, 745 (1995) (stating that unless the party attempting to bind the principal reasonably believed that the principal conferred authority to the agent to act on the principal's behalf, the agent does not have apparent authority).

Although plaintiff has established an agency relationship pursuant to the listing agreement entered into by defendants and Guy, plaintiff has failed to present any evidence to show that Guy had either the actual or apparent authority to make the alleged deceptive representations. For the reasons stated above, we find that the plaintiff has not presented sufficient evidence to establish a material issue of fact as relates to her fraud claim.

**Unfair or deceptive trade practices**

Plaintiff next argues that a genuine issue of material fact exists as to whether defendants engaged in unfair or deceptive

trade practices based on representations Guy made to plaintiff. We disagree.

To prevail on a claim of unfair or deceptive trade practices under Chapter 75 of the North Carolina General Statutes, "a litigant must prove that the other party committed an unfair or deceptive act or practice, that the action in question was in or affecting commerce, and that said act proximately caused actual injury to the litigant". *Creekside Apartments v. Poteat*, 116 N.C. App. 26, 36, 446 S.E.2d 826, 833 (1994).

A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. Furthermore, [a] practice is deceptive if it possesses the tendency or capacity to mislead, or create the likelihood of deception. A party is guilty of an unfair act or practice when it engages in conduct which amounts to an inequitable assertion of its power or position. Generally, whether a practice is unfair or deceptive is . . . dependent upon the facts of each case. Ultimately, [t]he determination of whether an act or practice is an unfair or deceptive practice that violates N.C.G.S. § 75-1.1 is a question of law for the court.

*Lake Mary Ltd. Partnership v. Johnston*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 551 S.E.2d 546, 553, *rev. denied by* 354 N.C. 363, 557 S.E.2d 538, *rev. denied by* 354 N.C. 363, 557 S.E.2d 539 (2001) (alteration in original) (citations and internal quotations omitted).

As previously discussed, plaintiff has failed to present any evidence that pursuant to the listing agreement, Guy had the actual or apparent authority to make representations on behalf of the defendants other than to represent that the defendants had property

for sale. We therefore find that the plaintiff has failed to present sufficient evidence to establish a material issue of fact as relates to her unfair and deceptive trade practices claim.

**Breach of contract**

Plaintiff has failed to present an argument concerning the trial court's granting of summary judgment for defendants as to the breach of contract claim. Therefore, we deem the issue to be abandoned. See N.C. R. App. P. 28 (2001).

**Conclusion**

Based on the foregoing reasons, we affirm the decision of the trial court in granting summary judgment for the defendants Bradley B. Minshew individually and d/b/a Pelican Properties, and wife Mary Nell J. Minshew.

AFFIRMED.

Judges McGEE and HUNTER concur.

Report per Rule 30(e).