[Cite as *Swolsky v. Movement by Design, L.L.C.*, 2011-Ohio-1833.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Joseph H. Swolsky

Appellant

v.

Movement by Design, LLC, et al.

Appellee

v.

Colleene Pilcher, et al.

Third-Party Defendants

Court of Appeals No. L-10-1186

Trial Court No. CI08-1519

DECISION AND JUDGMENT

Decided: April 15, 2011

* * * * *

Ralph DeNune, III, and Frederick E. Kalmbach, for appellant.

David P. Strup and David J. Copeland, for appellee Howard Sichel.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from the January 19, 2010 judgment of the Lucas County Court of Common Pleas which granted appellee Howard Sichel's motion for summary judgment. Because we find that no genuine issues remain for trial, we affirm.

{¶ 2} This case involves the breakdown of a business partnership involving a U.S. distributorship agreement for the sale of high-end exercise wear supplied by Casall Sport AB, a Swedish company. Beginning in the 1990s third-party defendant, Colleene Pilcher operated a Pilates studio in Sylvania, Ohio, where she sold Casall merchandise. At some point she decided to pursue a U.S. distributorship. Pilcher contacted Sichel, a prominent New York Pilates instructor and studio-owner to see if he would be interested in such a partnership. The parties formed Movement by Design, LLC ("MBD.")

{¶ 3} On September 18, 2006, MBD and Casall entered into the U.S. distributor agreement, excluding a designated retail area near Naples, Florida. The agreement set forth the duration of the agreement as well as minimum purchase levels. Two days later, MBD entered into an operating agreement.

{¶ 4} In order to fund the inventory purchase requirements, MBD secured a $1 million line of credit from appellant, Joseph Swolsky, a friend of Pilcher. Swolsky, in turn, secured the credit with his real estate holdings. Appellee and Pilcher provided personal guarantees as collateral for the note. Appellee assumed responsibility for 65 percent of the operating expenses, Pilcher assumed 35 percent responsibility.

{¶ 5} In the summer of 2007, Sichel's and Pilcher's business relationship deteriorated and discussions began regarding Sichel's exit from MBD, including the release of his personal guarantee. This information was forwarded by Pilcher to Casall via email. On August 3, 2007, company president, Carl Axle Surtevall, responded: "I confirm we accept Howard [sic] request to give up part of the shares in Movement by

Design to you. We hope that this will be a good solution for all involved and that it will move Casall forward on the US market."

{¶ 6} After further discussions, a memorandum of understanding ("MOU") was drafted representing a sale of MBD's assets to Pilcher's company, BD Hipwear, and the release of Sichel's personal guarantee. The MOU provided that MBD would sell its assets, including accounts receivables, to BD and that it would also pay BD $25,000 which represented the inventory purchased by Sichel from MBD. Further, the guarantee between Sichel and Swolsky would be rendered "null and void."

{¶ 7} The MOU, drafted by Pilcher's attorney, Russ Miller (and, arguably, Swolsky's as well, though this is disputed), was emailed to Sichel on September 10, 2007. The email stated, in part: "Attached to this message for your review is the form Memorandum of Understanding which Ms. Pilcher and Mr. Swolsky indicate that they are prepared to sign to conclude this matter." The next day, Miller again emailed appellee, through his attorney, and indicated:

{¶ 8} "Ms. Pilcher and Mr. Swolsky have confirmed their firm position that the documents must all be signed in their current form, preferably today, but no later than tomorrow morning (and for purposes of clarity, 12:00 noon EDST), with the wire of funds to follow immediately. Otherwise, they will withdraw their current terms and reconsider the matter."

{¶ 9} It is undisputed that Sichel did not email the signed document until 1:08 p.m. the next day. However, Sichel stated in an affidavit that he signed the agreement prior to the deadline.

{¶ 10} On September 13, 2007, Miller emailed Sichel and stated: "Below is the wire transfer information for transfer of the $25,000 payment to Movement by Design, LLC. When funds have hit the account, I will forward to you and David the copies of the fully signed Memorandum of Understanding and resolutions."

{¶ 11} The next day the following email was sent to appellee: "If you could advise when the wire transfer has been initiated, we would appreciate it, so that we may track its receipt. I will be obtaining Colleene's and Joe's signatures on the documents and will provide fully signed copies when the wire has been sent."

{¶ 12} Appellee transferred the funds and, on September 20, 2007, Miller emailed Sichel that "despite its prior communications during the time the parties' transaction was being finalized, Casall has apparently raised issues with regard to the BD Hipwear, LLC distributorship of Casall products." Miller indicated that he instructed Pilcher and appellant to hold the $25,000 pending resolution of the matter. Ultimately, the Casall distributorship was never transferred to BD.

{¶ 13} On January 23, 2008, appellant commenced the instant action seeking judgment against MBD on the promissory note and Sichel on his personal guarantee. Appellant alleged that the note was in default and the MBD owed the full sum of $1 million and that Sichel, personally, was responsible for $650,000 of that sum. In his

answer and counterclaim, Sichel denied owing the amount claimed and further alleged claims for breach of contract, negligent misrepresentation, and fraud surrounding his signing the MOU and transferring $25,000 pursuant thereto.

{¶ 14} Appellees also filed a third-party complaint naming Colleene Pilcher and her various business operations. Appellees claimed that the funds he forwarded pursuant to the MOU that Pilcher's attorney claimed had been frozen, were being spent by Pilcher and that he had been frozen out of the MBD bank account and denied access to inventory.

{¶ 15} On September 15, 2009, appellee Sichel filed his motion for summary judgment as to appellant's claims. Appellee essentially argued that the MOU was an enforceable contract: there was an offer, acceptance, and consideration. Further, appellee argued that Pilcher's and appellant's actions following the agreement were inconsistent with appellee having a continued interest in MBD.

{¶ 16} In opposition, appellant argued that appellee was aware that he and Pilcher were having difficulty securing the Casall distributorship and that, until that happened, they were not going to release him from his personal guarantee. Appellant further stated that prior to an agreement being reached, he and Pilcher became aware of potential liabilities of MBD including a claim by UPS for unpaid customs. Appellant argued that Russ Miller was not his attorney and he was not authorized to make an offer to Sichel. Appellant also argued that, if the emails and MOU could be considered an offer, Sichel failed to accept by the deadline set forth therein. Appellant further argued that the agreement failed due to lack of consideration.

{¶ 17} On January 19, 2010, the trial court granted appellee's motion for summary judgment finding that the MOU was clearly an offer, that Sichel accepted the offer by returning the signed MOU (that appellant waived the deadline) and agreeing to wire the $25,000, and that the consideration for the contract was Sichel's agreement to allow MBD to transfer some of its assets, including the Casall distributorship, to BD.

{¶ 18} Following the court's judgment, the parties agreed to dismiss all remaining claims, with prejudice. This appeal followed.

{¶ 19} Appellant now raises the following assignments of error for our consideration:

{¶ 20} "1. The trial court erred in granting summary judgment to the Appellee.

{¶ 21} "2. The trial court erred by failing to grant summary judgment to the Appellant in circumstances where all relevant evidence was before the court, no genuine issue as to any material fact existed, and the Appellant, as the non-moving party was entitled to judgment as a matter of law."

{¶ 22} The assignments of error are related and will be jointly addressed. At the outset we note that this court reviews de novo the trial court's ruling on the summary judgment motions. *Conley-Slowinski v. Superior Spinning & Stamping Co.* (1998), 128 Ohio App.3d 360, 363. Summary judgment will be granted only when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is

entitled to judgment as a matter of law. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66; Civ.R. 56(C).

{¶ 23} We will first address the issue of Pilcher's attorney Russ Miller's authority, or apparent authority, to bind appellant. Appellant contends that express authority was required to negotiate or settle the claims between the parties. In support, appellant relies on this court's case captioned *Ottawa Cty. Commrs. v. Mitchell* (1984), 17 Ohio App.3d 208. In *Mitchell*, we held that in cases involving real estate an attorney must have express authority to bind his client. We further noted that real estate transfers implicate the Statute of Frauds and further supports the argument that the agreement must be in writing. Id. at 214. This case is not persuasive as it deals specifically with an action involving real estate.

{¶ 24} Reviewing the record, there is evidence that appellant directed Miller to submit his and Pilcher's offer to Sichel. Appellant does not deny that he conveyed to Miller that the offer would expire at noon on September 12, 2007. Even assuming, as appellant argues, that Miller did not have specific authority to submit the MOU to appellee, the evidence establishes that Miller had apparent authority. In order to demonstrate that an agent had apparent authority to bind the principal it must be shown:

{¶ 25} "(1) that the principal held the agent out to the public as possessing sufficient authority to embrace the particular act in question, or knowingly permitted him to act as having such authority, and (2) that the person dealing with the agent knew of those facts and acting in good faith had reason to believe and did believe that the agent

possessed the necessary authority." *Master Consol. Corp. v. BancOhio Natl. Bank* (1991), 61 Ohio St.3d 570, syllabus.

{¶ 26} Appellee certainly had reason to believe that Miller was authorized to act on behalf of appellant. Miller indicated in his emails that he was acting pursuant to appellant's and Pilcher's direction and appellant was carbon copied. At that time, Sichel never heard from appellant that Miller's communications were not as he directed.

{¶ 27} We next address appellant's argument that because the MOU specified that it would be effective after all the parties signed or "caus[ed] their presence to be affixed," and it was never signed by appellant or Pilcher, the MOU was not a binding agreement. Appellee counters that once he accepted the offer, the agreement was "concluded" and appellant and Pilcher were bound by the MOU with or without their signatures.

{¶ 28} Unless expressly required by the contract or by law, parties to an agreement may assent to a contract by means that demonstrate their intent to be bound. In this case, the email offer required that Sichel sign and return the MOU by a date certain and wire transfer the $25,000. Once this was accomplished, the acceptance had been effectuated and the parties were bound.

{¶ 29} Appellant next contends that because appellee failed to return the document by the noon deadline the offer had expired and could not be accepted. This position is belied by the actions of Miller, on behalf of appellant and Pilcher, following Sichel's return of the document. Miller continued to work with Sichel to arrange the wire transfer

and the return of the signature page. Nothing in the record suggested that the offer had lapsed due to the one hour and eight minute delay in returning the signed document.

{¶ 30} Appellant also argues that the agreement lacked consideration. "Consideration may consist either in a detriment to the promisee or a benefit to the promisor." *Nilavar v. Osborn* (1998), 127 Ohio App.3d 1, 15. At the time of the contract, Sichel agreed to give up his interest in the Casall distributorship. This was done under the mutual belief that BD was to be assigned the distributorship. The fact that BD ultimately failed to contract with Casall is of no consequence to the sufficiency of the consideration at the time of the contract.

{¶ 31} Thus, we find that the MOU sent by Miller on behalf of appellant and Pilcher was an offer—the terms were certain and a meeting of the minds occurred. Appellee's act of signing and returning the document coupled with the transfer of $25,000 acted as acceptance of the offer. Any defects regarding appellant's or Pilcher's failure to sign the contract were waived by their acquiescence and failure to timely object. Finally, there was sufficient consideration. Accordingly, we find that the trial court did not err when it granted appellee's motion for summary judgment. Appellant's first and second assignments of error are not well-taken.

{¶ 32} On consideration whereof, we find that substantial justice was done the party complaining and the judgment of the Lucas County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE