[Cite as *Trepp, L.L.C. v. Lighthouse Commercial Mtge., Inc.*, 2010-Ohio-1820.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Trepp, LLC,	:	
Plaintiff-Appellant,	:	
	:	No. 09AP-597
v.		(C.P.C. No. 08CVH-13344)
	:	
Lighthouse Commercial Mortgage, Inc.,		(REGULAR CALENDAR)
	:	
Defendant-Appellee.		
	:	
Trepp, LLC,	:	
Plaintiff-Appellee,	:	
	:	No. 09AP-850
v.		(C.P.C. No. 08CVH-13344)
	:	
Lighthouse Commercial Mortgage, Inc.,		(REGULAR CALENDAR)
	:	
Defendant-Appellant.		
	:	

D E C I S I O N

Rendered on April 27, 2010

Wiles, Boyle, Burkholder & Bringardner Co., L.P.A., Mark J. Sheriff, Alicia E. Zambelli, and *Andrew J. Browell*, for Trepp, LLC.

Ostrowski Law Practice, and *Edward L. Ostrowski, Jr.*, for Lighthouse Commercial Mortgage, Inc.

APPEALS from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} In these consolidated cases, Lighthouse Commercial Mortgage, Inc. ("Lighthouse"), defendant, appeals from a judgment of the Franklin County Court of Common Pleas, in which the court granted a motion for summary judgment filed by Trepp, LLC ("Trepp"), plaintiff, and dismissed Lighthouse's counterclaim.

{¶2} Lighthouse is a residential and commercial mortgage brokerage. Lighthouse is owned by Vernon Morrison, its president, and Donald Dozer, its vice-president and secretary. Trepp sells access to commercial mortgage information. On April 10, 2007, Morrison and one of Lighthouse's loan officers, Michael Anderson, participated in a phone conversation with Scott Delman, account manager for Trepp. Lighthouse claims that Morrison told Delman Lighthouse could not afford a one-year subscription to Trepp's services and asked about a shorter term. The conversation ended with no agreement.

{¶3} On April 13, 2007, Delman called Anderson and, according to Lighthouse, offered a quarterly subscription and indicated the contract had been e-mailed to Anderson. In the e-mail, Delman wrote that the standard Trepp contract was attached "with the provision that we spoke about." Anderson assumed the "provision that we spoke about" was the quarterly subscription. No action was taken with regard to the agreement.

{¶4} In May 2007, Delman again called Anderson and spoke to Anderson about subscribing to Trepp's service. Delman offered to provide the first month of the service for free if Anderson signed and returned the contract that day. Lighthouse claims Delman again referred to the agreement as quarterly. Anderson spoke to Morrison, who agreed

to enter into the contract for a quarterly term plus one free month. Anderson signed the subscription agreement service order form ("contract" or "agreement") that day, indicating himself "principal," and mailed it to Trepp. Anderson failed to realize that the contract indicated it was for one year of service.

{¶5} Lighthouse used Trepp's service for the third quarter of 2007, paying Trepp $7,500 in July 2007. During this period, Anderson informed Delman that Lighthouse did not find the service useful and did not intend to renew the contract for another quarter. Delman offered Lighthouse additional services for free if Lighthouse subscribed for another quarter, to which Lighthouse agreed. Lighthouse paid Trepp $7,500 in October 2007 for the fourth quarter of service. During the fourth quarter of 2007, Anderson informed Delman that Lighthouse did not desire to renew the service for the next quarter, and Lighthouse did not use the service after the fourth quarter 2007.

{¶6} On September 18, 2008, Trepp filed a complaint against Lighthouse for breach of contract, claiming Lighthouse owed it $15,000 for the two remaining quarters of the one-year subscription service. On December 17, 2008, Trepp filed an amended complaint, and, on January 5, 2009, Lighthouse filed a counterclaim alleging fraud or, in the alternative, negligent representation.

{¶7} On February 24, 2009, Trepp filed a motion for summary judgment, arguing there was a valid contract between the parties for a one-year subscription, and it committed no fraud. On March 18, 2009, Lighthouse filed a memorandum in opposition to Trepp's motion for summary judgment. On March 18, 2009, the trial court signed a judgment granting Trepp's motion for summary judgment, and the judgment was filed March 19, 2009.

{¶8} On March 30, 2009, Lighthouse filed a motion for relief from judgment. Lighthouse argued that the trial court may have issued its judgment granting summary judgment without consideration of its memorandum in opposition. The trial court stayed execution of the judgment pending disposition of Lighthouse's motion for relief from judgment. On April 17, 2009, Lighthouse filed an appeal with this court. On May 12, 2009, this court remanded the matter to rule on Lighthouse's motion for relief from judgment. The trial court granted Lighthouse's motion for relief from judgment on May 22, 2009, and this court dismissed Lighthouse's appeal. Trepp appealed that judgment on June 19, 2009, and, on July 19, 2009, this court issued a limited remand and stayed the appeal, pending the trial court's reconsideration of Trepp's motion for summary judgment.

{¶9} On August 12, 2009, the trial court granted Trepp's motion for summary judgment, finding: (1) Anderson had apparent authority as an agent to enter into the contract on behalf of Lighthouse; and (2) Trepp committed no fraud because Lighthouse had a duty to inspect the contract before signing it. Lighthouse appealed the judgment of the trial court, and this court vacated the stay in Trepp's prior appeal. We have consolidated the cases for purposes of appeal, and only Lighthouse presents assignments of error. Because Trepp has not filed assignments of error relating to the trial court's granting of Lighthouse's motion for relief from judgment, that portion of the consolidated appeal is dismissed. Lighthouse's assignments of error are as follows:

> [I.] THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR PLAINTIFF WHEN IT DETERMINED THERE ARE NO GENUINE ISSUES OF MATERIAL FACT, AND THAT PLAINTIFF WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW.
>
> [II.] THE TRIAL COURT ERRED IN DISMISSING DEFENDANT'S CLAIM FOR FRAUD AND/OR NEGLIGENT

> REPRESENTATION WHEN IT DETERMINED THAT DEFENDANT WAS NOT JUSTIFIED IN ITS RELIANCE ON PLAINTIFF'S FALSE REPRESENTATION THAT PLAINTIFF'S PROPOSED AGREEMENT CONTAINED TERMS MADE IN ITS ORAL OFFER.

{¶10} In its first assignment of error, Lighthouse argues that the trial court erred when it granted Trepp's motion for summary judgment. When reviewing a motion for summary judgment, courts must proceed cautiously and award summary judgment only when appropriate. *Franks v. The Lima News* (1996), 109 Ohio App.3d 408. Civ.R. 56(C) provides that, before summary judgment may be granted, it must be determined that: (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the non-moving party, that conclusion is adverse to the non-moving party. *State ex rel. Howard v. Ferreri*, 70 Ohio St.3d 587, 589, 1994-Ohio-130. When reviewing the judgment of the trial court, an appellate court reviews the case de novo. *Franks*.

{¶11} The elements of a contract include the following: an offer, an acceptance, contractual capacity, consideration (the bargained-for legal benefit or detriment), a manifestation of mutual assent, and legality of object and of consideration. *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, ¶16. In order to present a claim for breach of contract, the movant must present evidence on several elements. Those elements include the existence of a contract, performance by the plaintiff, breach by the defendant, and damage or loss to the plaintiff. *Doner v. Snapp* (1994), 98 Ohio App.3d 597, 600.

{¶12} Lighthouse first argues that the trial court erred when it found Anderson had apparent authority to bind Lighthouse to a one-year subscription. A principal may be liable to a third party for the acts of the principal's agent, even though the agent had no actual authority, where the principal has by his words or conduct caused the third party to reasonably believe that the agent had the requisite authority to bind the principal. *Miller v. Wick Bldg. Co.* (1950), 154 Ohio St. 93, 95-96. A party claiming apparent authority must affirmatively show: (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 the 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. Thus, under an apparent authority analysis, the acts of the principal, rather than the agent, must be examined. *Groob v. KeyBank*, 108 Ohio St.3d 348, 2006-Ohio-1189, ¶56. Whether or not an agent has apparent or actual authority is an issue of fact. *Arnett v. Midwestern Ent., Inc.* (1994), 95 Ohio App.3d 429, 434.

{¶13} In the present case, the trial court found that Anderson did not have actual authority to sign the one-year subscription contract, but had apparent authority to sign the contract. The trial court reasoned that Delman primarily negotiated with Anderson, and Morrison participated in only one telephone call with Delman, and that had been one month before Delman offered the free month as an incentive. Furthermore, the trial court found Lighthouse submitted no evidence that Trepp had reason to believe Anderson was not a principal. The court also noted that Anderson did have authority to sign an agreement with Trepp for one quarter.

{¶14} Lighthouse argues that the only evidence offered by Trepp in support of its motion was the affidavit of Delman. In his affidavit, Delman purports that he reasonably believed that Anderson had authority to sign the contract because Anderson participated in the April 10, 2007 conference call, Anderson was his primary contact at Lighthouse, and there were multiple telephone conversations between Anderson and him regarding Trepp's services and negotiation of the contract. Lighthouse contends these assertions are contradicted by Morrison's and Anderson's affidavits, in which they both assert that Morrison told Delman during the conference call that Lighthouse did not want a one-year subscription, but may be interested in a shorter term. Anderson averred that, even after Delman offered him a free month as an incentive for Lighthouse to enter into a one-quarter contract, he told Delman that he would have to "check" with Morrison before he could accept the offer. Lighthouse also points out that, in his affidavit, Delman does not deny that Morrison told him that he would not enter into a one-year agreement, and that Anderson repeatedly told him he would not enter into a one-year agreement. Lighthouse additionally points out that Delman avers only that he did not represent to Anderson that the contract was for a duration of less than one year, but does not declare that he ever informed Anderson that the contract was for one year.

{¶15} We find Lighthouse's counterarguments raise a genuine issue of material fact. The legal focal point in the present case must be whether Morrison, by his words and acts, caused Delman to reasonably believe that Anderson had the requisite authority to bind Lighthouse to a one-year agreement. We find there exists a genuine issue of material fact in this respect. Initially, we note that, from Anderson's and Morrison's own affidavits, it is clear Morrison gave Anderson the authority to bind Lighthouse to a

quarterly contract with Trepp. Anderson and Morrison both aver that Anderson spoke with Morrison about a quarterly contract, and Morrison indicated such a term was acceptable. Because Morrison apparently did not direct Anderson to forward him the Trepp contract to sign, Morrison was granting authority to Anderson to sign a quarterly contract on behalf of Lighthouse.

{¶16} However, the real issue is whether Anderson had apparent authority to enter into a *one-year agreement*. With regard to a one-year agreement, the only undisputed evidence before the court is that both Anderson and Morrison explicitly and emphatically communicated to Delman that they opposed a one-year agreement for Trepp's services. Neither Anderson nor Morrison aver that they ever told Delman they would agree to a one-year term, and, absent from Delman's affidavit is why he believed Anderson had authority to specifically sign a one-year agreement on behalf of Lighthouse. Although Delman does indicate in his affidavit that he "did not represent to Mr. Anderson that [the] Agreement was for a duration of less than one year," this statement leaves much unanswered. In his affidavit, Delman fails to shed any light on Anderson's sworn averments that all of their negotiations and conversations prior to the execution of the agreement related only to a monthly or quarterly service term, and the two eventually agreed on a quarterly term before Delman e-mailed the agreement. Delman also fails to present any sworn evidence as to why he believed Anderson suddenly had the authority to enter into a one-year agreement with Trepp, when Anderson and Morrison both aver that, in all of their prior interactions, they had flatly refused a one-year agreement.

{¶17} Furthermore, there exists a glaring failure on behalf of Delman and Trepp to present any evidence explaining what Delman meant by writing in the April 13, 2007 e-mail to Anderson that the attached contract included "the provision that we spoke about." Lighthouse claims that the phrase demonstrates Delman also thought the agreement was for one quarter. Equally troubling is the fact that, during the first quarter of the subscription, when Anderson told Delman that Lighthouse was not going to subscribe for another quarter, Delman never raised to Anderson that the parties had a one-year subscription and Lighthouse could not terminate the contract; instead, Delman offered an additional level of service for free in order to induce Lighthouse to subscribe for a second quarter. As Lighthouse suggests, it would seem reasonable to have expected Delman to object to Anderson's refusal to renew for a second quarter by raising the fact that the contract was for one year. Both of these circumstances cast significant doubt on whether Delman knew of the actual facts and the content of the agreement and, in good faith, reasonably believed that Anderson possessed the necessary authority to enter into a one-year agreement on behalf of Lighthouse. See *Master Consol. Corp.*, syllabus. If Delman himself believed that the agreement was for only one quarter of service, such would establish that Delman never considered whether Anderson had the authority to bind Lighthouse to a one-year contract, much less reasonably believed so.

{¶18} As the non-moving party, Lighthouse had the burden of presenting evidentiary material in the record to establish material issues of fact, *Dresher v. Burt*, 75 Ohio St.3d 280, 296, 1996-Ohio-107, and it did so through submission of Anderson's and Morrison's affidavits, as well as Delman's e-mail. Lighthouse also set forth specific facts that showed there was a genuine issue of material fact by pointing out the inconsistency

in Delman's offer to add more services when Lighthouse indicated it desired to stop the service after the first quarter. Trepp's failure to counter Lighthouse's evidence and factual assertions in its reply, as well as the notable omissions in Delman's affidavit, leave genuine issues of material fact remaining, which are best left for a fact finder to determine. Therefore, we find there was a genuine issue of material fact as to whether Delman reasonably believed Anderson had the apparent authority to sign a one-year agreement on behalf of Lighthouse. For these reasons, Lighthouse's first assignment of error is sustained.

{¶19} Lighthouse argues in its second assignment of error that the trial court erred in dismissing Lighthouse's counterclaim for fraud and/or negligent misrepresentation when it determined that Lighthouse was not justified in its reliance on Delman's false representation that the contract contained the terms made in Trepp's oral offer. Lighthouse claims that, either Delman intentionally deceived Anderson, or Delman also believed that the agreement was on a quarterly basis. Lighthouse points to the affidavits of Anderson and Morrison, both of whom averred that Delman was fully aware that Morrison would not agree to a one-year subscription. Anderson also averred that Delman repeatedly referred to the written agreement e-mailed to Anderson as being for one quarter. As discussed above, Lighthouse complains that Trepp has never explained what Delman meant in his April 13, 2009 e-mail that stated the standard Trepp contract was attached "with the provision that we spoke about."

{¶20} The elements of fraud are: (a) a representation or, where there is a duty to disclose, concealment of a fact; (b) that is material to the transaction at hand; (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to

whether it is true or false that knowledge may be inferred; (d) with the intent of misleading another into relying upon it; (e) justifiable reliance upon the representation or concealment; and (f) a resulting injury proximately caused by the reliance. *Burr v. Bd. of Cty. Commrs. of Stark Cty.* (1986), 23 Ohio St.3d 69, paragraph two of the syllabus. The elements of fraud must be established by clear and convincing evidence. Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. *Cross v. Ledford* (1954), 161 Ohio St. 469. The burden to prove fraud rests upon the party alleging the fraud. *First Discount Corp. v. Daken* (1944), 75 Ohio App. 33, paragraph seven of the syllabus.

{¶21} "Negligent misrepresentation" has been defined as:

> "One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their *justifiable reliance* upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information."

Delman v. Cleveland Heights (1989), 41 Ohio St.3d 1, 4, quoting Restatement (Second) of Torts (1965), Section 552(1). (Emphasis sic.) Reliance is justified if the representation does not appear unreasonable on its face and if, under the circumstances, there is no apparent reason to doubt the veracity of the representation. *Lepara v. Fuson* (1992), 83 Ohio App.3d 17, 26. A negligent misrepresentation cause of action does not lie for omissions; there must be an affirmative false statement. *Interstate Gas Supply, Inc. v. Calex Corp.*, 10th Dist. No. 04AP-980, 2006-Ohio-638, ¶91.

{¶22} In the present case, Lighthouse's claims for both fraud and negligent misrepresentation must fail based upon the same defect. Lighthouse's failure to read the contract negates the justifiable reliance element necessary to demonstrate both types of claims. The Supreme Court of Ohio has stated that the failure to read the terms of a contract "drives a stake into the heart" of a fraud claim. *ABM Farms, Inc. v. Woods*, 81 Ohio St.3d 498, 503, 1998-Ohio-612. " 'A person of ordinary mind cannot be heard to say that he was misled into signing a paper which was different from what he intended, when he could have known the truth by merely looking when he signed.' " Id., quoting *McAdams v. McAdams* (1909), 80 Ohio St. 232, 240-41. Willful ignorance in failing to read a contract cannot be equated with reasonable reliance. *GRPL Ents. v. Angelo*, 7th Dist. No. 05 MA 77, 2006-Ohio-7065, ¶37. Therefore, a person cannot reasonably rely upon the statements of the other contracting party when the person failed to read the contract. Id.

{¶23} Here, Lighthouse's total failure to review the contract before executing it is fatal to its claims. The one-year term was clear and apparent on the face of the contract. The single-page subscription agreement indicated under the bold-print heading "Term" that the contract would be in effect for the term indicated in the service order. In the service order, under "TERM OF THE AGREEMENT," which was also in bold print, the one-year term was clearly indicated. Trepp did not attempt to hide the term by putting it in fine print, nestling it among other provisions, or burying it in a lengthy contract filled with legalese. The term was set-off in a separate paragraph that contained only one sentence, and the service order form was only a single page. With the reasonable diligence expected of a sophisticated business party, Lighthouse could have, and should

have, discovered the one-year term in the contract. For these reasons, Lighthouse cannot maintain its actions for fraud and negligent misrepresentation, and the trial court did not err when it granted summary judgment in favor of Trepp on Lighthouse's counterclaims.

{¶24} Accordingly, Lighthouse's first assignment of error is sustained, its second assignment of error is overruled, the judgment of the Franklin County Court of Common Pleas granting Trepp's motion for summary judgment is affirmed in part and reversed in part, and the matter is remanded to that court for further proceedings consistent with this decision. Trepp's appeal of the trial court's granting of Lighthouse's motion for relief from judgment is dismissed.

Appeal dismissed in case No. 09AP-597.
Judgment affirmed in part, reversed in part and cause remanded in case No. 09AP-850.

TYACK, P.J., and FRENCH, J., concur.

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