[Cite as *Sorrell v. Micomonaco*, 2015-Ohio-1417.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

CHARLES A. SORRELL,	:	
		CASE NO. CA2014-07-096
Plaintiff-Appellee,	:	
		O P I N I O N
	:	4/13/2015
- vs -		
	:	
CONSTANDINO A. MICOMONACO, et al.,	:	
Defendants-Appellants.	:	

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 13CV84361

David A. Chicarelli, 614 East Second Street, Franklin, Ohio 45005, for plaintiff-appellee

Constandino A. Micomonaco, 1507 Eaton Avenue, Middletown, Ohio 45044, defendant-appellant, pro se

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M. POWELL, J.

{¶ 1} Defendant-appellant, AAM Properties, LLC, appeals from the judgment of the Warren County Common Pleas Court ordering plaintiff-appellee, Charles A. Sorrell, to pay AAM $78,000 for three parcels of real estate, ordering AAM to prepare the deed for the real estate to be delivered to Sorrell, and ordering the parties to prorate the payment of accrued

taxes on the real estate. The trial court issued the judgment after granting Sorrell's motion to enforce a settlement agreement negotiated between his counsel and AAM's former counsel as to Sorrell's complaint for specific performance of a contract between the parties for the sale of the real estate in question. AAM argues the trial court erred in finding the existence of an enforceable settlement agreement between the parties. For the reasons that follow, we agree with AAM. Therefore we reverse the judgment of the trial court and remand this matter for further proceedings.

{¶ 2} In 2013, Constandino A. ("Tony") Micomonaco contracted to sell three parcels of real estate to Sorrell for $90,000. However, on the scheduled closing date, Micomonaco failed to show up, and afterwards, refused to convey the property to Sorrell as called for in the contract. Instead, Micomonaco sold the property to the Micomonaco Family Trust. As a result, Sorrell filed suit against Micomonaco, both in his individual capacity and in his capacity as trustee of the Micomonaco Family Trust. Sorrell sought specific performance of the contract for the sale of the real estate and damages. When the Micomonaco Family Trust failed to file a legally valid answer to Sorrell's complaint or otherwise appear in the case, default judgment was granted against it. At some point following the commencement of the litigation, Micomonaco conveyed the property to AAM Properties, which is owned by members of his family, including his brother, Fred Micomonaco. Sorrell joined AAM to the action as a necessary party.

{¶ 3} AAM's counsel (Vincent A. Sanzone) and Sorrell's counsel (David A. Chicarelli) engaged in settlement negotiations via email. AAM's counsel opened the negotiations on March 17, 2014 by sending an e-mail to Sorrell's counsel that stated, "Micomonaco and AAM have finally advised me that they will transfer real estate to Sorrell in exchange for * * * $80,000. I will do a deed tomorrow for signature and will 'fax' a copy to you. When you have the $80,000 in your trust account let me know, and I will deliver deed [sic] to you and get your

check and be done with this." On March 19, 2014, Sorrell's counsel sent an email to AAM's counsel that stated, "[W]e have an agreement in principle, however, Mr. Sorrell's attorney's fees exceed $11,000 right now and there obviously will be additional fees regarding the closing[.] * * * The bottom line is, we will agree to $78,000[.]" Several hours later, AAM's counsel sent an email to Sorrell's counsel that stated, "OK, but I am not sure how the fees went from 9,500 to over 11,000 in 3 weeks with no additional work, but I guess he is stuck with that based on your representation that it is so."

{¶ 4} On March 21, 2014, Sorrell's counsel sent an email to AAM's counsel that stated, in part, "Just to make sure, we have agreed on a settlement of $78,000 plus the proration of the taxes. * * * I would hope we could get the closing scheduled sometime the week of March 31st." On March 24, 2011, AAM's counsel sent an email to Sorrell's counsel that stated, "March 31st will work for us, I think. Prorate taxes accordingly and verify grantee to be Charles Sorrell alone or not?" At least five other emails passed between Sorrell's counsel and AAM's counsel on March 24, 2011; these emails reflected an increasing amount of hostility and distrust between the parties' respective counsel.

{¶ 5} A couple of days later, the settlement negotiations were delayed briefly when the county engineer required new surveys for the three parcels in question. On April 2, 2014, Sorrell's counsel sent an email to AAM's counsel that stated as follows:

> I would like to prepare a settlement entry confirming what is going on because of the survey issues that just arose. If we have an entry that specifically specifies the terms of the settlement and that the closing will take place, we should be in a position to have everything resolved and just wait for the correct legal description for the survey. Please let me know if you will sign this. I will hold the money and I will give it to you at the time of the closing.

{¶ 6} On April 3, 2014, AAM's counsel sent an email to Sorrell's counsel that stated, "I think I will sign it. As long as my client OKs it, as he has orally told me. I will show him and

have him sign for my protection and then sign and return to you." Sorrell's counsel sent a draft of the judgment entry he prepared for the case to AAM's counsel by regular mail. In the draft entry's cover letter, which was dated April 3, 2014, Sorrell's counsel requested AAM's counsel to "[p]lease send this back to me immediately so that we can file it and confirm with the court that we have an agreement since we have a deadline coming up for the motion for summary judgment we filed."

{¶ 7} At or about this time, AAM obtained new counsel (Thomas G. Eagle) who filed a notice of appearance in the case on April 4, 2014. Several days later, AAM's original counsel (Sanzone) withdrew from the case. On April 8, 2014, AAM's new counsel sent an email to Sorrell's counsel, informing him that AAM's former counsel (Sanzone) had confirmed to him that as far as former counsel was concerned, the case had not been settled, and that "any offers or demands you think are still out or open are rejected or revoked, as far as AAM is concerned."

{¶ 8} On April 14, 2014, Sorrell's counsel filed a motion to enforce the purported settlement agreement negotiated between him and AAM's former counsel, as reflected in their email exchanges set forth above. Prior to ruling on the motion, the trial court held a hearing. The parties stipulated that in ruling on Sorrell's motion to enforce settlement, the trial court could consider the emails exchanged between the parties' counsel from March 17, 2014 to April 8, 2014; that AAM's former counsel was present at the hearing but was not going to testify; that AAM's former counsel was AAM's attorney in this litigation and had authority to act on behalf of AAM; that AAM's former counsel could obtain authority from AAM through Fred Micomonaco; and that "Fred Micomonaco was an authorized agent of AAM Properties" and "was authorized to act on behalf of AAM." The trial court stated that it was "simply going to look at the e-mails * * * attached to the motions and the fact that [AAM's former counsel] could, if he did get authority from Mr. Fred Micomonaco on behalf of the

corporation, he didn't have to go to any one else on behalf of the corporation to get authority."

{¶ 9} On May 30, 2014, the trial court granted Sorrell's motion to enforce settlement. The trial court determined that a review of the email exchanges between the attorneys showed that "a valid settlement agreement was reached." The trial court found that "a meeting of the minds on the essential terms of the agreement occurred within the email exchange of March 24[, 2014]," when AAM's former counsel replied, "March 31st will work for us, I think. Prorate taxes accordingly and verify grantee to be Charles Sorrell alone or not?" The trial court found this language to be "sufficiently particular to constitute a valid agreement." The trial court rejected AAM's argument that its former counsel lacked authority to settle the case on its behalf, stating that "the parties had established a course of conduct whereby they communicated through their respective attorneys, thereby evidencing AAM's [former] counsel's authority to enter into a binding settlement on behalf of AAM."

{¶ 10} AAM moved the trial court to make additional findings of fact "particularly and only as to what the court finds the terms of any settlement that AAM is bound to, are." The trial court granted AAM's request and issued the following additional findings of fact:

> The court makes the following findings of fact as to the essential terms of the agreement pursuant to the email exchanges between counsel for each party between the dates of March 21-24, 2014: (1) Mr. Sorrell agreed to pay AAM $78,000.00 for the real estate at issue in this case, (2) the parties agreed to prorate the payment of accrued taxes, (3) AAM agreed to prepare the deed to be delivered to Mr. Sorrell.

{¶ 11} On July 16, 2014, the trial court issued a final, appealable order granting judgment to Sorrell. The trial court ordered Sorrell to pay AAM $78,000 for the three parcels of real estate in question, ordered AAM to prepare the deed to be delivered to Sorrell, and ordered the parties to prorate the payment of accrued taxes.

{¶ 12} AAM now appeals and assigns the following as error:

{¶ 13} THE TRIAL COURT ERRED IN FINDING THE EXISTENCE OF AND ENFORCING A SETTLEMENT AGREEMENT.

{¶ 14} AAM presents five issues for review. However, we only need to address the first and fifth of these issues, since our ruling on them is dispositive of this appeal.

{¶ 15} In its first issue presented for review, AAM argues the trial court erred in finding that its former counsel had the requisite authority to settle Sorrell's claim against it. AAM asserts that its former counsel did not have the "separate, specific and express" authority to settle Sorrell's claim against it, and therefore AAM is not bound by any purported settlement negotiated between its former counsel and Sorrell's counsel.

{¶ 16} Generally, an attorney's authority to act for his or her client is governed by the law of agency, with the client being deemed the principal and the attorney being deemed the agent. *See Morr v. Crouch*, 19 Ohio St.2d 24 (1969); *Ottawa Cty. Commrs. v. Mitchell*, 17 Ohio App.3d 208, 211-212 (6th Dist.1984); *Prime Properties LTD. Partnership v. Radah Enterprises*, 8th Dist., Cuyahoga, No. 99827, 2014-Ohio-206, ¶18.

{¶ 17} The Ohio Supreme Court stated:

> [T]he rule in Ohio and elsewhere is that an attorney who is without specific authorization has no implied power by virtue of his general retainer to compromise and settle his client's claim or cause of action.
>
> Moreover, where the power claimed is to sell real estate, the agent's authority must be expressly given to execute a contract for the sale of land before such contract will bind the principal.
>
> * * *
>
> "The authority to convey realty has been recognized as distinct and separate from a mere authority to sell, and the question has sometimes arisen whether an agent empowered to sell has the power to convey where the latter power is not expressly given. In this connection, and [sic] authorization to convey real estate has the dignity of an instrument of title and, as such, should either expressly or by necessary implication state the authority of the agent without leaving it to be established by parol, inferred from

> coincidences, or based on speculation. * * *" 3 American Jurisprudence 2d 514, Agency, Section 118.

(Citations omitted.) *Morr v. Crouch* at 27-28.

{¶ 18} Courts have found that the express authority of an agent to negotiate and enter a real estate agreement for a client may be shown by "parol," i.e., oral or unwritten, evidence. *Ottawa County Commrs. v. Mitchell*, 17 Ohio App.3d at 213. However, "[w]here it is claimed that the express authority to act in such matters was verbally conferred by the client, *clear and convincing evidence* is required to establish the fact—a mere preponderance of even the credible evidence is insufficient." (Emphasis sic.) *Id*., citing *Spengler v. Sonnenberg*, 88 Ohio St. 192 (1913), at paragraph three of the syllabus.

{¶ 19} The party who deals with a known agent must not simply trust the agent's statements as to the extent of the agent's authority, but instead must use reasonable diligence and prudence to ascertain the true nature and extent of the agent's authority. *Ottawa Cty. Commrs. v. Mitchell*, 17 Ohio App.3d at 214. "[W]hatever an agent may say about his specific authority to act for his principal, the law requires more to establish that authority that his own bare statements. Even apart from their hearsay nature, such assurances, standing alone, can never be satisfactory (or sufficient) proof of the agent's express (or special) authority." *Id*.

{¶ 20} Here, the trial court found that "the parties had established a course of conduct whereby they communicated through their respective attorneys, thereby evidencing AAM's [former] counsel's authority to enter into a binding settlement on behalf of AAM." The trial court did not specify what *type* of authority, e.g., express, implied, or apparent, that AAM's former counsel had that enabled him to make a binding settlement agreement on AAM's behalf. However, in light of the trial court's attempt to justify its decision by citing to the "course of conduct" established by the parties' respective counsel, it is likely that the trial

court found that AAM's former counsel had *apparent* authority to settle the case of AAM's behalf with AAM's consent.

{¶ 21} In *Master Consolidated Corp. v. BancOhio Natl. Bank*, 61 Ohio St.3d 570, 576-577 (1991), the Ohio Supreme Court discussed the concept of "apparent authority" as follows:

> [I]n order for a principal to be bound by the acts of his agent under the theory of apparent agency, evidence must affirmatively show: " ' * * * (1) [t]hat 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. The apparent power of an agent is to be determined by the act of the principal and not by the acts of the agent; a principal is responsible for the acts of an agent within his apparent authority only where the principal himself by his acts or conduct has clothed the agent with the appearance of the authority and not where the agent's own conduct has created the apparent authority. * * *' " *Logsdon v. ABCO Constr. Co.* (1956), 103 Ohio App. 233, 241–242, 3 O.O.2d 289, 293, 141 N.E.2d 216, 223; *Ammerman v. Avis Rent A Car System, Inc.* (1982), 7 Ohio App.3d 338, 7 OBR 436, 455 N.E.2d 1041; *Blackwell v. Internatl. Union, U.A.W.* (1983), 9 Ohio App.3d 179, 9 OBR 289, 458 N.E.2d 1272.

{¶ 22} "Generally, apparent authority may arise from a course of business or from a principal's spoken or written words or conduct which causes or permits a third person to act." *Fahey Banking Co. v. Adams*, 98 Ohio App.3d 214, 218 (3rd Dist.1994). Apparent authority also may arise "where an agent is shown to have authority because his principal has permitted and approved his prior similar acts, where a third party has relied upon the agent's capacity to do the act, to his detriment, without knowledge of an express limitation restricting the agent's actual authority, or without knowledge of the existence of the agency, which is undisclosed." *Levin v. Nielsen*, 37 Ohio App.2d 29, 54 (8th Dist.1973).

{¶ 23} Here, the only evidence presented in this case were the emails exchanged

between the parties' respective counsel from March 17, 2014 to April 8, 2014, and the stipulations that the parties made at the hearing held on Sorrell's motion to enforce the putative settlement agreement. The trial court relied exclusively on the emails in finding that AAM's former counsel had "authority" to settle Sorrell's claim against AAM. However, these emails contained only the statements of AAM's former counsel and Sorrell's counsel. None of the emails contain any evidence of what AAM did to "clothe" its former counsel "with the appearance" of having the authority to settle the case on AAM's behalf without AAM's express consent. *Master Consolidated Corp.* at 576-577. In fact, in the last email that AAM's former counsel sent to Sorrell's counsel on April 3, 2014, AAM's former counsel expressly informed Sorrell's counsel that "I think I will sign it [i.e., the draft settlement entry that Sorrell's counsel had sent, or was going to send, to AAM's former counsel]. As long as my client OKs it [i.e., the draft settlement entry], as he has orally told me. I will show him and have him sign for my protection and then sign and return to you."

{¶ 24} The trial court expressly found that "the parties had established a course of conduct whereby they communicated through their respective attorneys, thereby evidencing AAM's [former] counsel's authority to enter into a binding settlement on behalf of AAM." The "course of conduct" of which the trial court speaks involves the email exchanges between counsel over a two-week period between March 17, 2014 and April 3, 2014. However, this "course of conduct" does not provide sufficient evidence to establish that AAM's former counsel had apparent authority to settle Sorrell's claim on AAM's behalf without AAM's specific consent, because it, too, concentrates on the actions of the agent, i.e., AAM's former counsel, and not the acts of the principal itself. Simply put, the trial court's decision fails to recognize that the "[t]he apparent power of an agent is to be determined by the act of the principal and not by the acts of the agent" and that "a principal is responsible for the acts of an agent within his apparent authority only where the principal himself by his acts or conduct

has clothed the agent with the appearance of the authority and not where the agent's own conduct has created the apparent authority." *Master Consolidated Corp.*, 576-577. Compare *Adams*, 98 Ohio App.3d at 218 (record shows principal and agent were involved in various business dealings over several years during which time principal vested agent with ostensible and actual authority to engage in fraudulent credit card transactions and principal testified that agent was "automatically an agent because he was my partner in the business").

{¶ 25} Sorrell argues that the email evidence in this case provides "ample circumstantial evidence" that AAM was at all relevant times, kept in the loop and was guiding the entirety of the negotiations." Sorrell points to the April 3, 2014 email discussed above in which AAM's former counsel informed Sorrell's counsel that he could not act unilaterally and required his client's authorization to sign the draft settlement agreement. While Sorrell has failed to specify his argument in detail, he appears to be arguing that the April 3, 2014 email shows that AAM's former counsel acted in this matter *only* with AAM's *express* authority, and therefore, that AAM's former counsel was acting with AAM's express authority on March 24, 2014 when he sent an email to Sorrell's counsel stating that "March 31st will work for us, I think[.]" More specifically, Sorrell appears to be arguing that the email evidence in this case allows an inference to be drawn that demonstrates that AAM's former counsel *verbally* received express authority from AAM to settle Sorrell's claim against them. However, we find this argument unpersuasive.

{¶ 26} As we have indicated, "[w]here it is claimed that the express authority to act in such matters was verbally conferred by the client, *clear and convincing evidence* is required to establish the fact—a mere preponderance of even the credible evidence is insufficient." (Emphasis sic.) *Ottawa Cty. Commrs. v. Mitchell*, 17 Ohio App.3d at 213. "Clear and convincing evidence" is that measure or degree of proof that is more than a mere preponderance of the evidence but not as high as that measure or degree of proof necessary

in a criminal case, i.e., evidence beyond a reasonable doubt, and that "will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *In re Removal of Kuehnle*, 161 Ohio App.3d 399, 2005-Ohio-2373, ¶ 85 (12th Dist.). Here, the email evidence cited by Sorrell and the inference he is asking this court to draw from it does not constitute the "clear and convincing" evidence needed to establish that AAM's former counsel received verbal, express authority to settle Sorrell's claim against AAM.

{¶ 27} Sorrell also points out that AAM passed on its opportunity in the trial court to call its former counsel to the stand and question him about his authority to settle without AAM's consent. However, Sorrell is overlooking the fact that it was his responsibility to ascertain if AAM's former counsel, a "known" agent for AAM, had the authority to settle Sorrell's claim against AAM. *Ottawa Cty Commrs.*, 17 Ohio App.3d at 214.

{¶ 28} In its fifth issue presented for review, AAM argues the "[c]onflicting correspondence" between its former counsel and Sorrell's counsel that disputed the terms of the settlement agreement, that did not meet each of the other party's terms, and that equivocated on the terms of the settlement agreement did not constitute an enforceable settlement agreement. We find this argument persuasive.

{¶ 29} In *Richard A. Berjian, D.O., Inc. v. Ohio Bell Tel. Co.*, 54 Ohio St.2d 147, 151-152 (1978), the Ohio Supreme Court stated "that courts will give effect to the manifest intent of the parties where there is clear evidence demonstrating that the parties did not intend to be bound by the terms of an agreement until formalized in a written document and signed by both[.]"

{¶ 30} Here, there was clear evidence demonstrating that the parties did not intend to be bound by the terms of their proposed settlement agreement until both executed a formal written document memorializing the sale of the three parcels of real estate in question. While the emails between the parties indicate agreement on some terms, there remain unresolved

contingencies, e.g., the title search, survey, whether money will be paid at closing or at some time after the deed is recorded and no intervening liens are confirmed. On several occasions, both parties brought up the need to draft a judgment entry that finalized all the details of their settlement agreement and then file it with the trial court. After AAM's former counsel sent Sorrell's counsel the email that the trial court identified as the moment that a "meeting of the minds" took place between the parties, Sorrell's counsel sent an email to AAM's former counsel that stated, "I will also prepare an entry regarding the settlement of the case. This is the only way it is going to go because I totally do not trust your client." AAM's former counsel responded by sending an email to Sorrell's counsel informing him that "[w]e do not trust Sorrell either[,]" and that he could not "leave [his] client open for some delay in payment at [the] whim of [a] buyer, so let's pin it down in the [judgment] entry."

{¶ 31} These and the other emails between the parties' respective counsel demonstrate that under the facts in this case, the preparation of the judgment entry was not simply a "ministerial" matter as Sorrell claims. Consequently, the emails between the parties' respective counsel do not express agreement between the parties even if AAM's former counsel had been authorized to settle.

{¶ 32} In light of the foregoing, AAM's assignment of error is sustained.

{¶ 33} The judgment of the trial court is reversed, and this cause is remanded for further proceedings consistent with this opinion.

PIPER, P.J., and HENDRICKSON, J., concur.