

Reversed and Remanded and Memorandum Opinion filed January 27, 2011.



In The

Fourteenth Court of Appeals

NO. 14-09-01014-CV

MOHAMMAD A. BEHZADPOUR AND AB LAND COMPANY, Appellants

V.

GLORIA BONTON AND LAWRENCE BONTON, Appellees

**On Appeal from the 234th District Court
Harris County, Texas
Trial Court Cause No. 2009-01483**

M E M O R A N D U M O P I N I O N

Mohammed A. Behzadpour and AB Land Company appeal the trial court's summary judgment ruling enforcing an alleged agreement to settle claims brought by Gloria and Lawrence Bonton.¹ We reverse and remand because the Bontons failed to establish conclusively the existence of an enforceable settlement agreement.

¹ We refer to Behzadpour and AB Land Company collectively in this opinion as "Behzadpour." The trial court's order granting the Bontons' motion for summary judgment refers to these parties collectively, and the parties do not dispute on appeal the applicability of the judgment to both Behzadpour and AB Land Company.

BACKGROUND

The Bontons agreed to sell a plot of land to Behzadpour. After the sale, the Bontons allege that Behzadpour forged Mr. Bonton's name on and recorded a general warranty deed identifying a different plot of land owned by the Bontons. The Bontons allege that they never intended to transfer the plot identified on the deed. They sued Behzadpour for fraud in a real estate transaction, common law and statutory fraud, and negligent misrepresentation.

The Bontons' attorney exchanged emails with Kamran Mashayekh after the suit was filed but before the answer was due; Mashayekh repeatedly referred to Behzadpour as his "client." Mashayekh sent the Bontons' attorney an email on February 18, 2009:

Javier:

By way of this email, I confirm that my client is offering to sell the property [back to the Bontons] . . . for \$6100.00. We will await your response.

Regards

Kamran Mashayekh

Before the Bontons' attorney responded to Mashayekh's email, attorney Corwin Teltschik filed an answer for Behzadpour and became his designated attorney in charge under Texas Rule of Civil Procedure 8 on March 3, 2009. *See* Tex. R. Civ. P. 8. On April 3, 2009, the Bontons' attorney responded to Mashayekh's email:

Kamran,

I am authorized to accept your offer. . . .

. . . .

Regards,

Javier Marcos, Jr.

Behzadpour thereafter refused to comply with the alleged settlement agreement.

The Bontons filed a motion for summary judgment, in which they argued that Behzadpour breached the settlement agreement and asked the trial court to enforce the

agreement and award attorney's fees. *See* Tex. Civ. Prac. & Rem. Code Ann. § 38.001(8) (Vernon 2008). In his summary judgment response, Behzadpour argued that the emails between Mashayekh and the Bontons' attorney do not constitute an enforceable agreement because (1) email signatures cannot satisfy Rule 11 or statute of fraud requirements; (2) only Behzadpour's attorney in charge under Rule 8 could enter into a binding Rule 11 settlement agreement; (3) Behzadpour did not authorize Mashayekh to enter into any agreement on Behzadpour's behalf; and (4) Behzadpour revoked any alleged offers to settle before the Bontons accepted. Behzadpour also opposed the Bontons' request for attorney's fees because the Bontons did not segregate the amount of fees between claims for which such fees are recoverable and those for which they are not.

The trial court initially denied the Bontons' summary judgment motion because they had not pleaded breach of an alleged settlement agreement. *See Padilla v. LaFrance*, 907 S.W.2d 454, 462 (Tex. 1995) (an action to enforce a disputed settlement agreement must be based on proper pleading and proof). The Bontons amended their petition to include such a claim and then filed a motion asking the trial court to reconsider its denial of the motion for summary judgment. Behzadpour did not file an additional or amended response to the reconsidered summary judgment motion.

The trial court granted the Bontons' motion to reconsider and signed an order granting summary judgment in favor of the Bontons on their claim that Behzadpour breached the alleged settlement agreement. The trial court also awarded attorney's fees to the Bontons.

Behzadpour filed a motion for new trial, asserting the same arguments as those raised in his response to the Bontons' motion for summary judgment. The trial court denied Behzadpour's motion for new trial. Behzadpour appeals.

ANALYSIS

Behzadpour claims that the affidavit attached to his response to the Bontons' summary judgment motion raises factual issues that preclude summary judgment.

Behzadpour swears in his affidavit that no agreement was reached because Mashayekh “never was acting as [Behzadpour’s] lawyer and never had the authority to enter into any kind of agreement to settle this lawsuit or sell the property . . . without [Behzadpour’s] signature.” The Bontons contend that Behzadpour waived this issue on appeal because he did not expressly include it in his issues presented. *See* Tex. R. App. P. 38.1(f).

I. Briefing Waiver

Behzadpour stated his issues presented as follows:

ISSUE NO. ONE: Can emails, that bear no signature, ever constitute a valid, enforceable Rule 11 . . . agreement?

ISSUE NO. TWO: For there to be a valid, enforceable Rule 11 agreement between attorneys, must the attorneys be Rule 8 . . . attorney[s] in charge, or at least attorneys of record in the case?

ISSUE NO. THREE: Can unsigned documents, whether emails or faxes, ever constitute an agreement sufficient to comply with [the Texas statute of frauds] sufficient to require conveyance of title to real property?

ISSUE NO. FOUR: Does *Gullo* require the segregation of attorneys’ fees between claims and defenses?

Behzadpour’s arguments in the body of his brief do not directly correspond to his issues presented; they bear the following headings: (1) “Requirements for Rule 11;” (2) “Consent Did Not Exist;” (3) “No Contract to Sell Real Estate;” (4) “Waiver of Causes of Action;” and (5) “Attorney’s Fees.” Behzadpour’s arguments regarding alleged fact issues are included under the first three headings. All three of these headings contain arguments challenging the existence of a valid, enforceable settlement agreement.

Behzadpour is required to state concisely all issues or points presented for review. *See* Tex. R. App. P. 38.1(f). Appellate briefs are to be construed reasonably, yet liberally, so that the right to appellate review is not lost by imposing requirements not absolutely necessary to effect the purpose of the rule. *See Perry v. Cohen*, 272 S.W.3d 585, 587 (Tex. 2008) (per curiam); *Verburgt v. Dorner*, 959 S.W.2d 615, 616–17 (Tex. 1997). Appellate courts should reach the merits of an appeal whenever reasonably possible. *Perry*, 272 S.W.3d at 587. “Even though a specific point on appeal may not be

recited within the statement of the issue presented, that point is not waived if it is raised in the body of the brief.” *Hagberg v. City of Pasadena*, 224 S.W.3d 477, 480 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (citing *Tex. Dept. of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 642 n.1 (Tex. 2004) (additional ground for reversal of trial court’s judgment argued in conjunction with appellant’s issue regarding separate ground for reversal may properly be considered on appeal even though not expressly contained in wording of any issue)). Behzadpour develops his argument regarding Mashayekh’s authority to enter into a binding agreement in the body of his brief along with his other issues challenging the propriety of the summary judgment ruling. Although the better practice would have been for Behzadpour to have drafted his issues more precisely, we consider the argument even though it is not contained in the express wording of his issues presented. *See Tex. Dept. of Transp.*, 146 S.W.3d at 642 n.1.

II. Remaining Issue of Material Fact

A party seeking to recover upon a claim may move for summary judgment in his favor upon all or any part of the claim. *See Tex. R. Civ. P.* 166a. When reviewing a summary judgment, we follow well-established rules: (1) the movant has the burden of showing that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law; (2) in deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true; and (3) every reasonable inference must be indulged in favor of the non-movant and any doubts must be resolved in favor of the non-movant. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985). A matter is conclusively established if ordinary minds cannot differ as to the conclusion to be drawn from the evidence. *Triton Oil & Gas Corp. v. Marine Contractors & Supply, Inc.*, 644 S.W.2d 443, 446 (Tex. 1982).

Behzadpour first claims that a material fact issue remains as to whether Mashayekh was authorized to enter into an enforceable settlement agreement on Behzadpour’s behalf. An agent’s authority to act on behalf of a principal depends on

some communication by the principal either to the agent (actual authority) or to the third party (apparent authority). *In re ADM Investor Servs., Inc.*, 304 S.W.3d 371, 374 (Tex. 2010). An agent cannot bind a principal unless the agent has actual or apparent authority to do so. *Verizon Corporate Servs. Corp. v. Kan-Pak Sys., Inc.*, 290 S.W.3d 899, 904 (Tex. App.—Amarillo 2009, no pet.).

Actual authority is created through written or spoken words or conduct of the principal communicated to the agent. *Walker Ins. Servs. v. Bottle Rock Power Corp.*, 108 S.W.3d 538, 549–50 (Tex. App.—Houston [14th Dist.] 2003, no pet.). The existence of an agency relationship based on actual authority may be implied from the conduct of the parties or from the facts and circumstances surrounding the transaction in question. *Id.* at 550. Behzadpour states in his affidavit that Mashayekh never had authority to enter into any settlement agreement or to sell the property. We find no evidence in the record other than Mashayekh’s own statements via email tending to show that Behzadpour conferred actual authority on Mashayekh to act on Behzadpour’s behalf.² *See Triton Oil & Gas Corp.*, 644 S.W.2d at 446. A finding of actual authority of an agent cannot be based merely on the words or deeds of the agent. *Gaines v. Kelly*, 235 S.W.3d 179, 183–84 (Tex. 2007); *Walker Ins. Servs.*, 108 S.W.3d at 550.

To establish apparent authority, one must show that a principal either knowingly permitted an agent to hold himself out as having authority or showed such lack of ordinary care as to clothe the agent with indicia of authority. *Walker Ins. Servs.*, 108 S.W.3d at 550 (citing *NationsBank v. Dilling*, 922 S.W.2d 950, 952–53 (Tex. 1996)). Apparent authority is created by written or spoken words or conduct by the principal to a third party. *Id.* A party seeking to charge a principal through the apparent authority of an agent must establish conduct by the principal that would lead a reasonably prudent person

² An attorney retained for litigation is presumed to possess actual authority to enter into a settlement on behalf of a client. *See, e.g., City of Roanoke v. Town of Westlake*, 111 S.W.3d 617, 629 (Tex. App.—Fort Worth 2003, pet. denied). Even if this presumption applies, it may be rebutted by affirmative proof that Behzadpour did not authorize Mashayekh to enter into the settlement agreement. *See id.* Behzadpour’s affidavit constitutes such affirmative proof.

to believe the agent had the authority it purported to exercise. *Id.* at 550–51. We find no evidence in the record showing that Behzadpour engaged in any conduct that would lead a reasonably prudent person to believe that Mashayekh had authority to enter into an enforceable agreement on Behzadpour’s behalf. *See id.*

Based on the summary judgment evidence, we conclude that a material fact issue remains as to whether Mashayekh possessed actual or apparent authority to enter into a binding settlement agreement. *See Nixon*, 690 S.W.2d at 548–49. Because this issue alone requires reversal of the trial court’s summary judgment ruling, we do not reach Behzadpour’s other issues on appeal. *See Tex. R. App. P. 47.1*

CONCLUSION

We conclude that the Bontons failed to establish conclusively that Mashayekh had authority to enter into an agreement on behalf of Behzadpour, and we reverse the judgment of the trial court and remand for further proceedings consistent with this opinion.

/s/ William J. Boyce
Justice

Panel consists of Justices Brown, Boyce, and Jamison.