COURT OF APPEALS
DECISION
DATED AND FILED

November 28, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 99-2813

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

A.B. DATA, LTD.,

PLAINTIFF-APPELLANT,

V.

GRAPHIC WORKSHOP, INC.,

DEFENDANT,

INFLUENCE USA, INC. AND
JEWISH NATIONAL FUND, INC., A/K/A
KEREN KAYEMETH LEISRAEL, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from judgments of the circuit court for Milwaukee County: LEE E. WELLS, Judge. *Reversed and cause remanded with directions; affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. A.B. Data, Ltd. appeals from summary judgments granted in favor of Jewish National Fund, Inc. ("JNF") and Influence USA, Inc. A.B. Data claims that: (1) there are disputed issues of material fact regarding the agency relationship between JNF and Graphic Workshop, Inc., and material issues of fact on its unjust enrichment claim; and (2) the trial court should not have applied New York law in ruling that Influence cannot be held responsible for its predecessor's (Graphic) debt.[1] Because the evidentiary materials submitted by A.B. Data are sufficient to raise a material issue of fact with regard to whether Graphic was JNF's agent, we reverse the trial court's judgment as to JNF, and remand for a trial on the merits. However, because we conclude that the trial court did not err when it granted summary judgment to Influence, we affirm that judgment.

I. BACKGROUND

¶2 In October 1997, A.B. Data filed a complaint against JNF, Graphic, and Influence. The October 1997 complaint, together with an amended complaint filed in January 1998, alleged that A.B. Data performed direct mail services at the request of Graphic for the sole benefit of JNF, that Graphic acted as JNF's agent, that Influence was the successor corporation of Graphic, and that A.B. Data's outstanding invoices of $106,000 for services provided had not been paid. The amended complaint added an unjust enrichment claim against JNF.

[1] A.B. Data also raises a third issue regarding inability to conduct sufficient discovery. This issue, however, is not dispositive because we are reversing the summary judgment order and remanding for a trial on the merits. Accordingly, we decline to address the discovery issue. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938).

¶3 In March 1998, JNF filed a motion seeking summary judgment, alleging that JNF never entered into any contract with A.B. Data, and never authorized Graphic or Influence to act as its agent in entering into any contract with A.B. Data. The trial court granted the motion following a hearing in December 1998.

¶4 In January 1999, Influence filed a motion seeking summary judgment, alleging that Influence never contracted directly with A.B. Data and, even if Influence was the successor corporation to Graphic, it is not obligated to pay because both companies are New York corporations, requiring the application of New York law, which only imposes successor liability in tort cases. The trial court granted the motion in February 1999. Judgments were entered dismissing JNF and Influence from this case in August 1999. A.B. Data appeals from those judgments.

II. DISCUSSION

¶5 This case arises after summary judgment. We review summary judgments independently, employing the same methodology as the trial court. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). 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 the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2) (1997-98). Courts examine summary judgment motions in a three-step process. *See* ***Grams v. Boss***, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980).

¶6 First, we must determine whether the pleadings set forth a claim for relief as well as a material issue of fact. *See* ***id.*** Second, we must decide whether

the moving party's affidavit and other proofs present a prima facie case for summary judgment. *See* ***id.*** Finally, the court examines the affidavits and proofs of the opposing party to determine whether any disputed material fact exists, or whether any undisputed material facts are sufficient to allow for reasonable alternative inferences. *See* ***id.***

A. JNF.

¶7 It is undisputed that the first two steps of the summary judgment methodology were satisfied. The question for our consideration is whether the materials that A.B. Data submitted in opposition to JNF's motion for summary judgment create a genuine issue of material fact. We conclude that A.B. Data's evidentiary submissions do create an issue of fact, which must be resolved by a trial in this matter.

¶8 A.B. Data sought recovery from JNF under three theories: (1) that there was an actual agency between JNF and Graphic; (2) that there was an apparent agency between JNF and Graphic; and (3) that JNF was unjustly enriched by A.B. Data's services. In opposition to JNF's motion seeking summary judgment, A.B. Data submitted sufficient evidentiary material to create a genuine issue of fact with respect to all three theories.

¶9 In order to establish that actual authority exists, a party must show: (1) the conduct of the principal indicates that the agent is to act on the principal's behalf; (2) the conduct of the agent demonstrating that he or she accepts this undertaking; and (3) the understanding of the parties that the principal controls the undertaking. *See* WIS JI—CIVIL 4000. Here, the evidentiary submissions create factual issues on all three elements. For example, the submissions include a direct marketing proposal from Al Nudelman at Graphic to Jack Grunspan at JNF, which

states: "Please approve & fax back. Thanks, Al." The document was initialed and stamped by Grunspan, suggesting his approval. Further, affidavits from Jerry Benjamin and Edward Lyon, former Vice-President of A.B. Data, attest that JNF identified Graphic to representatives of A.B. Data as JNF's vendor, assuring A.B. Data that JNF was in charge of its direct marketing. JNF explicitly stated that JNF controlled its direct marketing campaign.

¶10 Documentation submitted in opposition to JNF's summary judgment motion also reveals that JNF represented to other organizations that it controlled its direct marketing campaign, and that Graphic simply handled the mailings. There is deposition testimony from Russell Robinson stating that recipients of JNF's solicitations assumed the material came directly from JNF, and that the United States Post Office processed JNF's mail at reduced rates because of its status as a charitable organization. Finally, Graphic indicated that JNF controlled both the content and day-to-day workings of JNF's own direct marketing campaign. This fact is documented in correspondence that Graphic exchanged with vendors working on the JNF account and by the language found at the bottom of Graphic's purchase orders. Therefore, there was sufficient documentation to establish a question of material fact as to whether Graphic was actually JNF's agent.

¶11 In order to establish apparent authority, a party must show: (1) acts by the agent or principal justifying belief in the agency; (2) knowledge by the party sought to be held; and (3) reliance consistent with ordinary care. *See* ***Larkin v. Johnson***, 67 Wis. 2d 451, 457, 227 N.W.2d 90 (1975). A.B. Data's evidentiary submissions demonstrate disputed issues of fact on each of these three elements as well. Graphic held itself out to vendors as JNF's agent, indicating that it acted only after JNF approval. For example, a fax from Nudelman at Graphic to

an A.B. Data representative stated: "Enclosed is [a] list that JNF was provided for them to choose from [sic] – not for us to choose. Hopefully you can match the enclosed list. I believe you attempted to do the choosing for them – not the case – call me when you receive fax. Thanks." Another note from Graphic to A.B. Data stated: "Can you start to clear the above. We don't have an approval yet but we won't for about 2 weeks." These documents indicate an agency relationship existed.

¶12 The evidentiary submissions also demonstrate that JNF representatives explicitly stated that, although it worked through an agent, JNF controlled the direct marketing campaign. Further, the submissions sufficiently allege that A.B. Data relied on the representations that JNF and Graphic had an agency relationship. Therefore, there is sufficient documentation that creates a material issue of fact as to whether an apparent agency relationship existed between Graphic and JNF.

¶13 In order to establish a claim for unjust enrichment, a party must show: (1) a benefit conferred on the defendant by the plaintiff; (2) appreciation or knowledge by the defendant of the benefit; and (3) acceptance or retention of the benefit by the defendant under such circumstances making it inequitable for the defendant to retain the benefit. *See* ***Watts v. Watts***, 137 Wis. 2d 506, 531, 405 N.W.2d 303 (1987). The evidentiary submissions also demonstrate disputed issues of material fact on this claim. It is alleged that JNF benefited from the direct marketing services that A.B. Data provided to Graphic, that JNF knew it received the services, and that JNF was the entity that first contacted A.B. Data regarding the purchase of mailing lists to be used in JNF's direct marketing campaign. There are issues as to whether JNF paid Graphic for the services A.B.

Data provided, whether JNF is obligated to do so; and whether JNF was properly released from its obligations.

¶14 The trial court dismissed the unjust enrichment claim on the basis that a contract existed between A.B. Data and Graphic. This is not an election of remedies case. Of course, A.B. Data cannot collect twice for what it contends it is owed. That is, it cannot collect both under a contract theory and an equitable unjust enrichment theory. It is entitled to present alternate theories to a jury.

¶15 There is clearly sufficient evidentiary material to raise a genuine issue of fact regarding agency and unjust enrichment, even though JNF has submitted evidentiary material to the contrary. Accordingly, we reverse the judgment dismissing JNF and remand the matter for a trial on the merits.

B. Influence.

¶16 The next issue is whether the trial court erred when it dismissed Influence from the case on the basis that New York successor liability law applied and precluded holding Influence responsible for Graphic's debt. We conclude the trial court's decision on this issue was correct.

¶17 It is undisputed that if New York law applies, then Influence was properly dismissed from the case. This is so because New York law on successor liability is far more limited than Wisconsin law. New York law limits successor liability to tort claims. *See* ***Symbax, Inc. v. Bingaman***, 631 N.Y.S.2d 829, 831

(N.Y.A.D. 1995). Therefore, we must decide whether Wisconsin or New York law applies to this issue.[2]

¶18 The trial court reasoned:

> However, keep in mind that in this situation we are dealing with a Wisconsin case, and it's a contract case, and a failure allegedly to complete the contract or to pay the contract. It's brought in Wisconsin. Wisconsin law should apply to who is the debtor and who's a creditor, and what is the amount that is owed, and has that been paid in part or in full, and is there some claim that the work that was supposed to be done wasn't done. My attitude is that those requests should be governed by Wisconsin law.
>
> However, when you go to the question of whether of not you have a successor corporation governed or successor debtor, that's an issue that is not critical to this case.… A.B. Data has every right to sue Graphic Workshop for non compliance [sic] with the contract, and to recover monies in order to pay that contract, and that should be governed by Wisconsin law. I agree.
>
> But if A.B. Data wants to assert a claim against a party that was in theory not a party to the contract but is responsible only as to successor corporation, that issue should be decided by New York law ….

In effect, the trial court ruled that the substance of the contract claim was governed by Wisconsin law, but that rules affecting successor liability must be governed by the laws of the state where Graphic and Influence elected to incorporate. We agree.

¶19 When the law of two different states conflicts on an issue presented, a choice of law analysis is required. In determining which state's law should

[2] There are also some allegations that Influence contracted directly with A.B. Data for Job No. R740. However, there is no contract between A.B. Data and Influence for that job. To the extent that Influence was Graphic's successor on that job, Influence's liability is resolved based on the choice of law application addressed in the body of this opinion.

apply, we consider five factors: (1) predictability of results; (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the forum's governmental interests; and (5) application of the better rule of law. *See* ***Heath v. Zellmer***, 35 Wis. 2d 578, 596, 151 N.W.2d 664 (1967). Here, the first four factors favor application of New York law. First, entities forming corporations need to know that the successor liability of the state of incorporation will control. Otherwise, as the trial court pointed out, a corporation would be required to know the successor liability law in all fifty states. Second, when the issue controls a corporation rule, applying the law of the corporation's state provides the best chance of maintaining order. Third, the judicial task is simplified if we apply the law of the state of incorporation when addressing issues dealing with a successor liability relationship. Fourth, application of New York law in this situation will further our own governmental interest because it assures that the laws of the state of incorporation will control these types of disputes. The fifth factor favors application of Wisconsin law. However, a balancing of all of the factors results in a conclusion that New York law should apply to the limited issue of whether Influence is liable for Graphic's debt as a successor corporation. New York law says that Influence is not liable. Accordingly, the trial court's judgment dismissing Influence will not be overturned.

By the Court.—Judgment reversed and cause remanded with directions; judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.