

FILED
JUN 06 2011
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

**WASHINGTON STATE COURT OF APPEALS
FOR DIVISION III**

NO. 293955-III

CHD, INC.,

Plaintiff/Respondent,

v.

**MELVIN C. TAGGART, d/b/a TAGGART
ENGINEERING & SURVEYING,**

Defendant/Appellant.

REPLY BRIEF OF THE APPELLANT/CROSS RESPONDENT

**Mark S. Moorer, WSBA No. 18773
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Moscow, ID 83843
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ARGUMENT

Pursuant to RAP 10.3(c), Appellant/Cross Respondent Mr. Taggart limits his response to the issues in the Brief of Respondent/Cross Appellant CHD, Inc. (hereafter, CHD). CHD argues that the law office of Waldo, Schweda and Montgomery had apparent authority to provide a payoff figure on the promissory note. Opening Brief of Respondent/Cross Appellant, No. 298955-III, page 6 (hereafter BRCA). At that point, CHD quotes a lengthy excerpt from the case of *King v. Riveland* (125 Wn.2d 500, 886 P.2d 160 (1994)), in which the court discusses actual and apparent authority. BRCA at 6-7. CHD then notes that to establish apparent authority, there must be objective manifestations by the principal, relied upon by third parties, and the party claiming reliance must actually or subjectively believe that the agent has authority to act for the principal, and that subjective belief must be objectively reasonable. BRCA at 7-8. Thus far the parties agree.

A. WALDO, SCHWEDA & MONTGOMERY DID NOT HAVE APPARENT AUTHORITY TO PROVIDE A PAYOFF FIGURE ON THE NOTE.

In general, “[a]n agent’s authority to bind his principal may be of two types: actual or apparent.” *Deers, Inc. v. DeRuyter*, 9 Wn.App. 240, 242, 511 P.2d 1379 (1973) (citing 3 Am.Jur.2d *Agency* § 68 (1962)). While ‘[i]mplied authority is “actual authority, circumstantially proven, which the principal is deemed to have actually intended the agent to possess,’ (*Id.*

(citing 3 Am.Jur.2d *Agency* § 71(1962)) “[a]pparent authority exists “when, though not actually granted, the principal knowingly permits the agent to perform certain acts, or where he holds him out as possessing certain authority; or, as sometimes expressed, when the principal has placed the agent in such a position that persons of ordinary prudence are led to believe and assume that the agent is possessed of certain authority, and to deal with him on reliance of such assumption.” *Id.* at 243 (citing *Larson v. Bear*, 38 Wn.2d 485, 490, 230 P.2d 610 (1951)). Notably, it is “*only* when a person exercising ordinary prudence, acting in good faith and conversant with business practices and customs, would be misled thereby, and such person has given due regard to such other circumstances as would cause a person of ordinary prudence to make further inquiry,” that the “[f]acts and circumstances are sufficient to establish apparent authority.” *Id.* (citing *J & J Food Centers, Inc. v. Selig*, 76 Wn.2d 304, 309, 456 P.2d 691, (1969); *Lamb v. General Associates, Inc.*, 60 Wn.2d 623, 374 P.2d 677 (1962)).

It should be noted that “[a]n agent can bind its principal to a contract when the agent has either actual or apparent authority. The existence of apparent authority is a question of fact for the trial court.” *Hoglund v. Meeks*, 139 Wn.App. 854, 866 (2007) (citing *Smith v. Hansen, Hansen & Johnson, Inc.*, 63 Wn.App. 355, 363, 818 P.2d 1127 (1991)). “On appeal, [the court] examines[s] whether substantial evidence supports the trial court’s findings of apparent authority.” *Id.* (citing *Rainier National Bank v.*

Clausing, 24 Wn.App. 441, 444, 661 P.2d 1015 (1983)). Further, “[a] trial court may find apparent authority based only on the principal’s actions toward a third party, and not based solely on the agent’s actions.

Nonetheless, actual authority to perform certain services on a principal’s behalf results in implied authority to perform the usual and necessary acts associated with the authorized services.” *Hoglund v. Meeks*, 139 Wn.App. 854, 866-67 (2007) (citing *Larson v. Bear*, 38 Wn.2d at 490, 230 P.2d 610 (1951)).

1. The promissory note did not show a manifestation of authority sufficient to create apparent authority.

CHD asserts that the manifestation of this alleged apparent authority from Mr. Taggart to Waldo, Schweda and Montgomery came from the promissory note at the heart of this case. BRCA at 8. CHD belittles Mr. Taggart’s discussion of the issue of the establishment of an escrow, but makes no argument against Mr. Taggart’s denial that an escrow was established. *Id.*

CHD also asserts that Mr. Taggart made an objective manifestation of apparent authority by participating in the creation of the promissory note, or as CHD puts it, “whether the language on the documents provided to the closing agent (Perednia) convey a message or manifestation from the lender (Taggart), that the agent (Waldo and Schweda (sic)) had authority to provide a pay-off figure and accept funds to satisfy the debt.” BRCA at 8.

CHD assumes its conclusion. In reality, the promissory note did not show a manifestation of authority sufficient to create apparent authority.

Notably, “[b]oth actual and apparent authority depend upon objective manifestations.” *Smith v. Hansen, Hansen & Johnson, Inc.*, 63 Wn.App. 355, 363, 818 P.2d 1127 (1991) (citations omitted). More particularly, “[w]ith actual authority, the principal’s objective manifestations are made to the agent; with apparent authority, they are made to a third person.” *Id.* (citing *Barnes v. Treece*, 15 Wn.App. 437, 442, 549 P.2d 1152 (1976)). Obviously where an agent “exercise[s] . . . either type of authority,” this would “result[] in the principal’s being bound.” *Id.* at 264 (citing *Petersen v. Pacific Am. Fisheries*, 108 Wn. 63, 68, 183 P. 79, 9 A.L.R. 198 (1919)).

With regard to how such a manifestation of authority is made: “[m]anifestations to a third person can be made by the principal in person or through anyone else, including the agent, who has the principal’s actual authority to make them--*e.g.*, an advertisement in the newspaper, provided it is placed by the principal or an agent with actual authority.” *Smith*, 63 Wn.App. at 364 (citations omitted). To support a finding of apparent authority, however, “such manifestations,” must “have two effects. First, they must cause the one claiming apparent authority to actually, *i.e.*, subjectively, believe that the agent has authority to act for the principal. Second, they must be such that the claimant’s actual subjective belief is

objectively reasonable.” *Id.* (citations omitted). Certainly, these “manifestations must be communicated to the claimant before they can have either effect.” *Id.* at 365 (citing Restatement (Second) of Agency § 27, comment *b*, at 105). The *Smith* court goes on to state “specific manifestations” that the Restatement lists that can support a finding of apparent authority:

The information received by the third person may come directly from the principal by letter or word of mouth, from authorized statements of the agent, from documents or other indicia of authority given by the principal to the agent, or from third persons who have heard of the agent’s authority through authorized or permitted channels of communication. Likewise, as in the case of [actual] authority, apparent authority can be created by appointing a person to a position, such as that of manager or treasurer, which carries with it generally recognized duties; to those who know of the appointment there is apparent authority to do the things ordinarily entrusted to one occupying such a position, regardless of unknown limitations which are imposed upon the particular agent.

Smith, 63 Wn.App. at 365, 818 P.2d 1127 (citing Restatement (Second) of Agency § 27, comment *a*, at 104). However, simply “because an agent is appointed or occupies a high position in the principal’s organization,” does not in and of itself create apparent authority. *Id.* at 365 (citing *Richardson v. Taylor Land & Livestock Co.*, 25 Wn.2d 518, 171 P.2d 703 (1946); other citations omitted). Finally, “[a]n agent has apparent authority to act for a principal only when the *principal* makes objective manifestations of the agent’s authority “to a third person.”” *Ranger Ins. Co. v. Pierce County*,

164 Wn.2d 545 (2008) (citing *Lamb v. Gen. Assocs. Inc.*, 60 Wn.2d 623, 627, 374 P.2d 677 (1962)). This “manifestation must be sufficient to mislead a reasonable person, to deter further inquiry, and to cause reliance on the manifestation of apparent authority.” *Barnes v. Treece*, 15 Wn.App. 437, 443, 549 P.2d 1152, 1156 (1976) (citing *Lamb v. General Associates, Inc.*, 60 Wash.2d 623, 374 P.2d 677 (1962)).

Here, Waldo, Schweda & Montgomery was not an agent of Mr. Taggart. (CP 404) Mr. Taggart never gave Waldo, Schweda & Montgomery authority to do anything on his behalf. (CP404) As has been established, there was no escrow, and there were no instructions informing an alleged agent of what they were supposed to do. Since a principal must inform an agent what to do, simply identifying that a promissory note will be deposited somewhere does not create a principal or an agent. It must be remembered that only Wesley Crosby, President of CHD signed the promissory note. CP at 388 - 89. Mr. Taggart’s participation does not make him a principal. A principal must give a manifestation of authority to his agent, and Mr. Taggart’s providing a legal description does not a manifestation make. CHD is again grasping at straws to create conduct that expresses an intent.

- 2. Mr. Perednia may have had the actual belief that Waldo, Schweda & Montgomery was granted authority to provide a payoff figure, but that belief was not objectively reasonable.**

While Mr. Perednia's actions, observed in a vacuum, might be consistent with those of a "person who believed he was dealing with an agent with actual authority,"(BRCA at 11), his actions were not objectively reasonable. CHD claims that Mr. Perednia "is a seasoned real estate attorney who was acting as the closing agent for the refinance of the property." BRCA at 10. If that is true, Mr. Perednia should have known that there should have been instructions associated with the "escrow." Mr. Perednia also should have been familiar with the situation such that he would have known that Mr. Taggart was not a principal, and thus Waldo, Schweda & Montgomery was not his agent. All Mr. Taggart did was provide information to ensure that the legal descriptions were correct as CHD admits. BRCA at 9 - 10. He gave no instructions to Waldo, Schweda & Montgomery until he was provided with an improper payoff amount. And, at that time he rejected the payoff. (CP 404) Mr. Taggart did not sign the documents. Mr. Perednia also should have known that the payments were not completed, as an agent acting on behalf of his principal, CHD, who certainly knew that. Mr. Perednia should have sought a payoff amount from Mr. Taggart, because the plain language of the note allows for advances and because Mr. Taggart would have provided verification of any amount due.

CHD's central point is that using the term "escrow" essentially tells any "reasonable person" that Waldo, Schweda & Montgomery is an agent

regarding matters of the promissory note. This statement is unsupported by a legal authority and is without merit.

B. CHD, INC. IS NOT ENTITLED TO ATTORNEY FEES.

Mr. Taggart does not dispute that the prevailing party in this action could be awarded attorney fees through RCW § 4.84.330. However, case law clearly has requirements that the prevailing party must fulfill before this grant of attorney fees may be granted. Rather than again explain the argument put forth in the Appellant's Brief, pages 19 - 25, Mr. Taggart will simply address some of the issues raised by the Respondent in its reply Brief.

Mr. Taggart agrees that the underlying action in this case is based on a contract entered into after September 21, 1977. BRCA at 15. Further, the document that this action is based on contains a provision allowing the recovery of attorney fees and costs to one party. BRCA at 15. However, because the Respondent is not the prevailing party, as there has not been a final judgment, attorney fees should not be awarded until such a determination has been made. This much the parties agree on. Until there is a final judgment, neither party will receive attorney fees or costs. *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 491, 300 P.3d 683 (2009).

The RAP 18.1 disagreement is where CHD is in error, and where the court should deny CHD's demand for attorney fees. RAP 18.1 is a procedural rule, but parties to a legal dispute must follow procedure.

Two recent cases are notable. In the first case, the court noted that “[u]nder RCW 4.84.330, parties can enter agreements that allow the prevailing party to recover attorney fees in disputes arising from the agreement.” *Borish v. Russell*, 155 Wn.App. 892, 907 (2010). Because the prevailing party had “requested attorney fees on appeal under RAP 18.1,” and was the prevailing party under RCW § 4.84.330, the court found that “on compliance with RAP 18.1, the [prevailing party is] entitled to attorney fees on appeal.” *Id* (emphasis added).

The second case, *Almanza v. Bowen*, one party sought attorney fees under a term in a contract similar to the case at hand, under RCW § 4.84.330, but in that case, the party had rescinded the contract. 155 Wn.App. 16, 23 (2010). While not necessarily applicable to this case in its facts, the *Almanza* court found that plaintiff was the prevailing party. *Id.* at 24. The court awarded attorney fees “subject to [the plaintiff’s] compliance with RAP 18.1,” in which case “a commissioner of this court will enter an appropriate order awarding them attorney fees for this appeal.” *Id* (emphasis added).

It is a foregone conclusion that the party seeking attorney fees must comply with RAP 18.1 in order to receive attorney fees and costs, *even if they are the prevailing party*. While the prevailing party has not been decided in this case, CHD has removed itself from receiving attorney fees and costs on appeal because it failed to comply with RAP 18.1. CHD does

not deny this, simply claiming that it does not need to comply with RAP 18.1. The case law says otherwise. CHD did not devote a section of its opening Brief to the request for fees or expenses on review, and thus is not entitled to potential attorney fees and costs award on appeal.

C. CHD, INC. IS NOT ENTITLED TO ATTORNEY FEES ON APPEAL.

Based on the arguments and facts presented above, CHD is not entitled to attorney fees related to this appeal, for the same reason such attorney fees should be denied on the previous appeal—CHD did not abide by RAP 18.1. If the trial court’s decision is affirmed, although CHD would be the prevailing party, that decision would not change the fact that CHD failed to ask for attorney fees in its opening Brief in spite of a clear requirement under RAP 18.1. Obviously, if the trial court’s decision is not affirmed, CHD would no longer be the prevailing party, and thus would be due no attorney fees, for whatever reason, regardless of conformance with the court rules. CHD’s request of fees in compliance with RAP 18.1 is too little too late.

APPELLANT ATTORNEY FEES

As in its opening Brief, and based on the case law in the State of Washington and the contractual provision in the Deed of Trust, the appellant asks that this court grant appellant attorney fees under RAP 12 and RAP 18; assuming the court finds in favor of the appellant.

CONCLUSION

The trial court erred when it found that Waldo, Schweda & Montgomery were agents of Mr. Taggart with apparent authority to provide a loan payoff to CHD. Where CHD requested the payoff from Waldo, Schweda & Montgomery and never communicated with Mr. Taggart until after the fact, it is clear that they could not have been said to be working as an agent for Mr. Taggart. The summary judgment ruling should be reversed. CHD has failed to prove that Mr. Taggart was a principal, or that Waldo, Schweda & Montgomery was his agent. CHD has also failed to comply with the requirements of RAP 18.1 on the first appeal, and the decision to deny those fees at the trial court level should be upheld. Finally, the court should grant reasonable attorney fees to appellant.

Respectfully submitted this 2nd day of June, 2011.



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Spokane County Superior Court Case No.:
07-2-01042-9

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of June, 2011, I served a true and correct copy of the Reply Brief of the Appellant/Cross Respondent by mailing the same, postage prepaid, by regular U.S. mail to the following:

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Dated this 2nd day of June, 2011.



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