

CASE NO. 316670-III

COURT OF APPEALS, STATE OF WASHINGTON,
DIVISION III

FILED

GB AUCTIONS, INC., a Washington corporation,

Plaintiff/Respondent,

vs.

PRIVATE LEDGER, INC., a Nebraska corporation,

Defendant/Appellant,

OCT 14 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

APPELLANT'S BRIEF

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I. INTRODUCTION

Respondent, GB Auctions, Inc. ("GB Auctions"), a Washington corporation which specializes in dealer auto auctions, desired to sell its Hawker Beechcraft King Air C90B. To that end, GB Auctions executed an Aircraft Sale and Listing Agreement ("Agreement") with Appellant, Private Ledger, Inc. ("PLI"), a Nebraska corporation which specializes in the brokerage of private aircraft. The dispute between the parties centers on whether GB Auctions terminated the Agreement early, thereby incurring, pursuant to the Agreement, an obligation to pay PLI the sales commission at asking price, or, alternatively, whether GB Auctions properly cancelled the Agreement at the end of its third term owing no commission.

GB Auctions filed an action seeking declaratory judgment in Spokane County Superior Court. Subsequently, GB Auctions moved for declaratory judgment requesting the trial court to find, as a matter of law, that (1) GB Auctions properly terminated its contractual relationship with PLI, and (2) GB Auctions owes no commission to PLI. Spokane County Superior Court Judge Eitzen granted the motion in its entirety.

PLI asks the Court of Appeals to reverse the Order Granting Plaintiff's Motion for Declaratory Judgment and to direct judgment in favor of PLI, or, in the alternative, to vacate the Order Granting Plaintiff's

Motion for Declaratory Judgment and to remand the case for further proceedings.

II. ASSIGNMENT OF ERROR

1. The trial court erred in granting declaratory judgment when, taking the evidence, and all inferences drawn therefrom, in the light most favorable to PLI, PLI met its burden of production to establish disputed issues of material fact regarding whether GB Auctions terminated the Agreement early.

2. The trial court further erred when it found that the Agreement terminated upon the expiration of the third term.

3. The trial court further erred when it found "[t]he Listing Agreement states that the contract can be terminated with written notice at least two weeks before the term end."

4. The trial court further erred when it found "no sales commission was due or owing under the contract when the third term expired."

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether a reasonable person could conclude, when viewing all evidence, and drawing all reasonable inferences therefrom, in favor of PLI, that the Agreement was terminated early by GB Auctions giving rise to the obligation to pay the sales commission at asking price.

2. Whether the trial court's use of the term "termination" where the Agreement uses "cancelation" is relevant to delineate between early termination and proper cancellation in the Agreement.

3. Whether Mr. Muelheim had authority to terminate the Agreement.

4. Assuming arguendo Mr. Muelheim lacked authority, whether Mr. McConkey terminated the Agreement early through Mr. Muelheim.

IV. STATEMENT OF THE CASE

A. Procedural History.

GB Auctions started this action in Spokane County Superior Court pursuant to the Uniform Declaratory Judgment Act, seeking relief identical to that sought in Plaintiff's Motion for Declaratory Judgment. CP 3-6. PLI then asserted breach of contract and unjust enrichment counterclaims against GB Auctions, seeking monetary damages. CP 12-18.

GB Auctions then moved for declaratory judgment requesting the trial court to find, as a matter of law, that (1) GB Auctions properly terminated its contractual relationship with PLI, and (2) GB Auctions owes no commission to PLI. CP 35-46. Spokane County Superior Court Judge Eitzen granted the motion in its entirety. CP 175-178.

PLI now seeks review of the trial court's order granting declaratory judgment.

B. Factual Background.

Mark Muelheim, on behalf of GB Auctions, initiated contact with PLI on April 16, 2010, inquiring about trading GB Auctions' King Air C90B for a King Air 200 which PLI was listing. CP 67. The trade did not occur; however, on July 20, 2010, Mr. Muelheim, on behalf of GB Auctions, re-approached PLI regarding listing the aircraft for sale. CP 67. GB Auctions continued to correspond with PLI, eventually inviting PLI to Spokane on February 17, 2011 to discuss and potentially enter into a listing agreement regarding the aircraft. CP 68.

Prior to the meeting on February 17, 2011, PLI sent an email to GB Auctions containing the Agreement and an appraisal to be discussed at the meeting. CP 68, 75. The most important characteristics for establishing an aircraft's value within a model year are a reputable maintenance history, time in service, and damage history. CP 68. The \$1,900,000 asking price indicated in the Agreement had been predicated on the appraisal which detailed an aircraft which had been flown 1500 hours with no damage history and engines which had been flown 1100 hour. CP 68. All of the information which formed the basis for the appraisal was provided by GB Auctions prior to the meeting. CP 68. On

February 17, 2011, Mr. Frisbie, of PLI, met with Mr. Muelheim, Bob McConkey, and Greg Mahugh. CP 68. All parties carefully reviewed the Agreement and addressed all relevant clauses. CP 68. All parties had ample opportunity to discuss, modify, or contest any portion of the Agreement prior to executing the document. CP 68. The Agreement was executed by Mr. Frisbie and Mr. Mahugh. CP 69.

Prior to the meeting on February 17, 2011, all correspondence between GB Auctions and PLI occurred between Mr. Muelheim and Mr. Frisbie. CP 68. During the meeting on February 17, 2011, Mr. McConkey and Mr. Mahugh did not indicate in any manner that they were the only individuals with authority to make contractual commitments for GB Auctions. CP 69. Rather, Mr. McConkey stated that PLI should continue to receive direction through, and correspond with, Mr. Muelheim. CP 69.

In an email dated October 27, 2011, PLI referenced GB Auctions' direction to receive instruction through, and correspond with, Mr. Muelheim. CP 77-78. Mr. McConkey confirmed using Mr. Muelheim as his intermediary in his email dated November 30, 2011. CP 80. Furthermore, emails between Mr. Muelheim and third party entities, including Elliott Aviation, show Mr. Muelheim as the lead contact and acting on behalf of GB Auctions. CP 112-117.

Pursuant to the Agreement, GB Auctions was required to provide maintenance documents for the aircraft. CP 109. On August 29, 2011, in a written response to a maintenance documents request dated August 25, 2011, PLI received from Mr. Muelheim, on behalf of GB Auctions, an assertion that the delay had been due to a need to first speak with Mr. McConkey. CP 83. In the same email Mr. Muelheim indicated “the decision now is to pull the airplane from the market.” CP 83. In a November 30, 2011 email, Mr. McConkey admits directing Mr. Muelheim to “take it off the market.” CP 80. No updated maintenance documents were ever received. CP 70.

On the next day, August 30, 2011, PLI sent GB Auctions an email seeking to confirm the removal from the market. CP 92. PLI also asked if it was to follow through on inquiries previously made or was GB Auctions “closed to the prospect of a sale at this point?” CP 92. The written answer from GB Auctions referenced Mr. McConkey's “resolve” not to sell and further stated that Mr. McConkey was telling others that he “wasn't going to sell his King Air.” CP 91. In this email Mr. Muelheim offered a full paragraph on Mr. McConkey and his dissatisfaction with their inability to work out a partnership agreement to purchase a replacement aircraft as a reason for removing the aircraft from the market. CP 91.

Two weeks prior to instructing PLI to remove the aircraft from the market, in an email dated August 14, 2011 from GB Auctions to Elliott Aviation, Mr. Muelheim states “we are going to keep our C90B” and “boss wants to know the costs to do a G1000” [an avionics upgrade costing approximately \$325,000] “to our bird.” CP 87.

On September 20, 2011, in an effort to restart a dialog and perhaps get GB Auctions to resume the listing, PLI sent Mr. Muelheim an email noting that, due to other aircraft leaving the market, the aircraft was the “top choice.” CP 71, 95. PLI further pointed out that after adjusting the asking price for hours flown since February, using the same industry accepted methods as the appraisal in February, the aircraft was “well positioned.” CP 95. Mr. Muelheim, on behalf of GB Auctions, responded to PLI's September 20, 2011 email by quoting Mr. McConkey as saying “don't think we are interested in selling at this time at all.” CP 94.

On October 28, 2011, GB Auctions entered into a contract with Elliot Aviations for a complete avionics upgrade making a non refundable deposit payment of \$81,000. CP 72, 97-107. A complete avionics upgrade would only be conducted by GB Auctions if it had no intent to sell the aircraft. CP 72. Absent the early termination, the applicable third term of GB Auctions' Agreement with PLI was in effect until November 14, 2011. CP 72.

V. ARGUMENT

A. **Standard of Review.**

All issues of fact related to GB Auctions' Motion should be considered in the same fashion as issues of fact in summary judgment proceedings. *See*, Neb. Rev. Stat. § 25-21,157 (When a declaratory judgment proceeding involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending).

The appropriate standard of review of an order granting summary judgment is *de novo*, engaging in the same inquiry as the trial court. *Automotive United Trades Organization v. State*, 175 Wn.2d 537, 541, 286 P.3d 377 (2012). The facts, and all reasonable inferences drawn from the facts, are to be construed in the light most favorable to the nonmoving party. *Elcon Constr., Inc. v. Eastern Washington Univ.*, 174 Wn.2d 157, 164, 273 P.3d 965 (2012). A motion for summary judgment is proper only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The moving party has the burden of proving the absence of an issue of material fact. *Alhadeff v. Meridian on Bainbridge Island, LLC*, 167 Wn.2d 601, 611, 220 P.3d 1214 (2009). Summary judgment should only be granted if, even

after construing the evidence in the light most favorable to the nonmoving party, reasonable persons could reach but one conclusion. *Trimble v. Washington State University*, 140 Wn.2d 88, 93, 993 P.2d 259 (2000).

When there are no contested issues of material fact the appellate court may reverse a grant of summary judgment and enter judgment for the non moving party. RAP 12.2.

B. GB Auctions Terminated the Agreement Early, and, Pursuant to the Agreement Owes the Commission at Asking Price.

At its core, this contract dispute can be simplified to the single question of whether GB Auctions' removal of its aircraft from the market is early termination, when it occurred early in the third term of the Agreement. PLI contends that it is unquestionably early termination. How could a broker negotiate an offer with a potential purchaser when the item being purchased is not on the market?

It is undisputed that the Agreement unambiguously indicates "early termination of this agreement will trigger the sales commission due at asking price." See, CP 109. The trial court indicated, and counsel for GB Auctions agreed, that the Agreement was between "sophisticated businessmen" who are experienced when it comes to contracts. RP 5. The early termination clause of the Agreement forms the basis for PLI's demand for payment of a 3% commission on the asking price.

On August 25, 2011, PLI sent an email stating that interest in the aircraft was increasing and that PLI needed the current maintenance documents to establish airworthiness which had been requested on a previous occasion and were essential to PLI's attempts to procure a valid offer. CP 89. On August 29, 2011, in a written response to the maintenance documents requests, PLI received from Mr. Muelheim, on behalf of GB Auctions, an assertion that the delay had been due to a need to speak with Mr. McConkey first. CP 83. In the same email, Mr. Muelheim terminated the Agreement by stating **"the decision now is to pull the airplane from the market."** CP 83 (emphasis added).

In contrast to how GB Auctions' counsel portrayed the facts during oral argument, nowhere in the August 29, 2011 email, or any other emails during this time frame, is there any mention of a need to reduce the asking price for the aircraft. See, RP 7; CP 83, 89, 91-92. Rather, GB Auctions' August 29, 2011 email was in response to the August 25, 2011 email from PLI where PLI indicates that "the inquiries on N928K have increased dramatically. I believe we have moved to the front of the line (or very close)." CP 89.

PLI did mention a price adjustment due to additional miles flown on the aircraft a month later in a September 20, 2011 email attempt to bring GB Auctions' aircraft back to the market because the "aircraft

continued to receive inquiries." CP 95. PLI attempted to bring GB Auctions' aircraft back to the market so that it could complete its efforts and secure a valid offer, understanding that earning its commission by presenting a valid offer would be more beneficial to his client than enforcing the early termination clause of the Agreement. CP 71. It should be noted that the price adjustment requested was "not an adjustment to the baseline" indicating the adjustment was driven by GB Auctions' recent usage of the aircraft and not a market decline. CP 95. The response received from GB Auctions on September 20, 2011 was "don't think we are interested in selling at this time at all." CP 94. GB Auctions now contends that during this time whole timeframe the Agreement was still in force and no termination had yet occurred. RP 8, 24.

The connection between GB Auctions removal of the aircraft from the market and a request to lower the asking price was first contrived in Mr. McConkey's November 30, 2011 email, well after the disagreement between the parties materialized. See, CP 80. In that same email Mr. McConkey admits directing Mr. Muelheim to "**take it off the market,**" which Mr. Muelheim by email on August 29, 2011. See, CP 80 (emphasis added).

During oral argument counsel for GB Auctions vehemently argued that if Mr. Frisbee, the CEO of PLI, had been "a fair guy" who followed

the "covenant of good faith and fair dealing" he would have addressed the early termination immediately. RP 7. However, that is exactly what Mr. Frisbee did. On August 30, 2011, PLI sent GB Auctions an email seeking to confirm the removal from the market, "I understand that you want me to pull the aircraft now. Is that correct?" CP 92. The written answer from GB Auctions references Mr. McConkey's "resolve" not to sell and further states that Mr. McConkey was telling others that he "wasn't going to sell his King Air." See, CP 91. In this email, Mr. Muelheim offered a full paragraph on Mr. McConkey and his dissatisfaction with their inability to work out a partnership agreement to purchase a replacement aircraft as a reason for the termination of the Agreement. See, CP 91. It was unknown to PLI at this time that GB Auctions had indicated to a third party was before that it was not going to sell the aircraft. See, CP 87.

The above facts, evidenced by emails between the parties, detail GB Auctions' early termination of the Agreement. GB Auctions' early termination on August 29, 2011 makes Mr. Mahugh's letter dated October 20, 2011 cancelling the Agreement inapplicable; for the same reason, the trial court's granting of GB Auctions' Motion was improper. PLI respectfully requests the Court of Appeals to reverse the trial court's granting of Plaintiff's Motion and to direct judgment in favor of PLI, pursuant to RAP 12.2, as there are no material questions of fact that GB

Auctions' August 29, 2011 email was an early termination of the Agreement. In the alternative, PLI respectfully requests the Court of Appeals to vacate the trial court's granting of Plaintiff's Motion and to remand the case for further proceedings because, when construing all inferences from the above emails in PLI's favor multiple questions of fact exist as to whether the Agreement was properly cancelled by GB Auctions at the end of the term or whether an early termination occurred.

C. Mr. Muelheim had Authority to Terminate the Contract.

The trial court failed to indicate whether it considered the authority of Mr. Mulheim in determining "there was no premature cancellation of the contract." RP 25. However, the trial court did pose numerous questions to counsel for PLI during oral argument related to the authority of Mr. Mulheim. RP 14-16. For this reason, the authority of Mr. Mulheim will be shortly briefed below although GB Auctions failed to present any legal authority substantiating the assertion that Mr. Mulheim did not have the authority to act on behalf of GB Auctions.

i. Mr. Mulheim had actual or apparent authority to terminate the Agreement.

Nebraska law, like Washington, recognizes the agency relationship created through employment, and the authority (whether actual or apparent) of an employee to act on behalf of the employer:

Where a principal has, by his voluntary act, placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped as against such third person from denying the agent's authority.

Moore v. Puget Sound Plywood, 214 Neb. 14, 19, 332 N.W.2d 212, 216 (1983) cited on numerous occasions, including *Draemel v. Rufenacht, Bromagen & Hertz, Inc.*, 223 Neb. 645, 653, 392 N.W.2d 759, 764 (1986) and *Gibb v. Citicorp Mortg., Inc.*, 246 Neb. 355, 368, 518 N.W.2d 910, 920 (1994).

Even when an agent acts in direct contradiction to instruction received from a principle, the principle is bound:

If an act done by an agent is within the apparent scope of the authority with which he has been clothed, it does not matter that it is directly contrary to the instructions of the principal. The principal will, nevertheless, be liable unless the third person with whom the agent dealt knew that he was exceeding his authority or violating his instructions. Thus, if one appoints an agent to conduct a series of transactions over a period of time, it is fair that he should bear losses which are incurred when an agent although without authority to do so, does something which is usually done in connection with the transactions he is empowered to conduct.

3 Am.Jur.2d *Agency* § 273 at 776-77 (1986) cited in its entirety by *Draemel v. Rufenacht, Bromagen & Hertz, Inc.*, 223 Neb. 645, 653-54, 392 N.W.2d 759, 765 (1986).

Prior to the meeting on February 17, 2011, all correspondence between GB Auctions and PLI occurred between Mr. Muelheim and Mr.

Frisbie. CP 68. It is disputed whether Mr. McConkey stated that PLI should continue to receive direction through, and correspond with, Mr. Muelheim during the meeting on February 17, 2011, or whether he indicated that Mr. Mulheim had no authority. See, CP 68-69, 128-129.

Mr. McConkey himself confirms using Mr. Muelheim as his intermediary in his email dated November 30, 2011. CP 80. Furthermore, emails between Mr. Muelheim and third party entities, including Elliott Aviation, show Mr. Muelheim as the lead contact and acting on behalf of GB Auctions. See, CP 112-117.

Mr. Muelheim was integral to the relationship between GB Auctions and PLI, involved in every aspect of the Agreement. GB Auctions has failed to establish any evidence showing Mr. Mulheim's lack of actual authority to act on behalf of GB Auctions. However, even if Mr. Muelheim did not possess actual authority, there was unquestionably apparent authority. As shown above, GB Auctions continually portrayed Mr. Muelheim as the agent for the company. Only after a dispute arose did GB Auctions first reference any potential limited authority of Mr. Muelheim, in an attempt to avoid liability under the Agreement. For these reasons Mr. Muelheim's authority to terminate the Agreement should be established as a matter of law.

ii. Assuming Arguendo that Mr. Muelheim Did Not Have Actual or Apparent Authority to Terminate the Agreement, Mr. McConkey Terminated the Agreement Early Through Mr. Muelheim. .

In the August 29, 2011 email where Mr. Muelheim terminated the Agreement he also indicated that the delay in response had been due to a need to first speak with Mr. McConkey regarding the decision. CP 83. The next day Mr. Muelheim repeatedly references that the decision to remove the aircraft from the market was made by Mr. McConkey. See, CP 91. Furthermore, on September 20, 2011, when PLI attempted to restart a dialog with GB Auctions, Mr. Muelheim initially indicated "Bob [Mr. McConkey] is in a convention in Chicago for the week but I will see what he has to say" and then followed up the same day with "[s]orry but I got word back: 'don't think we are interested in selling at th[i]s time at all.'" See, CP 94. In both emails where Mr. Muelheim references the early termination of the Agreement he clearly is communicating Mr. McConkey's decision. This is confirmed by Mr. McConkey himself in his email dated November 30, 2011. See, CP 80.

The above facts show that Mr. McConkey made the decision to terminate the Agreement early and, on multiple occasions, directed Mr. Muelheim to communicate the early termination to PLI on behalf of GB Auctions.

D. The Trial Court Failed to Consider the Evidence in a Light Most Favorable to PLI.

In making its ruling, the trial court began by admitting "[i]t's real fact-determinative on a case like this." RP 25. The trial court also candidly stated "I could be wrong, I'm wrong a lot, but I get paid to be wrong about half the time." RP 25. Even after indicating that it is a fact determinative issue which it could be wrong about, the trial court held "[t]o me, it looks like there was no premature cancellation of the contract. I'm granting declaratory judgment in favor of GB Auctions." RP 25.

The trial court's holding failed to consider all evidence, and the inferences drawn therefrom, in a light most favorable to PLI, as was required in deciding GB Auction's Motion for Declaratory Judgment. Rather, the trial court decided GB Auction's Motion based on what it "looks like." See, RP 25. In contrast to the trial court's decision based on what it "looks like," the evidence clearly establishes that GB Auctions terminated the Agreement early, and, pursuant to the Agreement, owes the sales commission on the asking price. The trial court failed to consider all evidence, and the inferences drawn therefrom, in a light most favorable to PLI, as was required in its analysis. If the trial court had properly considered the evidence it should have found there are multiple questions

of fact which make the trial court's granting of GB Auction's Motion for Declaratory Judgment improper.

VI. CONCLUSION

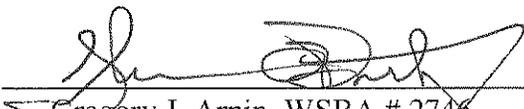
For the reasons presented herein, the trial court's Order Granting Plaintiff's Motion for Declaratory Judgment should be reversed on appeal and judgment should be directed in favor of PLI remanding the case to the trial court for determination of the amount of such judgment, or, alternatively, the matter should be remanded to the trial court for entry of an order denying the declaratory judgment motion.

VII. COSTS AND FEES ON APPEAL

Should the trial court's declaratory judgment decision be reversed on appeal, PLI respectfully requests an award of costs and statutory attorney fees to it as the prevailing party pursuant to RAP 14. Any further award of attorney fees is improper as neither the Uniform Declaratory Judgment Act nor Nebraska common law allows for attorney fees even if included in contractual provisions. SEE, CP 64-65.

RESPECTFULLY SUBMITTED this 14th day of October.

PAINE HAMBLÉN LLP

By: 

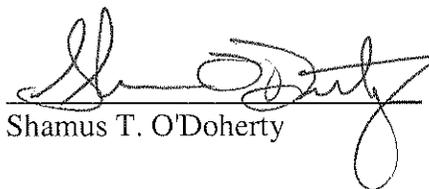
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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of October, 2013, I caused to be served a true and correct copy of the foregoing **APPELLANT'S BRIEF**, by the method indicated below and addressed to the following:

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