

NO. 35885-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JACK WALTER and VIVIAN WALTER, husband and wife

Respondents,

v.

ALICE A. BAUER,

Appellant.

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REPLY BRIEF OF APPELLANT ALICE A. BAUER

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I. INTRODUCTION

Apart from the deemed admissions, there is no evidence in the record suggesting that Alice Bauer was acting as her son Scott Bauer's undisclosed principal when he entered into a commercial lease with Jack and Vivian Walter (the "Walters"). Properly construed, the deemed admissions do not establish that Scott Bauer was his mother's agent, and the Declarations of Alice Bauer, Scott Bauer, and T. Gerald Chilton, Jr. directly dispute the Walters' claim. Even if the trial court did not abuse its discretion in making the deemed admissions, there was clearly a genuine issue of material fact regarding the existence of the agency relationship. Because Alice Bauer's alleged status as Scott Bauer's undisclosed principal is the only basis for summary judgment against her, and because there are genuine issues of fact about that status, this Court should reverse the trial court's grant of summary judgment and remand this matter for further proceedings.

II. ARGUMENT AND AUTHORITY

1. The trial court abused its discretion when it deemed certain matters to be admitted.

The Walters acknowledge that *Santos v. Dean*, 96 Wn. App. 849, 982 P.2d 632 (1999), "set[s] forth the general framework deciding the abuse of discretion question" pertaining to deemed admissions. *Opening Brief of Respondents Jack and Vivian Walter*, ("Respondents' Brief"), p 9. Under *Santos*,

[an] admission that otherwise would result from a failure to make timely answer should be avoided when to do so will aid in the presentation of the merits of the action and will not prejudice the party who made the request. Under this test, the court answers two questions: (1) whether permitting the extension subserves the presentation of the merits of the case; and (2) whether the extension will prejudice the opposing party

Santos, 96 Wn. App. at 857-58. However, the Walters claim that Alice Bauer's previous counsel failed to bring the relevant issues and arguments to the attention of the trial court, thereby rendering the *Santos* test moot. *Respondents' Brief*, pp. 9- 12.

Alice Bauer's previous counsel did submit a late response to the *Request for Admission* prior to the trial court's ruling on the Walters' *Motion to Compel*.¹ CP 186-189. Whether this late submission effectively constituted a motion for an extension of time is a question that should be resolved in the light of the law's strong preference for resolving matters on the merits. As discussed below in section 2, the deemed admissions were the sole basis for the court's subsequent judgment against Alice Bauer. Moreover, the trial court incorrectly interpreted the deemed admissions as conclusively establishing Alice Bauer's liability.² Given its

¹ In addition, Alice Bauer raised the issues bearing on the trial court's abuse of discretion in making the deemed admissions in the *Motion to Vacate Judgment* filed by her new counsel. CP 318-24.

² The Walters' attempt to dispute this point is self-defeating. They claim that Alice Bauer "could well have admitted the fact that she was registered as owner of the business and still raised issues of fact as to whether Scott Bauer was acting as her agent . . ." *Response Brief*, p. 11. However, both Alice and Scott Bauer did deny that Scott Bauer was acting as Alice Bauer's agent when he entered the lease. In her Declaration, Alice Bauer asserted that "I have had no involvement with Scott Bauer's operation of his business." CP 253, ¶ 5 (emphasis added). In his Declaration, Scott

interpretation of the deemed admissions as tantamount to unchallengeable proof of Alice Bauer's liability, the trial court abused its discretion by not granting the motion for an extension of time that was implied by the late submission of the response to the *Request for Admission*.

2. Even if the trial court properly deemed certain matters to be admitted, the admissions do not support summary judgment against Alice Bauer.

Unless Scott Bauer was in fact acting as Alice Bauer's agent when he dealt with the Walters, Alice Bauer can not have been liable for his actions as his undisclosed principle. See *Matsumura v. Eilert*, 74 Wn.2d 362, 363, 444 P.2d 806 (1968) (noting that "[b]efore the sins of an agent can be visited upon his principal, the agency must first be established").³

In this case, the existence of the alleged agency relationship cannot be established by any showing of apparent authority. The Walters have conceded that they did not know of Alice Bauer's existence until after they filed their Complaint. *Respondents' Brief*, p. 5. Under Washington law,

Bauer asserted that he "never suggested that my parents were involved in any way in the business they were not involved: I owned the business." CP 220, ¶ 4 (emphasis added). Thus, if the Walters' are correct that the court did not treat the admissions as conclusive of liability, then by their own argument the trial court erred in failing to find genuine issues of material fact based on the Declarations of Alice Bauer and Scott Bauer.

³ The Walters are thus confused when they assert that their claim against Alice Bauer arises from the fact that they did not know of her existence prior to the execution of the lease. *Respondents' Brief*, p. 8. Their claim against Alice Bauer can only arise out of her alleged role as Scott Bauer's principal, not out of the fact that she was unknown to them at the time the lease was executed.

“until [a] person learns facts from which he reasonably infers that the agent is authorized, there is no apparent authority.” *Smith v. Hansen, Hansen, & Johnson, Inc.*, 63 Wn. App. 355, 365, note 15, 818 P.2d 1127 (1991) (citing to *Restatement (Second) of Agency*, § 27, comment (b)). Accordingly, the only possible basis for the Walters’ claim against Alice Bauer is that she either actually controlled or had the right to actually control her son’s commercial decisions. *See, e.g., Chapman v. Black*, 49 Wn. App. 94, 98, 741 P.2d 998 (1987).

The Walters present no evidence that Alice Bauer actually controlled her son’s activities with regard to the lease. Instead, their argument for summary judgment rests exclusively on an attempt to show that Alice Bauer had the right to control her son’s activities by virtue of her purported ownership of an Arizona proprietorship doing business as the Wholesale Tool Outlet. The evidence for this right, in turn, derives exclusively from the Walters’ *Request for Admission*. CP 75-100; 266-68.

Although the Walters posed seven requests for admission, two of them bear all of the weight of their argument in support of summary judgment. Request for Admission No. 2 states in its entirety as follows:

You are requested to admit that Alice A. Bauer is shown by the records of the Arizona Secretary of State and registered with the Secretary of State to be the owner of the business known as Wholesale Tool Outlet.

CP 76. Request for Admission No. 5 in turn asserts:

You are request to admit that on July 1, 2004, Scott Bauer executed the Lease Agreement appended hereto as Exhibit “B” as an agent for Wholesale Tool Outlet.

CP 76.

The Walters claim that these two requests, once deemed admitted by the trial court, dictate Alice Bauer's liability. The Walters view the admissions as establishing two premises: 1) that Alice Bauer owned a sole proprietorship named the Wholesale Tool Outlet (from Request for Admission No. 2); and 2) that Scott Bauer was an agent of Wholesale Tool Outlet (from Request for Admission No. 5). Equipped with these premises, the Walters deduce the apparently necessary conclusion that Alice Bauer was Scott Bauer's principal, and is therefore liable for his actions in breaking the lease.

Despite its apparent logic, the Walters' argument fails because the premises in fact do not follow from the deemed admissions. First of all, the deemed admission to Request for Admission No. 2 is at most conclusive as to what is shown by the records of the Arizona Secretary of State. In other words, it at most establishes that Alice Bauer is shown by the records of the Arizona Secretary of State and is registered with the Arizona Secretary of State to be the owner of Wholesale Tool Outlet.⁴ The deemed admission does not establish that Alice Bauer is in fact the owner of Wholesale Tool Outlet.

⁴ The document attached by the Walters to their *Request for Admission* as Exhibit A in fact shows the results of a registered name search. CP 79-80. On its face, it shows that Alice Bauer owns the trade name Wholesale Tool Outlet in Arizona. It does not show that Alice Bauer owns a proprietorship doing business as Wholesale Tool Outlet in Arizona. The Walters have presented no argument that ownership of a trade name is the legal equivalent to ownership and operation of a proprietorship.

As pointed out in *Appellant's Opening Brief*, the Washington Supreme Court has emphasized the distinction between an admission that a statement was made and an admission that a statement was true. See *Salvino v. Aetna Life Ins. Co.*, 64 Wn.2d 795, 394 P.2d 366 (1964). The Walters make no attempt to discredit *Salvino*, and instead content themselves with asserting that Request for Admission No. 2 “was a request for [Alice Bauer] to admit that she was in fact registered as the owner.” *Respondents' Brief*, p. 13. However, under *Salvino* an admission that Alice Bauer is registered as the owner of Wholesale Tool Outlet is not the same thing as an admission that Alice Bauer is in fact the owner of Wholesale Tool Outlet. As in *Salvino*, there is at most an admission that a statement was made (contained and reflected in the records of the Arizona Secretary of State), but no admission that the statement is true.

Second, the Walters' *Request for Admission* fails to define the scope of the reference of the name “Wholesale Tool Outlet.” In addition, there is no individual request for admission asking Alice Bauer to admit that the Wholesale Tool Outlet she allegedly owns (purportedly an Arizona proprietorship) (Request for Admission No. 2) is the same as the Wholesale Tool Outlet for which Scott Bauer is allegedly an agent (operating in Washington) (Request for Admission No. 5). As a consequence, there is at most an inference that the two uses of the name “Wholesale Tool Outlet” refer to the same entity.

Because the premises of the Walters' argument do not follow from the deemed admissions, neither does their conclusion that Alice Bauer is

Scott Bauer's undisclosed principal. At most, the Walter's preferred conclusion is a tenuous inference from the deemed admissions, an inference that must be weighed against the countervailing evidence and reasonable inferences therefrom to determine if there is a genuine issue of fact concerning the agency relationship that prevents summary judgment. *See Salvino*, 64 Wn.2d at 797, and *Phillips v. Richmond*, 59 Wn.2d 571, 369 P.2d 299 (1962).

The countervailing evidence consists of the Declarations of Alice Bauer, Scott Bauer, and T. Gerald Chilton, Jr. In her Declaration, Alice Bauer asserts two critical facts. First, she asserts that although she and her husband were initially co-owners of a proprietorship doing business under the name "Wholesale Tool Outlet," they formed an LLC under the same name in 1999. "After its formation, all of our Wholesale Tool Outlet business activities were done through the limited liability company." CP 253, ¶ 3 (emphasis added). Alice Bauer "never operated the business separate from the limited liability company after we created it." CP 254, ¶ 8 (emphasis added). Seen in the light most favorable to Alice Bauer as the non-moving party, this evidence clearly supports the inference that by 2004 there was no Arizona proprietorship under the name of Wholesale Tool Outlet of which Alice Bauer was the owner.

Second, Alice Bauer asserts that the assets of Wholesale Tool Outlet, LLC were sold to Scott Bauer in 2002, and that she "had no involvement with Scott Bauer's operation of his business since the assets were sold to him." CP 253, ¶ 5 (emphasis added). Her total lack of

involvement in Scott Bauer's business is confirmed by the Declarations of both Scott Bauer and T. Gerald Chilton, Jr. Discussing his Washington operations under the name of Wholesale Tool Outlet, Scott Bauer asserts that "I never suggested that my parents were in any way involved in the business. I would not have done so because they were not involved. I owned the business." CP 220, ¶ 4 (emphasis added). T. Gerald Chilton, Jr. notes that "Mr. and Mrs. Bauer were not involved in the business previously conducted by the Wholesale Tool Outlet, LLC" after its assets were sold to Scott in 2002. CP. 241, ¶ 5 (emphasis added). This evidence directly refutes the claim that Alice Bauer controlled Scott Bauer's business or had the right to control his business after 2002. It was his business, not hers, and she was simply not involved in its affairs.

Viewing this evidence and the reasonable inferences therefrom in the light most favorable to Alice Bauer, one simply cannot conclude that Alice Bauer was Scott Bauer's undisclosed principal at the time he entered into the lease with the Walters. This is so even if the trial court did not abuse its discretion by making the deemed admissions.

3. Alice Bauer's request for attorneys' fees.

If this Court finds the trial court erred and reverses the grant of summary judgment in favor of the Walters, it may remand this matter for trial. However, Alice Bauer will have prevailed on this appeal, and will be entitled to her reasonable attorneys' fees and costs for this appeal pursuant to the terms of the contract between the parties. The standard form lease provides in pertinent part as follows:

If Tenant or Landlord engage the services of an attorney to collect monies due . . . the losing party shall pay the prevailing party a reasonable sum for attorneys' fees in such suit in mediation or arbitration, at trial, on appeal and in any bankruptcy proceedings.

CP 89, ¶ 26. By separately designating "trial" and "appeal" as events warranting an award of fees, the lease supports an award of fees to the party that prevails on appeal, even if the matter is remanded for further proceedings in the trial court.

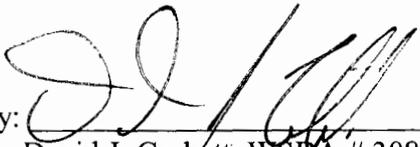
III. CONCLUSION

The trial court erred when it granted summary judgment against Alice Bauer and determined that she is liable for more than \$54,000 in damages incurred when her adult son breached a commercial lease. The only evidentiary basis for the ruling is provided by deemed admissions. For the reasons explained above and in *Appellant's Opening Brief*, the trial court abused its discretion when it deemed the matters admitted.

Even if it did not abuse its discretion, the trial court erred when it granted summary judgment to the Walters. The deemed admissions do not conclusively establish that an agency relationship existed between Alice Bauer and her son. The Declarations of Alice Bauer, Scott Bauer, and T. Gerald Chilton, Jr. directly deny the existence of any such relationship. Because there is a genuine issue of material fact concerning whether Alice Bauer was her son's undisclosed principal, this Court should reverse the trial court and remand the matter for further proceedings below.

RESPECTFULLY SUBMITTED this 13th day of June, 2007.

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DECLARATION OF
SERVICE

I hereby certify that on the 13th day of June, 2007, I caused all parties hereto to be served with the *Reply Brief of Appellant Alice A. Bauer* and this *Declaration of Service* by directing delivery to the following persons by the means stated:

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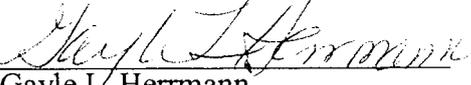
By ABC Legal Messenger for delivery on June 13, 2007, to:

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DECLARATION OF SERVICE - 1

I hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 13th day of June, 2007, at Tacoma, Washington.


Gayle L. Herrmann

DECLARATION OF SERVICE - 2