STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM R. ELDRIDGE and SERVICE CORPORATION OF SOUTHEASTERN MICHIGAN,

Plaintiffs-Appellants,

v

SIENA GROUP, LLC,

Defendant-Appellee.

UNPUBLISHED
July 10, 2003

No. 238489
Wayne Circuit Court
LC No. 00-009991-CZ

Before: Owens, P.J., and Bandstra and Murray, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). We affirm.

I. Facts and Procedural History

William R. Eldridge owned several cemeteries as the sole shareholder of Michigan Cemetery Management, Inc. As early as 1994 or 1995, a representative from Loewen Group International, Inc. ("Loewen") contacted Eldridge regarding the purchase of the cemeteries. Pursuant to MCL 339.1812, which precludes owners of funeral homes from also owning cemeteries, Loewen could not own the cemeteries because it owned several funeral homes in Michigan. Because Loewen was precluded from owning the cemeteries, Loewen immediately sold the cemetery properties to defendant on the same day it purchased the cemetery properties from Eldridge.

Pursuant to the sales agreement between Eldridge and Loewen, Loewen executed a promissory note in the amount of $4,600,000 to Eldridge, along with an employment agreement and a non-competition agreement. On October 25, 1997, payment became due on the promissory note, employment agreement, and the non-competition agreement; however, Loewen failed to make payments under the agreements. On December 4, 1997, Eldridge brought suit against Loewen for damages based on Loewen's failure to make the payments under the agreements. On February 3, 1998, Loewen and Eldridge entered into a settlement agreement regarding the payment terms of Loewen's remaining obligations. On June 1, 1999, Loewen defaulted on its payment obligations under the settlement agreement and filed for bankruptcy. Loewen did not identify plaintiffs as creditors in the bankruptcy proceedings. Subsequently,

plaintiffs brought suit against defendant and alleged that defendant was liable for Loewen's obligations under the promissory note, employment agreement, and non-competition agreement based on theories involving agency, joint venture, and equitable lien principles. Defendant brought a motion for summary disposition pursuant to MCR 2.116(C)(10) regarding each of plaintiffs' claims, which the trial court granted.

II. Standard of Review

We review de novo a trial court's grant of summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In reviewing motions brought pursuant to MCR 2.116(C)(10), we must determine whether any genuine issue of material fact exists that would deny judgment to the moving party as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). "We must 'consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the party opposing the motion, and grant the benefit of any reasonable doubt to the opposing party.'" *Id*. (citation omitted).

III. Analysis

A. Agency

Plaintiffs first argue that an "agency" relationship existed between defendant and Loewen, and that, based on this "agency" relationship, defendant was liable for the remaining balances of the promissory note, employment agreement, and non-competition agreement entered into between Loewen and Eldridge. We disagree.

To prove that an agency relationship existed, a plaintiff is required to show that the alleged principal had the right to control the actions of the agent. *Meretta v Peach*, 195 Mich App 695, 697; 491 NW2d 278 (1992). "The authority of an agent to bind the principal may be either actual or apparent." *Id*. at 698. Plaintiffs presented no evidence that an actual agency relationship existed between defendant and Loewen, and do not rely on this theory.

Instead, plaintiffs argue that a defendant may be liable as a principal on a contract purporting to be that of an agent even if the principal's name does not appear on the face of the contract. Specifically, plaintiffs argue that Loewen had the apparent authority to act as defendant's agent. Apparent authority arises where the acts and appearances lead a third person to reasonably believe that an agency relationship exists. *Alar v Mercy Memorial Hosp*, 208 Mich App 518, 528; 529 NW2d 318 (1995). Apparent authority must be traceable to the principal and cannot be established only by the acts and conduct of the agent. *Id*.

We find that plaintiffs failed to present any evidence traceable to defendant that Loewen had the apparent authority to act as defendant's agent. In support of their theory that Loewen had the apparent authority to act on defendant's behalf, plaintiffs have improperly categorized the connection between plaintiffs and defendant as having arisen from a single transaction, whereby Loewen allegedly acted as defendant's agent. Such argument ignores the fact that two separate transactions were entered into, on the same day, in order to effectuate the change in control of the cemetery properties from Eldridge to defendant.

On October 25, 1996, Eldridge sold the stocks and assets of Michigan Cemetery Management to a subsidiary of Loewen, MCM Acquisitions, Inc. Following the transfer from Eldridge to MCM Acquisitions, MCM Acquisitions immediately sold the assets of Michigan Cemetery Management to defendant. It was evident to all parties that the multiple transactions were necessary to complete the sale between Eldridge and Loewen, in that MCL 339.1812 prohibited Loewen from owning and operating the cemetery properties. Further, there was evidence that the state of Michigan had input into the structure of the sales, which had been incorporated by Loewen. Although plaintiffs point to a letter sent by the Department of Commerce to Loewen in support of their proposition that Loewen had violated MCL 339.1812, and was necessarily acting as defendant's agent, the letter makes no indication of such a violation. Plaintiffs also point to the non-competition agreement, and argue that only defendant could benefit from such an agreement. This argument ignores that fact that the sales agreement entered into between defendant and Loewen contained a provision regarding the assets defendant would acquire, which included the benefit of all contracts relating to the cemetery businesses, which certainly provided Loewen with some benefit in its negotiations regarding the purchase of the cemetery properties to Sienna. Accordingly, plaintiffs' reliance on the fact that Loewen could not own or operate cemeteries while maintaining its funeral home license pursuant to MCL 339.1812 is misplaced.

B. Joint Venture

Next, plaintiffs argue that they presented a genuine issue of material fact regarding their claim that a joint venture existed between defendant and Loewen. We disagree.

Generally, where a joint venture exists, a co-venturer is liable for the acts of the other co-venturer if the acts are reasonably necessary to carry out the joint venture. *Reed & Noyce, Inc v Municipal Contractors, Inc,* 106 Mich App 113, 119; 308 NW2d 445 (1981). To prove that a joint venture existed, a plaintiff must show "(a) an agreement indicating an intention to undertake a joint venture; (b) a joint undertaking of; (c) a single project for profit; (d) a sharing of profits as well as losses; (e) contribution of skills or property by the parties; (f) community interest and control over the subject matter of the enterprise." *Berger v Mead,* 127 Mich App 209, 214-215; 338 NW2d 919 (1983), citing *Meyers v Robb,* 82 Mich App 549, 557; 267 NW2d 450 (1978). Whether a joint venture exists is a question of law for the trial court to decide. *Berger*, *supra* at 214.

Plaintiffs argue that there was sufficient evidence presented regarding their claim of joint venture to defeat defendant's motion for summary disposition. Plaintiffs contend that the initial agreement, the asset purchase agreement, and the sales agreement entered into by defendant and Loewen evidence defendant's intent to create a joint undertaking for the pursuit of a single project for profit with Loewen. While this evidence may provide some support with respect to the first three elements necessary to establish a joint venture, we find it significant that the sales agreement entered into between defendant and Loewen expressly provided that Loewen was providing services as an independent contractor and expressly denied the existence of a joint venture or partnership between defendant and Loewen. Thus, the very document upon which plaintiffs have relied, in part, provides no support for plaintiffs' claim that a joint venture existed and expressly rejects such a relationship. We also find plaintiffs' suggestion that the sales agreement demonstrated that defendant and Loewen shared profits and losses tenuous. While the sales agreement indicated a method for apportioning losses through the indemnification clause,

there was no specific mention of profit sharing between defendant and Loewen. Thus, we find that plaintiffs failed to present sufficient evidence regarding each of the elements necessary to prove that a joint venture existed. Accordingly, we conclude that the trial court properly granted summary disposition in favor of defendant regarding plaintiffs' joint venture claim.

C. Equitable Lien

Finally, plaintiffs argue that a genuine issue of material fact existed regarding their claim that they were entitled to an equitable lien on the cemetery properties. We disagree.

An equitable lien is defined as "[a] right, enforceable only in equity, to have a demand satisfied from . . . specific property." Black's Law Dictionary (6th ed). This right exists independently of an express agreement. Generally a court of equity will impose an implied lien for the unpaid purchase price of land where the vendor has conveyed legal title. *Paternoster v Van Meaghen*, 298 Mich 274, 277; 299 NW 80 (1941).

In the instant case, Loewen made a promissory note solely to Eldridge, in his individual capacity, in the amount of $4,600,000. Although the promissory note did not indicate on its face the consideration for the note, it is evident that the promissory note was made with regard to Eldridge's stock rather than the cemetery properties. Loewen and Eldridge, in his individual capacity, mutually agreed to the sale of Eldridge's stock in the amount of ten million dollars. Contrarily, Loewen and Eldridge, in his capacity as the president of Michigan Cemetery Management, mutually agreed to the sale of Michigan Cemetery Management's assets in the amount of $6,444,885. As indicated on the face of the promissory note, Loewen made the promissory note to Eldridge in his individual capacity. There was no mention of Michigan Cemetery Management in the promissory note, nor was there any other evidence to support plaintiffs' allegation that the promissory note was made with respect to the entire transaction or that the promissory note was made solely for the sale of the cemetery properties. Accordingly, because the promissory note was not made with respect to the cemetery properties, no equitable lien would have arisen; thus, the trial court properly granted defendant's motion for summary disposition with respect to plaintiffs' equitable lien claim.

Affirmed.

/s/ Donald S. Owens
/s/ Richard A. Bandstra
/s/ Christopher M. Murray