STATE OF MICHIGAN

COURT OF APPEALS

ALAN J. WIENHOLD,

Plaintiff/Counter-Defendant-Appellee,

v

MARK PEARSALL,

Defendant,

and

NATIONWIDE MEDIA DISTRIBUTORS, INC.,

Defendant/Counter-Plaintiff-Appellant,

and

GEORGE DEUTSCH,

Defendant-Appellant.

UNPUBLISHED
June 25, 2013

No. 303635
Washtenaw Circuit Court
LC No. 07-000930-CZ

Before: MURRAY, P.J., and MARKEY and WHITBECK, JJ.

PER CURIAM.

This is an action on a promissory note signed by defendant Mark Pearsall. Defendants Nationwide Media Distributors, Inc. (Nationwide) and George Deutsch (Deutsch) appeal by right a judgment entered against them for $294,903.23 that included damages of $126,798.28 and attorney fees and costs of $168,104.95. Defendants also appeal the trial court's order denying Deutsch's motion for summary disposition on the basis of lack of personal jurisdiction. We affirm the trial court's denial of Deutsch's motion regarding jurisdiction and its grant of summary disposition to plaintiff as to Nationwide. We conclude, however, that the trial court erred by finding Deutsch personally liable on the promissory note under the theory of partnership

by estoppel. Consequently, we vacate the judgment as to defendant George Deutsch but affirm the judgment as to defendants Pearsall[1] and Nationwide.

I. LIMITED PERSONAL JURISDICTION OVER DEUTSCH

Defendants first argue that as a New York resident, Deutsch's contacts with Michigan were insufficient under the Due Process Clause for the trial court to exercise limited personal jurisdiction over him under Michigan's long-arm statute, MCL 600.705. We disagree. We review de novo both the trial court's decision on a motion for summary disposition and the legal question whether a court possesses personal jurisdiction over a party. *Yoost v Caspari*, 295 Mich App 209, 219; 813 NW2d 783 (2012).

We conclude that the trial court did not err by ruling that it had acquired limited personal jurisdiction over Deutsch under Michigan's long-arm statute, MCL 600.705. Deutsch does not specifically challenge the application of the statute, but only challenges that he had sufficient minimum contacts with Michigan so that this state's exercise of jurisdiction "is consistent with the notions of fair play and substantial justice required by the Due Process Clause of the Fourteenth Amendment." See *Yoost*, 295 Mich App at 219. We find that Deutsch's own activities of initiating business in Michigan by sending Pearsall to solicit business in this state, making Pearsall the vice-president of a business entity he created, Nationwide, and personally vouching for Pearsall for the purpose of obtaining business in Michigan, were sufficient minimum contacts so that Deutsch should have reasonably anticipated being haled into a Michigan Court over claims arising out of Pearsall and Nationwide's business activities in Michigan. See *Witbeck v Bill Cody's Ranch Inn*, 428 Mich 659, 667; 411 NW2d 439 (1987), and *W H Froh, Inc v Domanski*, 252 Mich App 220, 230; 651 NW2d 470 (2002).

Although plaintiff bears the burden of establishing jurisdiction over a defendant, only a prima facie showing of jurisdiction is necessary to defeat a motion for summary disposition. *Yoost*, 295 Mich App at 221. Where the parties present conflicting evidence to support or oppose the motion for summary disposition on the basis of lack of personal jurisdiction, "'all factual disputes are resolved in the plaintiff's favor, and the plaintiff's prima facie showing is sufficient notwithstanding the contrary presentation by the moving party.'" *Id*. at 222, quoting *Williams v Bowman Livestock Equip Co*, 927 F2d 1128, 1131 (CA 10, 1991), quoting *Behagen Amateur Basketball Ass'n*, 744 F2d 731, 733 (CA 10, 1984).

Determining whether a Michigan court has properly exercised personal jurisdiction over an out-of-state resident requires a two-step analysis. *Yoost*, 295 Mich App at 222. First, it must be ascertained whether jurisdiction is authorized by Michigan's long-arm statute. *Id*. Defendant Deutsch does not specially challenge this first requirement. Second, the exercise of jurisdiction over the out-of-state resident must be consistent with the requirements of the Due Process Clause of the Fourteenth Amendment. *Id*. "Both prongs of this analysis must be satisfied for a Michigan court to properly exercise limited personal jurisdiction over a nonresident." *Id*.

[1] Defendant Pearsall was defaulted and is not a party to this appeal. He filed for bankruptcy and is apparently uncollectable.

A Michigan court may exercise personal jurisdiction over a nonresident consistent with Due Process Clause of the Fourteenth Amendment when the nonresident's relationship with this state is such that it is fair to require the nonresident to appear before the court. *Jeffrey v Rapid American Corp*, 448 Mich 178, 185; 529 NW2d 644 (1995), citing *Int'l Shoe* v *Washington*, 326 US 310, 319; 66 S Ct 154; 90 L Ed 95 (1945). The test for determining "fairness" is whether the nonresident has sufficient "minimum contacts" with the forum state so that maintaining the lawsuit does not offend "'traditional notions of fair play and substantial justice.'" *Jeffrey*, 448 Mich at 185-186, quoting *Int'l Shoe*, 326 US at 316. Whether a putative nonresident defendant has sufficient "minimum contacts" to satisfy the "fair play and substantial justice" standard is in turn determined by employing a three-part test:

> "First, the defendant must have purposefully availed himself of the privilege of conducting activities in Michigan, thus invoking the benefits and protections of this state's laws. Second, the cause of action must arise from the defendant's activities in the state. Third, the defendant's activities must be substantially connected with Michigan to make the exercise of jurisdiction over the defendant reasonable." [*Froh*, 252 Mich App at 227-228, quoting *Mozdy v Lopez*, 197 Mich App 356, 359; 494 NW2d 866 (1992).]

Because the primary focus of whether the exercise of personal jurisdiction satisfies due process is on "fairness" and "reasonableness," the merits of each case depend on its own facts. *Jeffrey*, 448 Mich at 186; *Froh*, 252 Mich App at 228.

Viewing the evidence in the light most favorable to plaintiff, we conclude defendant Deutsch has sufficient "minimum contacts" with Michigan so that the exercise of limited personal jurisdiction satisfies the due process "fairness" and "reasonableness" tests. Deutsch created a company, Nationwide, to engage in the business of obtaining purchase orders from Michigan businesses that supply products to automobile parts manufacturers, to manufacture those products in China, to import the products, and to distribute them in the state of Michigan. Deutsch hired, retained, or partnered with Pearsall for the purpose of soliciting this Michigan business. Also, to facilitate Nationwide's and Pearsall's business efforts in Michigan, Deutsch appointed or permitted Pearsall to use the title vice-president of Nationwide. Indeed, Deutsch's personal assistant or daughter designed and provided Pearsall with the business cards to assist Pearsall's sales efforts in Michigan. Deutsch also personally sent a letter to an officer of the Sandy Corporation, a Michigan automobile parts supplier, to support Pearsall's effort to obtain a purchase order from Sandy for Nationwide. These efforts led to Nationwide obtaining a purchase order from the Sandy Corporation to import to Michigan a quantity of owner's manual pouches. From these activities, we conclude Deutsch "purposefully availed himself of the privilege of conducting activities in Michigan, thus invoking the benefits and protections of this state's laws." See *Froh*, 252 Mich App at 227; see also *Mozdy*, 197 Mich App at 359.

Deutsch misplaces reliance on *Rush v Savchuk*, 444 US 320; 100 S Ct 571; 62 L Ed 2d 516 (1980), to argue that his putative partnership with Pearsall and Nationwide's activities are insufficient to establish that Deutsch himself had sufficient minimum contacts with Michigan to satisfy due process. In *Rush*, the Supreme Court held that the forum state could not acquire jurisdiction over a nonresident where the nonresident's only contact with the forum was that the nonresident's liability insurance company did business in the state. The Court reasoned that

"[t]he contractual arrangements between the defendant and the insurer pertain only to the conduct, not the substance, of the litigation, and accordingly do not affect the court's jurisdiction unless they demonstrate ties between the defendant and the forum." *Id*. at 329. The Court held that jurisdiction over the defendant could not be based solely on the activities of the insurer in the forum state, but rather the "minimum contacts" necessary to satisfy due process "must be met as to each defendant over whom a state court exercises jurisdiction." *Id*. at 332. Thus, "'[j]urisdiction is proper . . . where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum state.'" *Witbeck*, 428 Mich at 668, quoting *Burger King Corp v Rudzewicz*, 471 US 462, 475; 105 S Ct 2174; 85 L Ed 2d 528 (1985) (emphasis in original). Here, however, the evidence viewed in the light most favorable to plaintiff demonstrates that Deutsch personally had a substantial connection with Nationwide's and Pearsall's conduct of business in Michigan.

Second, this litigation arises out of Deutsch's business activities in this state, which were aimed at procuring purchase orders from Michigan automobile parts suppliers and importing products into Michigan. Deutsch was personally involved with soliciting a purchase order from the Sandy Corporation. When viewed in the light most favorable to plaintiff, the facts indicate that the money plaintiff loaned to Pearsall and Nationwide was for the purpose of Nationwide's fulfilling the Sandy purchase order and was also secured by the purchase order's subject matter, product imported into Michigan. Consequently, although Deutsch was not aware of or did not participate in negotiating the loan from plaintiff and did not sign the notes at issue, he was directly involved in the underlying subject matter out of which the notes arose—the Sandy purchase order to import products to Michigan. Therefore, viewing the evidence in the light most favorable to plaintiff, we conclude the second prong of the due process "minimum contacts" test is satisfied. See *Jeffrey*, 448 Mich at 200 ("The second prong is easily disposed of because the cause of action . . . directly relates to [the predecessor company's] alleged distribution of . . . products in Michigan.").

For the reasons discussed regarding the first two prongs, we also conclude that the third prong of the "minimum contacts" test is satisfied because Deutsch's activities are "substantially connected with Michigan to make the exercise of jurisdiction over [Deutsch] reasonable." See *Froh*, 252 Mich App at 228; see also *Mozdy*, 197 Mich App at 359. Deutsch purposefully directed activities at Michigan in an effort to obtain a purchase order that would entail the manufacture of products in China and importation and distribution of those products in Michigan. The promissory notes at issue, viewed in the light most favorable to plaintiff, were to obtain money to facilitate the importation of products into Michigan. The notes were signed in Michigan and secured by collateral stored here. Deutsch should have anticipated that if litigation arose out of this Michigan business activity, he might be summoned to court in this state. See *Witbeck*, 428 Mich at 667. Given that nearly all activity relevant to this case occurred in Michigan and weighed against the purported inconvenience to Deutsch and other factors, Michigan's exercise of personal jurisdiction over Deutsch comports with traditional notions of fair play and substantial justice. See *Id*. at 666, 669; see also *Jeffrey*, 448 Mich at 185-186; see also *Int'l Shoe Co*, 326 US at 316.

For these reasons, we affirm the trial court's denial of Deutsch's motion for summary disposition under MCR 2.116(C)(1) because the trial court correctly ruled that it had acquired limited personal jurisdiction over Deutsch.

II. DID ADEQUATE CONSIDERATION SUPPORT THE "SECOND" NOTE

There were several notes in this case. An "original" four-month note for $105,000 plus interest dated September 7, 2006, signed by Pearsall in both his individual capacity and as vice-president of Nationwide. There also was a "first" note dated September 8, 2006, which consisted of an exchange of emails signed by both Pearsall as vice-president and plaintiff that included both the $105,000 that Pearsall and Nationwide borrowed in the "original" note, plus an assumption of liability for an earlier note executed by Pearsall's sister, Kimberly Pearsall, and her boyfriend, David Hughes. Both the "original" and "first" notes were due at the end of January 2007 but were not paid by that date. After default, plaintiff obtained Pearsall's signatures both in his individual capacity and for Nationwide as its vice-president on a "second" note for $105,000 plus accrued interest. All three notes were secured by product described in a purchase order from the Sandy Corporation to Nationwide. There is no dispute that no new money was advanced for the second note and that it replaced the original and first notes.

Defendants argue that the trial court erred by finding that the second note, on which plaintiff sued, was supported by adequate consideration. Specifically, defendants argue that no consideration flowed to Nationwide, but rather, all the money that plaintiff loaned went to Pearsall's personal bank account. Defendants assert that the drawer or maker of a note has a defense if it is issued without consideration. See MCL 440.3303(2). Defendants further argue that the trial court erred when, in granting plaintiff summary disposition, it ignored this issue by finding as a fact that "[r]ecords indicate that at least $23,000 [sic] of the total amount loaned was deposited directly into Nationwide's bank accounts." We conclude that, although the trial court erred in its determination of the amount of money that plaintiff loaned which found its way to Nationwide's bank account, it did not err by impliedly finding that the second note was adequately supported by consideration.

We review de novo the trial court's decision regarding a motion for summary disposition under MCR 2.116(C)(10), which tests the factual support for a claim. *Karbel v Comerica Bank*, 247 Mich App 90, 95-96; 635 NW2d 69 (2001). The moving party must specifically identify and support with evidence the issues as to which it believes there is no genuine issue of material fact and that entitle it to judgment as a matter of law. MCR 2.116(10), (G)(4); *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). After the moving party properly supports its motion, the opposing party then has the burden of establishing that a genuine issue of a material disputed fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The nonmoving party must present specific evidence, the content of which would be admissible at trial, establishing a genuine issue of disputed material fact. MCR 2.116(G)(4), (6); *Maiden v Rozwood*, 461 Mich 109, 121, 123 n 5; 597 NW2d 817 (1999). The trial court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Id*. at 120. Where the documentary evidence fails to establish a genuine issue of a material disputed fact, and the moving party is entitled to judgment as a matter of law, summary disposition is appropriate. *Id*. In rendering its decision on a motion for summary disposition, a trial court may not make findings of fact or weigh the credibility of witnesses. *Amerisure Ins Co v Plumb*, 282 Mich App 417, 431; 766 NW2d 878 (2009).

We conclude that defendants' argument on this issue is without merit and provides no basis for reversing the trial court. The original or first note that Pearsall signed on behalf of himself and as vice-president of Nationwide was clearly supported by consideration: $105,000 wired to Pearsall's bank account. Moreover, undisputed evidence—Pearsall's testimony and bank records—establish that at least $23,000 of the $105,000 was deposited to Nationwide's bank account. There was also consideration supporting the second note taken for payment of the first defaulted note. See *Ann Arbor Constr Co v Glime Constr Co*, 369 Mich 669, 674; 120 NW2d 747 (1963) ("[A] note given in payment of a pre-existing debt is supported by a valuable consideration."); see also MCL 440.3303(1)(c) ("An instrument is issued or transferred for value if" it "is issued or transferred as payment of, or as security for, an antecedent claim against any person[.]"). Last, there is no genuine issue of material fact as to whether consideration moved to Nationwide. This issue does not warrant reversal of the trial court.

Defendants misplace reliance on *Scottsbluff Nat Bank v Blue J Feeds, Inc*, 156 Neb 65, 71-78; 54 NW2d 392 (1952), which held that where a vice-president of a company was not authorized to sign a note on behalf of the company and none of the proceeds of the loan went to it, the note as to the company failed for lack of consideration. First, this out-of-state authority is not binding precedent in Michigan, although we may find its reasoning persuasive. *Great Lakes Society v Georgetown Charter Twp*, 281 Mich App 396, 414; 761 NW2d 371 (2008). Even if *Scottsbluff* were persuasive, it is factually distinguished from the undisputed facts of this case.

Although the trial court was not correct as to the amount, it correctly ruled that the undisputed evidence showed that a significant portion of the $105,000 originally wired to Pearsall was "deposited directly to Nationwide's bank accounts." Pearsall testified that from the money plaintiff wired to his account he obtained a bank money order payable to Nationwide and deposited it into Nationwide's bank account. Bank records establish that Pearsall obtained a cashier's check payable to Nationwide for $25,300 on September 11, 2006, the same day that plaintiff wired him the $105,000. Other bank records show that a check for $25,300, plus $1700 in cash, for a total of $27,000, was deposited to Nationwide's bank account on September 12, 2006.

Contrary to defendants' contention that a disputed issue of material fact exists whether Nationwide received any of the $105,000, defendant points to no admissible evidence to create such a disputed fact issue. MCR 2.116(G)(6) provides regarding motions for summary disposition that "[a]ffidavits, depositions, admissions, and documentary evidence offered in support of or in opposition to a motion based on subrule (C)(1)-(7) or (10) shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion." Thus, with respect to documentary or other evidence to create a genuine issue of a material fact, "the substance or content of the supporting proofs must be admissible in evidence." *Maiden*, 461 Mich at 119; see also MCR 2.116(G)(6).

Defendants point to only two evidentiary items to raise a fact dispute on this issue. First, defendants cite Deutsch's affidavit which reads in part: "Nationwide did not receive any of the monies that are the subject of the Note attached to the Complaint, nor did Nationwide receive any benefit therefrom." The problem with this statement is that it relates to the note attached to plaintiff's complaint, which is the second note executed after the first note was in default. It is undisputed that no new money was advanced regarding the second note. Consequently, Deutsch

could truthfully aver that no benefit accrued to Nationwide from the second note attached to plaintiff's complaint. But this averment does not contradict the clear evidence of Pearsall's testimony or the bank records that show both the drawing of a cashier's check payable to Nationwide and its deposit to Nationwide's account.

Second, defendants rely on a report the Pittsfield police department prepared after it obtained a search warrant for and examined Pearsall's bank account records. The report concluded regarding the $105,000 plaintiff wired to the account on September 11, 2006, that "[n]o outgoing checks or wire transfers were issued to Nationwide Media Distributers." But this police report is hearsay on hearsay. While bank records likely would be admissible evidence of regularly conducted activity, MRE 803(6), the police department's report regarding an officer's conclusion based upon an examination of the records is not admissible. MRE 802; MRE 805. "By presenting inadmissible hearsay evidence, a nonmoving party is actually promising to create an issue for trial where the promise is incapable of being fulfilled." *Maiden*, 461 Mich at 123 n 5. The other drawback regarding the police report is that the cashier's check payable to Nationwide would likely not be reflected in the records the police reviewed. Indeed, the report discloses that Pearsall transferred $50,000 of the $105,000 to his savings account on September 11, 2006, from which the funds for the cashier's check could have been withdrawn. Consequently, the police report does not contradict Pearsall's testimony or the actual bank records regarding the cashier's check and deposit to Nationwide's account.

Additionally, it is not clear that the rule of *Scottsbluff* is applicable in Michigan. Plaintiff cites *Behrens v Apessos*, 39 Mich App 426, 429; 197 NW2d 886 (1972), which holds that whether "consideration moves from or to a third party is immaterial." Also, in *Ann Arbor Constr Co*, 369 Mich at 675, the Court held that "[i]n an action against accommodation endorsers on a note, it is not necessary to show any consideration moving to them." The Uniform Commercial Code (UCC) also appears to adopt the rule that consideration moving to one maker of a note is sufficient. MCL 440.3303(2), on which defendants rely, provides in part that "[i]f an instrument is issued for value as stated in subsection (1), the instrument is also issued for consideration." Subsection (1), pertinent to this case, provides: "An instrument is issued or transferred for value if any of the following apply: . . . (c) The instrument is issued or transferred as payment of, or as security for, an antecedent claim against *any person*, whether or not the claim is due." (Emphasis added.) This language suggests that a note issued in payment of a claim as to at least one person (Pearsall) is supported by adequate consideration.

Finally, we find that defendants' argument on this issue conflates the issue of consideration necessary to sustain a contract with the issue of whether Pearsall had actual or apparent authority to bind Nationwide to the notes he signed on its behalf.

For all of these reasons, we conclude that defendants' argument that the notes in question lacked consideration does not warrant reversal of the trial court's judgment.

III. APPARENT AUTHORITY OF PEARSALL

A principal is not bound where its agent lacks authority and the person dealing with the agent knows or should know that the agent lacks authority. Here, defendants assert that Pearsall lacked actual authority to bind Nationwide and argue that Pearsall also lacked apparent authority

to borrow money on behalf of Nationwide because under Michigan law, apparent authority cannot be established solely by the acts and conduct of the agent. *Cutler v Grinnell Bros*, 325 Mich 370, 376; 38 NW2d 893 (1949). Defendants contend that plaintiff's reliance on Pearsall's title of vice president of Nationwide to presume Pearsall was authorized to enter into a business relationship on behalf of Nationwide was unreasonable and that a "red flag" was raised when Pearsall asked that money be wired to his personal bank account.

Defendants correctly observe that there is no dispute that Pearsall lacked actual authority to borrow money on behalf of Nationwide because both Pearsall and Deutsch testified that he did not. Therefore, the only issue is whether Pearsall had apparent authority to bind Nationwide on the notes he signed as its vice-president. Although a close question, we conclude that the trial court did not err when it ruled that reasonable minds could not differ in finding that Pearsall had apparent authority to borrow money for Nationwide in connection with the Sandy Corporation purchase order. See *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003) ("A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.").

Regarding Pearsall's authority, the trial court ruled:

> In this case, there is no doubt that Pearsall had the apparent and/or implied authority to transact business on behalf of Nationwide. On Pearsall's authority, Nationwide entered into purchase orders over $1 million worth of product. Plaintiff was taken to a warehouse where Pearsall stated Nationwide conducted business. Pearsall had a business card that stated he was vice-president of Nationwide. Pearsall described his relationship with Deutsch as "partners" to Plaintiff, and Deutsch described his relationship with Pearsall as "partners." The evidence shows that Deutsch represented that Pearsall was a partner or vice president to others as well. There is no genuine question of fact as to whether Pearsall had apparent or implied authority to act on behalf of Nationwide in connection with this loan.

The undisputed evidence and Michigan caselaw support the trial court's ruling. Although the exact dollar value of the contracts Pearsall obtained for Nationwide is unclear, it is undisputed Pearsall had the authority to enter into contracts on Nationwide's behalf requiring the foreign manufacture, importation, warehousing and delivery of millions of automobile parts to US manufacturers. Plaintiff's loan to Pearsall and Nationwide was allegedly for the purpose of completing one such contract, the purchase order with the Sandy Corporation. Pearsall was able to show plaintiff the Sandy purchase order he obtained, the warehouse where the product would be stored, and business cards identifying him as a vice-president of the corporate entity Nationwide. It is reasonable to conclude that an officer of a company authorized to enter into such substantial contracts would also be authorized to borrow money to fulfill them. "'Persons dealing with an agent have the right to act upon the presumption that he is authorized to do and perform all things within the usual scope of his principal's business.'" *Central Wholesale Co v Sefa*, 351 Mich 17, 27; 87 NW2d 94 (1957) (citation omitted).

On the other hand, as defendants argue, "apparent authority cannot be established solely by the acts and conduct of the agent." *Cutler*, 325 Mich at 376. Stated otherwise, "[a]pparent

authority must be traceable to the principal and cannot be established by the acts and conduct of the agent." *Meretta v Peach*, 195 Mich App 695, 699, 271-272; 491 NW2d 278 (1992). But this limitation on the doctrine of apparent authority does not prevent its application here. Nationwide CEO George Deutsch appointed or permitted Pearsall to use the title vice-president of Nationwide. And CEO Deutsch emailed a letter to an official of the Sandy Corporation, sending a copy to Pearsall, to support Pearsall's efforts to secure business for Nationwide.[2]

After being shown Deutsch's letter, the vice-president business cards, the Sandy purchase order, and the warehouse under the control of Pearsall acting for Nationwide, a reasonable person would conclude that Pearsall, as Nationwide's vice-president was authorized to bind Nationwide to contracts necessary to carrying out the Sandy purchase order. Pearsall's apparent authority to act for Nationwide on all matters related to the Sandy purchase order was created by more than Pearsall's actions. Nationwide, acting through its CEO, George Deutsch, also helped create and perpetuate the impression that Pearsall had the authority to act on its behalf in this scenario.

Defendants also argue that plaintiff was negligent for failing to inquire further regarding Pearsall's authority and was presented a "red flag" when he was asked to wire money to Pearsall's personal bank account. This argument does not diminish the facts and circumstances discussed already that establish Pearsall's apparent authority to act for Nationwide.

Similarly, the present case is distinguishable from *Cutler*, 325 Mich at 378, where a local store general manager did not have authority to bind the company, a chain of retail stores, on matters outside the normal course of buying and selling merchandise at the store. Here, Pearsall had actual authority to enter into significant multi-national contracts for the production, importation, warehousing, and distribution of millions of automobile parts. He also had actual authority to enter into a purchase order contract with the Sandy Corporation involving such an extensive operation. Pearsall's apparent authority to enter ancillary contracts was within the scope of the massive undertakings that were authorized. The *Cutler* Court observed that "a manager is in general charge of the store. He makes contracts for sale or purchase of merchandise and the conduct of the local business, which are binding on his principal. They are within the ambit of apparent authority." *Id*. The same applies to this case. Contracts necessary for the carrying out of the authorized activities, the Sandy purchase order, were within the ambit of Pearsall's apparent authority as vice president of Nationwide.

Defendants also argue Nationwide and Deutsch cannot be liable for Pearsall's actions because they received no benefit and plaintiff dealt with Pearsall in his personal capacity. First, for the reasons discussed in part II, the undisputed evidence showed that Nationwide did benefit from the money plaintiff loaned to Pearsall. Second, although Pearsall described the loan as personal and used the proceeds for both personal and business expenses, it is also undisputed that he signed all the various promissory notes as "Vice President" of Nationwide; the loan was

[2] This letter, although clearly noting that Nationwide was a corporate spinoff of another successful Deutsch corporation, also mistakenly described Pearsall as a "partner at Nationwide Media Distributors, Inc."

secured by the subject of Nationwide's purchase order the Sandy Corporation; and, for the reasons already discussed, Pearsall had apparent authority to bind Nationwide to the notes.

We conclude that defendants' argument that the trial court erred by ruling that Pearsall had apparent authority to bind Nationwide fails.

IV. PERSONAL LIABILITY OF DEUTSCH

Defendant Deutsch argues that the trial court erred by finding him personally liable on the promissory note on a theory of partnership on the basis of the court's determination that Nationwide was neither a de jure nor a de facto corporation. We agree.

We conclude that the trial court erred when it ruled that Nationwide was neither a de jure nor a de facto corporation. At the time Pearsall signed the notes in question, Nationwide was a de jure corporation, and if not, it was a de facto corporation. NY Bus Corp Law § 403; *Tisch Auto Supply Co v Nelson*, 222 Mich 196, 200; 192 NW 600 (1923). Consequently, the trial court erred by finding Deutsch personally liable under the theory of partnership by estoppel. See *Bergy Bros, Inc v Zeeland Feeder Pig, Inc*, 415 Mich 286, 294; 327 NW2d 305 (1982) ("Where the corporation has at least de facto existence . . . under Michigan law . . . the partnership theory of liability is inapplicable.").

Moreover, defendants correctly assert that because plaintiff dealt with Nationwide as a corporation, and Pearsall signed the notes on behalf of "Nationwide Media Distributers, *Inc*.," a corporation, the doctrine of corporation by estoppel applies to preclude plaintiff from denying that Nationwide is a corporation. See *Duray Dev, LLC v Perrin*, 288 Mich App 143, 152-153; 792 NW2d 749 (2010), quoting *Estey Mfg Co v Runnels*, 55 Mich 130, 133; 20 NW 823 (1884): "'Where a body assumes to be a corporation and acts under a particular name, a third party dealing with it under such assumed name is estopped to deny its corporate existence.'" *Id*. at 153. The reason for this is "'that one who contracts with an association as a corporation is estopped to deny its corporate existence . . . so as to prevent one from maintaining an action on the contract against the associates, or against the officers making the contract, as individuals or partners.'" *Id*. (citations omitted). Consequently, the trial court erred by finding Deutsch personally liable as a "partner" of Pearsall or Nationwide. See *Id*. at 153, 160.

Defendants presented evidence that Nationwide was lawfully incorporated in the state of New York on December 10, 2004, by filing with the appropriate authorities in that state its certificate of incorporation. This date was well before any of the events relevant to the promissory notes at issue in this case. Defendants correctly argue that Nationwide became a de jure corporation on the date of the filing of its articles of incorporation as a matter of New York law.

> Upon the filing of the certificate of incorporation by the department of state, the corporate existence shall begin, and such certificate shall be conclusive evidence that all conditions precedent have been fulfilled and that the corporation has been formed under this chapter, except in an action or special proceeding brought by the attorney-general. [NY Bus Corp Law § 403.]

Similarly Michigan's Business Corporation Act (BCA), MCL 450.1001, *et seq.*, provides:

> The corporate existence shall begin on the effective date of the articles of incorporation as provided in section 131.[3] Filing is conclusive evidence that all conditions precedent required to be performed under this act have been fulfilled and that the corporation has been formed under this act, except in an action or special proceeding by the attorney general. [MCL 450.1221.]

Thus, under both New York and Michigan law, a corporation comes into existence on the filing of its articles of incorporation with the appropriate state office. Under both states' laws, the filing of articles of incorporation provides conclusive evidence that all conditions precedent necessary under the law to the formation of the corporation have been fulfilled and that only the attorney general may thereafter challenge the corporation's legal existence. See, e.g., *Allied Supermarkets, Inc v Grocer's Dairy Co*, 45 Mich App 310, 317; 206 NW2d 490 (1973).

Even if Nationwide failed to satisfy the requirements necessary to its becoming a de jure corporation, the requisites of being a de facto corporation are satisfied: "'When [1] incorporators have proceeded in good faith, [2] under a valid statute, [3] for an authorized purpose, and [4] have executed and acknowledged articles of association pursuant to that purpose, a corporation *de facto* instantly comes into being.'" *Tisch Auto Supply Co*, 222 Mich at 200 (citations omitted); see also *Duray Dev, LLC*, 288 Mich App at 154-155. A de facto corporation is a real corporation that has the same legal status and powers as a de jure corporation. *Id*.

In *Bergy Bros, Inc*, 415 Mich 286, a corporation's de jure status had been suspended under certain statutes for failing to file reports and pay fees. The plaintiff maintained that its officer's thereby became personally liable for the corporation's contract debts. *Id*. at 291. The Court held that the corporation's failure to comply with the statute had resulted in merely the suspension of its de jure status but "the corporation should be considered to have had at least de facto existence during the period of forfeiture[.]" *Id*. at 296. Because the company was at least a de facto corporation, the Court rejected the lower court's imposition of personal liability on the corporate officers under a partnership theory. The Court held that "[w]here the corporation has at least de facto existence . . . it is clear under Michigan law that the partnership theory of liability is inapplicable." *Id*. at 294.

In this case, the evidence establishes that Nationwide was a de jure corporation, but if not, it was at least a de facto corporation. It is well-settled that the officers of a corporation are not personally liable for the corporation's debts. *Id*. at 297; *Tross v H E G Clarke Co*, 274 Mich 263, 266; 264 NW 365 (1936). Consequently, no personal liability attaches to Deutsch on the basis of Pearsall's having signed notes payable to plaintiff on behalf of Nationwide. See *Honegger's & Co, Inc v Frog Valley Farm Servs, Inc*, 98 Mich App 568, 569-570; 296 NW2d 314 (1980). Personal liability could attach to Deutsch as an officer of Nationwide only if he personally participated in tortuous or criminal conduct. See *Attorney General v Ankersen*, 148 Mich App 524, 557; 385 NW2d 658 (1986) ("[A] corporate employee or official is personally

[3] MCL 450.1131 provides for the filing of necessary documents with the appropriate state office, together with a fee, and for the endorsement with the word "filed" if the document substantially complies with the BCA.

liable for all tortious or criminal acts in which he participates, regardless of whether he was acting on his own behalf or on behalf of the corporation."). Here, there is no allegation that Deutsch engaged in tortuous conduct (fraud) or criminal activity. Consequently, Deutsch cannot be held personally liable for Nationwide's debts.

The trial court found that Nationwide was neither a de jure nor de facto corporation because Deutsch "admitted that Nationwide never had annual meetings, never had directors or corporate officers. Further, at the time the promissory note was signed, no stock had been issued. The only shares were issued, and Deutsch only acted as if there was a corporation, after this lawsuit was filed." These facts, even if true, are insufficient to deprive Nationwide of its corporate existence under New York and Michigan law. Under NY Bus Corp Law § 403, the filing of articles of incorporation on December 10, 2004, is "conclusive evidence that all conditions precedent have been fulfilled and that the corporation has been formed[.]" At best, the defects that the trial court noted might be a basis for revoking a corporate charter, but "as a general rule, a corporation properly formed does not lose its de facto existence through the nonperformance of conditions subsequent to its incorporation, such as the failure to adopt or file bylaws, elect officers, or pay fees." *Bergy Bros, Inc*, 415 Mich at 294. The trial court erred by finding a fact not supported by undisputed evidence and also erred as a matter of law.

Moreover, all the notes at issue identified Nationwide as a corporation: "Nationwide Media Distributers, *Inc*." The abbreviation "Inc." is well-known as meaning "incorporated." Similarly, "vice-president" is an office of a corporate entity. A partnership might have a managing partner, a silent partner, or simply a partner, but rarely a vice-president. In all of the documents on which plaintiff relies to assert both jurisdiction over Deutsch and his liability, the business cards, the letter to the Sandy Corporation, the fact sheet, and the notes at issue, Nationwide is identified as "Nationwide Media Distributers, *Inc*." Pearsall signed the notes at issue vice-president of "Nationwide Media Distributers, *Inc*." It follows that despite Pearsall's and Deutsch's referring to each other as partners, plaintiff contracted with Nationwide as a corporation; therefore, the doctrine of corporation by estoppel applies to preclude plaintiff from denying that Nationwide is a corporation. See *Duray Dev, LLC*, 288 Mich App at 152-153. The purpose of the doctrine is "'that one who contracts with an association as a corporation is estopped to deny its corporate existence . . . so as to prevent one from maintaining an action on the contract against the associates, or against the officers making the contract, as individuals or partners.'" *Id*. at 153, quoting 6 Michigan Civil Jurisprudence, § 47, p 140, citing *Lockwood v Wynkoop*, 178 Mich 388; 144 NW 846 (1914). For the reasons discussed above, the trial court erred by finding Deutsch personally liable as a "partner" of Nationwide.

In summary, the trial court erred as a matter of fact and a matter of law by concluding that Nationwide was neither a de jure nor a de facto corporation. As a result, the trial court erred as a matter of law by finding that Deutsch was personally liable on the promissory notes at issue under the theory of partnership by estoppel. Furthermore, the doctrine of corporation by estoppel precludes plaintiff from denying the corporate status of Nationwide. For these reasons, we vacate the judgment entered in this matter as to defendant George Deutsch.

V. ATTORNEY FEES AND COSTS

After the trial court had ruled in his favor on all issues, plaintiff moved the trial court for a determination of reasonable attorney fees and costs to be added to a judgment. This motion was based on a provision in the second or final note which provides:

> If any payment obligation under this Note is not paid when due, the Promisor promises to pay all costs of collection, including actual attorney fees, whether or not a lawsuit is commenced as part of· the collection process.

After defendants objected, the trial court conducted an evidentiary hearing and then issued an opinion and order applying the relevant factors it was required to consider according to *Smith v Khouri*, 481 Mich 519, 529-532; 751 NW2d 472 (2008), and *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573, 588; 321 NW2d 653 (1982). The court conducted its analysis using these factors and the evidence presented to it at the hearing, including expert testimony and the "most recent 2010 survey of the Economics of Law Practice in Michigan, published in the February 2011 issue of the Michigan Bar Journal."

We review for an abuse of discretion the trial court's award of attorney fees and costs. *Smith*, 481 Mich at 526. "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id*. The trial court's findings of fact are reviewed for clear error, and any questions of law presented are reviewed de novo. *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). A finding of fact "is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake was made." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 296; 769 NW2d 234 (2009).

First, the trial court did not abuse its discretion by conducting an evidentiary hearing on plaintiff's motion for attorney fees. Where the reasonableness of a party's attorney fee request is challenged, the court should conduct an evidentiary hearing. *Miller v Meijer, Inc*, 219 Mich App 476, 479; 556 NW2d 890 (1996). Second, we find that defendants' arguments regarding the reasonableness of the amount of the attorney fee are not meritorious. The trial court followed the instructions of *Smith*, 481 Mich at 529-532, and other case law, including *Wood*, 413 Mich at 573. The trial court's opinion and order regarding attorney fees is well-reasoned and thorough. In light of the length and complexity of this litigation, we find no abuse of discretion by the trial court regarding the reasonableness of the number of hours or the hourly rate awarded. This is especially true in light of evidence that the number of defense attorney hours and hourly rate defense attorneys charged was greater than what plaintiff requested and the court awarded. We affirm the trial court's award of reasonable attorney fees and costs.

VI. CONCLUSION

We summarize our rulings on the issues raised in this appeal. First, we affirm the trial court's September 30, 2009, opinion and order denying Deutsch's motion for summary disposition under MCR 2.116(C)(1) on the basis of lack of personal jurisdiction. Second, we affirm the trial court's grant of summary disposition to plaintiff on the promissory note at issue. Specifically, we affirm the lower court's ruling that the note was supported by adequate consideration and that Pearsall had apparent authority to bind Nationwide to the note. But we conclude the trial court erred as matter of fact and a matter of law by finding Nationwide was

neither a de jure nor a de facto corporation. Consequently, the trial court erred by ruling that Deutsch as an officer of Nationwide could be held personally liable on the promissory note that Pearsall signed on behalf of Nationwide. Finally, we conclude that the trial court did not abuse its discretion by conducting an evidentiary hearing and awarding plaintiff reasonable attorney fees and cost. Based on these holdings, we vacate the March 28, 2011, judgment as to defendant George Deutsch but affirm the judgment as to defendants Pearsall and Nationwide Media Distributers, Inc.

We affirm in part and vacate in part the judgment of the lower court. Because neither party prevailed in full, the parties are responsible for their own costs. MCR 7.219.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ William C. Whitbeck