[Cite as *MJ Direct Consulting, L.L.C. v. Brooks & Stafford Co.*, 2016-Ohio-7718.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104067

MJ DIRECT CONSULTING, L.L.C.

PLAINTIFF-APPELLANT

vs.

BROOKS & STAFFORD COMPANY D.B.A. BROOKS & STAFFORD, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-818176

BEFORE: S. Gallagher, J., McCormack, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: November 10, 2016

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SEAN C. GALLAGHER, J.:

{¶1} Plaintiff-appellant, MJ Direct Consulting, L.L.C. ("MJ Direct"), appeals the decision of the trial court that granted summary judgment in favor of defendant-appellee, The Brooks and Stafford Company, d.b.a. Brooks & Stafford ("B&S Company").[1] Upon review, we reverse the decision and remand the matter to the trial court.

I. Procedural Background

{¶2} On December 3, 2013, MJ Direct filed a complaint against B&S Company, raising claims for breach of contract and unjust enrichment. The complaint alleged that B&S Company owed MJ Direct the sum of $197,724 in unpaid invoices for customer leads that had been provided pursuant to a lead delivery agreement. A copy of the agreement and copies of the unpaid invoices were attached to the complaint. B&S Company filed an answer denying liability and raising several affirmative defenses. Depositions were taken in the matter.

{¶3} On June 6, 2014, B&S Company filed a motion for summary judgment. MJ Direct filed a brief in opposition, together with plaintiff's motion for summary judgment. After responsive briefs were submitted, the trial court conducted a number of status conferences.

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[1] Although this matter is captioned "et al.," in its judgment entry, the trial court recognized "there is really only a single defendant: the Brooks & Stafford Company, described by the plaintiff as 'd.b.a. Brooks & Stafford.'" We refer to a singular defendant-appellee herein.

{¶4} On January 4, 2016, the trial court ruled upon the dispositive motions. The court granted defendant's motion for summary judgment and denied plaintiff's motion. MJ Direct timely filed this appeal.

II. Factual Background

{¶5} MJ Direct is an internet lead generation business that provides leads on prospective purchasers of insurance to clients for a fee. Jeffrey Levy is the president of MJ Direct. Levy formed the company in 2003 with Eugene L. Calhoun. Calhoun was bought out near the end of 2011. He entered into a consulting agreement with MJ Direct that continued through May 2012.

{¶6} B&S Company is an insurance agency and brokerage in the business of selling insurance policies. Neil Corrigan is the president of B&S Company. John R. Kunze is the first vice president and treasurer of B&S Company. Corrigan, Kunze, and Gary Lanzen are the three directors of B&S Company.

{¶7} Calhoun testified in his deposition that in 2012, he was hired to develop an online presence and a national platform for B&S Company. He proposed two different models in connection with this business venture. Under Model 1, Calhoun proposed that he would be an employee of B&S Company with a biweekly salary and a potential for future ownership. Under Model 2, he proposed that "Brooks & Stafford would create and own a 'sub-corporation' for the purpose of developing a world class web-based insurance sales system." With regard to Model 2, Calhoun requested "temporary seed

money" to establish a profitable venture. Calhoun understood that B&S Company would be loaning money for the initial start-up of the subcorporation.

{¶8} On June 1, 2012, Brooks & Stafford Direct, L.L.C. ("B&S Direct, L.L.C."), was formed as an Ohio limited liability company. B&S Company is the sole member of B&S Direct, L.L.C. B&S Company executed an operating agreement for B&S Direct, L.L.C.

{¶9} An employment agreement was entered between Calhoun and B&S Direct, L.L.C., on July 1, 2012. Under the agreement, B&S Direct, L.L.C., agreed to employ Calhoun as its director of web-based sales, reporting directly to the president of the employer. Kunze stated in an affidavit that Calhoun was hired by B&S Direct, L.L.C., and was at no time an employee or agent of B&S Company.

{¶10} Calhoun worked at the offices of B&S Company, located at 55 Public Square, along with 15 or 20 other employees of B&S Company. He utilized the phones and the computer network of B&S Company. He was also provided with a B&S Company email address. Calhoun reported directly to the president of his employer, who was Kunze. He attended "maybe a dozen" board meetings with the directors for B&S Company. He was paid a salary by B&S Company.

{¶11} Calhoun indicated his understanding that B&S Direct, L.L.C., is a subsidiary of B&S Company. Commissions that were generated from successful leads went directly to B&S Company. B&S Direct, L.L.C., did not have a bank account.

{¶12} Calhoun stated in his deposition that the directors for B&S Company understood that Calhoun was going to find and contract with third-party internet-lead providers. At some point, Calhoun contacted Levy to discuss hiring MJ Direct as an internet-based lead provider. In July 2012, Levy sent a draft agreement to Calhoun and the two engaged in discussions and negotiations over the agreement. Calhoun stated it was his understanding that he had the authority to negotiate the terms and conditions of contracts with third-party internet-based lead providers and that Corrigan and Kunze were aware that he was negotiating such contracts.

{¶13} The lead delivery agreement was entered on September 5, 2012, between "MJ Direct Consulting LLC * * * and Brooks & Stafford ('B&S'), an Ohio Corporation with a local office located at 55 Public Sq., suite 1650, Cleveland, Ohio 44113." The agreement provided that MJ Direct would generate exclusive health insurance leads for B&S and that B&S would pay MJ Direct for valid leads delivered in accordance with the agreement. The agreement was signed on behalf of MJ Direct by Jeff Levy as president, and on behalf of B&S by Eugene L. Calhoun as director.

{¶14} In emails sent from Calhoun to Levy in June and July 2012, Calhoun's signatory block contained "Brooks & Stafford Direct, LLC, Director." In an email sent from Levy to Calhoun in July 2012, Levy expressed the following concern: "since this is a new venture for B&S and the reality is there is some degree of likelihood that it doesn't work out, and there is significant and devastating risk on my part if it doesn't * * *." Levy stated in his deposition that he understood that what Calhoun was doing was a new

business venture. However, at that time, he did not have any information about B&S Direct, L.L.C., and he was unaware that the entity was organized in May 2012.

{¶15} Levy stated in his affidavit that "[p]rior to entering into the Agreement, Calhoun used [B&S Company's] long-standing history and reputation in the industry, one of the oldest and largest insurance agencies in the state, as major selling points." Levy further expressed his understanding that Calhoun was acting on behalf of B&S Company and that he was entering into an agreement with B&S Company.

{¶16} Calhoun never told Levy that he was not contracting with B&S Company, and at no point did Calhoun request that Levy change the reference "Brooks & Stafford" to "Brooks & Stafford Direct, L.L.C." Levy acknowledged that the only person he dealt with was Calhoun.

{¶17} Calhoun stated that he provided Kunze with a copy of the lead delivery agreement. In an affidavit, Kunze maintained that he did not learn of the existence of the lead delivery agreement until after the lawsuit was filed and that no one affiliated with B&S Company had any dealings with MJ Direct or Levy until late November 2012 when he first learned that B&S Direct, L.L.C., owed money to MJ Direct for internet leads.

{¶18} Calhoun stated that he would receive invoices from MJ Direct for valid leads that were being generated. He would forward them to Kunze and to the administrative department for B&S Company. The invoices that were paid, were paid by B&S Company.

{¶19} In December 2012, Calhoun attended a meeting with Levy and Kunze to discuss setting up a payment plan for overdue invoices from MJ Direct. Levy was not told that he was invoicing the wrong company. According to Calhoun, Kunze informed Levy that there were cash-flow issues and they discussed figuring out a way "to make everything right." A number of follow-up emails were exchanged regarding formalizing a payment plan. In an email sent by Kunze, Kunze indicated to Levy that MJ Direct was "our most important second tier accounts payable." The email continues, "In addition to making payments as funds become available, we intend to make periodic payment by AmEx of approximately $10,000 per month."

{¶20} In January 2013, Levy prepared a draft letter of understanding memorializing the balance due MJ Direct as of January 8, 2013, in the amount of $179,427. No disputes were raised as to the amount owed. The document referenced only "Brooks & Stafford." Kunze returned the draft with changes, including a change to reflect "Brooks & Stafford Direct, LLC." Levy never signed the revised letter of understanding.

{¶21} The final leads were sent by MJ Direct in March 2013. Payments were issued by B&S Company to MJ Direct between January and July 2013.

{¶22} Kunze stated in his affidavit that B&S Company loaned B&S Direct, L.L.C., over $800,000, of which over $110,000 was used to pay outstanding invoices of MJ Direct.

{¶23} Calhoun's employment agreement with B&S Direct, L.L.C., was terminated on October 31, 2013. B&S Direct, L.L.C., is now insolvent. This lawsuit was filed by MJ Direct to recover the balance owed for the unpaid invoices.

III. Standard of Review

{¶24} Under its sole assignment of error, MJ Direct claims the trial court erred in granting summary judgment in favor of B&S Company.

{¶25} Appellate review of summary judgment is de novo, governed by the standard set forth in Civ.R. 56. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8. Summary judgment is appropriate when "(1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party." *Marusa v. Erie Ins. Co.*, 136 Ohio St.3d 118, 2013-Ohio-1957, 991 N.E.2d 232, ¶ 7.

IV. Analysis

{¶26} Appellant claims that reasonable minds could find that B&S Company was a party to the lead delivery agreement and that Calhoun acted with actual authority as an employee of B&S Company to bind B&S Company to the agreement. Appellant also claims that triable issues of fact exist over whether B&S Company cloaked Calhoun with apparent authority to contract on the company's behalf. Appellant further claims that

issues of fact exist over whether B&S Company ratified the agreement by accepting and paying invoices over several months without objection or reservation.

{¶27} Appellee argues that the action was brought against the wrong company and that the contracting entity to whom the leads were provided was B&S Direct, L.L.C. Appellee maintains that B&S Company never contracted with MJ Direct; that Calhoun was employed by B&S Direct, L.L.C.; and that Calhoun did not have actual or apparent authority to bind B&S Company to the lead delivery agreement. Appellee also claims B&S Company never ratified the lead delivery agreement.

{¶28} The record shows that the lead delivery agreement was entered between MJ Direct and "Brooks & Stafford," which was referred to as "an Ohio Corporation." The agreement does not refer to the limited liability company. Calhoun indicated that Levy relied on B&S Company's "long standing history" and Calhoun indicated his understanding that he was entering into an agreement with B&S Company.

{¶29} Here, there are disputed facts as to whether Calhoun had the authority to bind B&S Company to the lead delivery agreement. Whether Calhoun was under the direction and control of B&S Company so as to create an employment relationship is a question of fact to be decided at trial. Although Calhoun entered an employment agreement with B&S Direct, L.L.C., this is not dispositive in the matter. There is also a question of fact as to whether Calhoun was acting an agent of B&S Company in entering the lead delivery agreement.

{¶30} "The relationship of principal and agent, and the resultant liability of the principal for the acts of the agent, may be created by the express grant of authority by the principal." *Master Consol. Corp. v. BancOhio Natl. Bank*, 61 Ohio St.3d 570, 574, 575 N.E.2d 817 (1991). "'Express authority is that authority which is directly granted to or conferred upon the agent or employee in express terms by the principal, and it extends only to such powers as the principal gives the agent in direct terms * * *.'" *Master Consol*. at 574, quoting *Stevens v. Frost*, 140 Me. 1, 7, 32 A.2d 164 (1943).

{¶31} Although appellee claims that Calhoun was acting on behalf of B&S Direct, L.L.C., and that Kunze was not aware of the lead delivery agreement, there was evidence to the contrary. Calhoun worked at the offices of B&S Company, used the company phones and computers, had a company email address, was paid a salary by B&S Company, and reported to all three directors of the company. Calhoun indicated that the directors for B&S Company were aware that he was negotiating contracts with third-party internet-lead providers, that he provided Kunze with a copy of the lead delivery agreement, and that he forwarded the invoices to Kunze and the administrative department for B&S Company, without objection. Thus, there is an issue of fact as to whether Calhoun had actual authority to bind B&S Company to the lead delivery agreement.

{¶32} Assuming Calhoun did not have actual authority to so act, there is an issue of whether he had apparent authority. Even in the absence of actual authority, "[a]n agency relationship may be created if the principal causes or allows a third person to act

as an apparent agent." *Villagran v. Cent. Ohio Business Servs.*, 10th Dist. Franklin No. 94APE08-1267, 1995 Ohio App. LEXIS 2366, 22 (June 8, 1995), citing *Johnson v. Tansky Sawmill Toyota, Inc*., 95 Ohio App.3d 164, 167-168, 642 N.E.2d 9 (10th Dist.1994). "'[A principal] will be bound by the contract if such party has by his words or conduct, reasonably interpreted, caused the other party to the contract to believe that the one assuming to act as agent had the necessary authority to make the contract.'" *Master Consol. Corp*. at 576, quoting *Miller v. Wick Bldg. Co.*, 154 Ohio St. 93, 93 N.E.2d 467 (1950), paragraph two of the syllabus.

{¶33} For a principal to be bound by the acts of his agent under the theory of apparent agency, however, evidence must affirmatively show the following:

> (1) that the principal held the agent out to the public as possessing sufficient authority to embrace the particular act in question, or knowingly permitted him to act as having such authority, and (2) that the person dealing with the agent knew of those facts and acting in good faith had reason to believe and did believe that the agent possessed the necessary authority.

Master Consol., 61 Ohio St.3d 570, 575 N.E.2d 817, at syllabus. It is the acts of the principal, not those of the agent, that create apparent authority. *Id*. at 576. "The principal is responsible for the agent's acts only when the principal has clothed the agent with apparent authority and not when the agent's own conduct has created the apparent authority." *Ohio State Bar Assn. v. Martin*, 118 Ohio St.3d 119, 2008-Ohio-1809, 886 N.E.2d 827, ¶ 41, citing *Master Consol*. at 576-577. The party asserting the agency has

the burden of proving apparent authority. *Scott v. Kindred Transitional Care & Rehab.*, 8th Dist. Cuyahoga No. 103256, 2016-Ohio-495, ¶ 15.

{¶34} In this case, there is evidence upon which the trier of fact could find that B&S Company held Calhoun out as possessing sufficient authority to bind the company to the lead delivery agreement. The directors of B&S Company understood that Calhoun was going to contract with third-party internet-lead providers. B&S Company furnished Calhoun with an office space indistinguishable from the parent company's operations and supplied Calhoun with an email account with the same domain as all other officers and employees of B&S Company. B&S Company also issued payment to MJ Direct on the invoices that were sent to Calhoun. Levy could have reasonably believed, and in fact did believe, that Calhoun possessed the authority to bind B&S Company to the lead delivery agreement. Generally, "[a] dispute over the question of agency is properly a subject for the trier of fact." *Villagran* at 22.

{¶35} There also was evidence to show ratification of the agreement by B&S Company. "A well-settled doctrine of the law of agency is that a principal may ratify the acts of its agent performed beyond the agent's scope of authority, and such ratification relates back to the time of performance of the acts and binds the principal from that time." *State v. Warner*, 55 Ohio St.3d 31, 65, 564 N.E.2d 18 (1990).

> "[A]n unauthorized contract entered into by a corporate officer or agent may be impliedly ratified by the corporate board of directors where the directors have actual knowledge of the facts and (1) accept and retain the benefits of the contract, (2) acquiesce in it, or (3) fail to repudiate the contract within a reasonable period of time."

Id., quoting *Campbell v. Hospitality Motor Inns, Inc*., 24 Ohio St.3d 54, 57, 493 N.E.2d 239 (1986).

{¶36} Calhoun indicated that he provided Kunze with a copy of the lead delivery agreement and that he forwarded the invoices to Kunze and the administrative department for B&S Company without objection. There is no evidence that the agreement was ever repudiated by B&S Company. B&S Company accepted the leads and the commissions they generated without objection. The outstanding balances owed were discussed at board meetings of B&S Direct, L.L.C. Kunze informed Levy of cash-flow issues and discussed formalizing a payment plan. Kunze also expressed the intent to make payments, and payments were in fact issued from B&S Company to MJ Direct. Although Kunze stated B&S Company loaned money to B&S Direct, L.L.C., there was evidence that B&S Direct, L.L.C., did not have a bank account and that the commissions generated from successful leads went directly to B&S Company. Appellant's evidence could be viewed as demonstrating ratification of the lead delivery agreement by B&S Company.

{¶37} Our review of the record reflects that genuine issues of material fact exist as to whether B&S Company was bound by the lead delivery agreement.

{¶38} Appellant further claims that if an enforceable contract did not exist with B&S Company, there is evidence in the record to show B&S Company was unjustly enriched by the customer leads that were furnished by MJ Direct without payment. Appellant acknowledges that this claim is dependent upon a lack of an enforceable

agreement with B&S Company. Appellee asserts that B&S Company did not benefit from the lead delivery agreement and that B&S Company, as a member of a limited liability company, is not responsible for the debts of B&S Direct, L.L.C., pursuant to R.C. 1705.48(B).[2]

{¶39} To prevail on a claim for unjust enrichment, a plaintiff must prove by a preponderance of the evidence that (1) the plaintiff conferred a benefit upon the defendant, (2) the defendant had knowledge of such benefit, and (3) the defendant retained that benefit under circumstances in which it would be unjust to do so without payment. *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278, 2005-Ohio-4985, 834 N.E.2d 791, ¶ 20.

{¶40} Calhoun testified that B&S Company received the commissions generated by the successful leads. B&S Company maintains that it loaned B&S Direct, L.L.C., over $800,000, of which $110,000 was used to pay some of MJ Direct's invoices. There is evidence that B&S Direct, L.L.C., did not have an accounting department or a bank account. Our review reflects there is a genuine issue of material fact as to whether B&S Company received the benefit of the insurance leads and was unjustly enriched.

{¶41} Finally, appellant argues that B&S Company is not insulated from liability under R.C. 1705.48(B) for the debts of B&S Direct, L.L.C., based on the theory of

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[2] R.C. 1705.48(B) provides as follows: "No member, manager, or officer of a limited liability company * * * is personally liable to satisfy in any other manner, a debt, obligation, or liability of the company solely by reason of being a member, manager, or officer of the limited liability company."

piercing the corporate veil. Appellant claims reasonable minds could conclude that B&S Company, which is the sole member of B&S Direct, L.L.C., created and maintained a shell subsidiary to avoid the claims of creditors, including MJ Direct.

{¶42} The trial court did not address the theory of piercing the corporate veil in its decision. Although appellant did not assert allegations in the complaint for piercing the corporate veil, or alter ego, appellant raised the issue in its opposition to defendant's motion for summary judgment. The theory was raised in response to the defendant's reliance on R.C. 1705.48(B) on the claim for unjust enrichment, and the parties debated the issue in their summary-judgment briefing.[3]

{¶43} Under Ohio law,

> [t]he corporate form may be disregarded and individual shareholders held liable for wrongs committed by the corporation when (1) control over the corporation by those to be held liable was so complete that the corporation has no separate mind, will, or existence of its own, (2) control over the corporation by those to be held liable was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity, and (3) injury or unjust loss resulted to the plaintiff from such control and wrong.

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[3] Nothing herein shall preclude appellant from seeking to amend the complaint upon remand.

Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos., 67 Ohio St.3d 274, 1993-Ohio-119, 617 N.E.2d 1075, paragraph three of the syllabus. In order to satisfy the second prong of the *Belvedere* test for piercing the corporate veil, "the plaintiff must demonstrate that the defendant shareholder exercised control over the corporation in such a manner as to commit fraud, an illegal act, or a similarly unlawful act." *Dombroski v. Wellpoint, Inc.*, 119 Ohio St.3d 506, 2008-Ohio-4827, 895 N.E.2d 538, ¶ 29.

{¶44} In this matter, sufficient evidence has been presented to raise a genuine issue of material fact of whether to pierce the corporate veil, which is primarily a question for the trier of fact.

{¶45} Accordingly, because we find genuine issues of material fact preclude summary judgment on appellant's claims for breach of contract and unjust enrichment, appellant's sole assignment of error is sustained.

{¶46} Judgment reversed; case remanded.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, JUDGE
TIM McCORMACK, P.J., and
MARY J. BOYLE, J., CONCUR