

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

THE PLAIN DEALER PUBLISHING CO., INC.)	CASE NO. CV 11 762467
)	
Plaintiff,)	JUDGE JOHN P. O'DONNELL
)	
vs.)	
)	
BRYAN EQUIPMENT SALES, INC.)	<u>JOURNAL ENTRY</u>
)	
Defendant.)	

John P. O'Donnell, J.:

STATEMENT OF THE CASE

Plaintiff The Plain Dealer Publishing Company filed this lawsuit for breach of contract on August 22, 2011. Defendant Bryan Equipment Sales, Inc., filed an answer generally denying the plaintiff's allegations and a bench trial was held on October 17, 2012. This entry follows.

STATEMENT OF THE FACTS

Three witnesses testified at trial: Judith A. Baim, the plaintiff's credit representative; Daniel Scott Walker, the vice president and general manager of Bryan Equipment Sales, Inc.; and Doug Geers, the defendant's marketing director. Plaintiff's exhibits A, D, E, F and G, and defendant's exhibits 2 through 13 were admitted into evidence.

Bryan Equipment Sales is a distributor of lawn and garden and light construction equipment manufactured by Stihl. Bryan distributes to Stihl dealers in Ohio and Michigan. In 2009, Bryan retained the advertising agency Freedman, Gibson & White, Inc., to execute Bryan's marketing plan in the Cleveland and Grand Rapids, Michigan markets.

According to Walker, Bryan paid Freedman, Gibson & White – which later came to become known as FocusMark and then Focus/FGW – \$500,000 to devise and implement a media buying strategy for those two markets. The bulk of that fee was intended for the purchase of advertising space in print media and air time in electronic media.

As part of the marketing plan, Freedman, Gibson & White created six print advertisements that were placed in the plaintiff's newspaper, The Cleveland Plain Dealer, on May 3, May 17, May 31, December 10, December 11, and December 14, 2010. The cost of each advertisement was \$4,500. The ads were printed as requested and never paid for, leaving a balance due of \$27,000.

The dispute in this case is whether Freedman, Gibson & White placed the advertisements as an agent for Bryan, in which case Bryan, as principal, is responsible for payment, or whether Freedman, Gibson & White acted as an independent contractor, in which case Bryan is not liable for Freedman's contract with The Plain Dealer.

In support of its claim that Freedman was Bryan's agent, the plaintiff introduced exhibit A into evidence. Exhibit A is a letter, signed by Walker, that reads as follows:

July 20, 2009

Media Representative:

Bryan Equipment Sales has named Freedman, Gibson & White, Inc. as their Agency of Record for 2010 media planning and buying in the Cleveland and Grand Rapids markets. Therefore, Freedman, Gibson & White, Inc. is responsible for managing, planning, buying and invoicing media for Bryan Equipment Sales. All media concerns and invoices need to be directed to Freedman, Gibson & White, Inc.

/s/Scott Walker
Bryan Equipment Sales

On April 30, 2010, after Freedman changed its name to FocusMark Group, another letter was sent to change the agency of record from Freedman to FocusMark Group. The letter noted that "FocusMark Group is responsible for managing, planning, buying and invoicing for Bryan Equipment Sales."

The Plain Dealer concedes that all of the communication for purchasing and placing the ads was through Freedman or FocusMark and never directly with Bryan. However, after the bills were overdue, the Plain Dealer's collections department did communicate directly with Bryan and was never told that only Freedman, not Bryan, was responsible.

For Bryan's part, Geers testified that Freedman was paid \$500,000 by Bryan that included the cost of the ads at issue in this case.

LAW AND ANALYSIS

Generally, the elements for a breach of contract are that a plaintiff must demonstrate by a preponderance of the evidence that (1) a contract existed, (2) the plaintiff fulfilled his obligations, (3) the defendant failed to fulfill his obligations, and (4) damages resulted from this failure. *Anzalaco v. Graber*, 8th Dist. Nos. 96761 and 96787, 2012-Ohio-2057, ¶18. As to the first element, to prove that a contract existed between particular parties, a plaintiff must show that both parties consented to the terms of the contract, *i.e.* that there was a "meeting of the minds" of both parties. *Ruple v. Midwest Equip. Co.*, 8th Dist. No. 95726, 2011-Ohio-2923, ¶18.

Here there is no question that Bryan was not itself directly involved in entering into the contract. Instead, the plaintiff alleges that Freedman acted as Bryan's agent when making the agreement with The Plain Dealer, thereby binding Bryan to the agreement's terms. "Agency" has been defined as a consensual fiduciary relationship between two persons where the agent

has the power to bind the principal by his actions, and the principal has the right to control the actions of the agent. *Evans v. Ohio State Univ.*, 112 Ohio App.3d 724, 744 (10th Dist.1996). One of the most important features of the agency relationship is that the principal itself becomes a party to contracts that are made on its behalf by the agent. *Cincinnati Golf Mgmt. v. Testa*, 132 Ohio St. 3d 299, 2012-Ohio-2846, ¶23. But that can only occur when the agent has the principal's authority to bind it. Ordinarily, authority of the agent to bind the principal is created expressly by means of the agreement between the agent and principal. This is known as actual authority or express authority. Express authority is that authority which is directly granted to or conferred upon the agent in express terms by the principal, and it extends only to such powers as the principal gives the agent in direct terms; express provisions are controlling where the agency is expressly conferred. *Id.*, ¶24.

Bryan's witnesses testified that Freedman did not have Bryan's actual authority to act as its agent, and the contract between Bryan and Freedman was not offered as evidence at trial to contradict that testimony, so the evidence does not support a conclusion that Freedman was acting as Bryan's agent with actual authority. However, an agency relationship sufficient to bind Bryan may still be shown under the doctrine of apparent authority. Even where one assuming to act as agent for a party in the making of a contract has no actual authority to so act, such party 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. *Miller v. Wick Blg. Co.*, 154 Ohio St. 93 (1950), syllabus 2. In order to prove apparent authority, The Plain Dealer must prove that the principal (Bryan) held the agent (Freedman) 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 that the person dealing with the agent (The Plain Dealer) knew of the facts and acting in good faith had reason to believe and did believe that the agent possessed the necessary authority. *Master Consol. Corp. v. BancOhio Nat'l Bank*, 61 Ohio St. 3d 570, 576 (1991).

Walker's July 20, 2009, letter supports proof of those elements in this case. By that letter Walker informed all "media representatives," including The Plain Dealer, that Freedman was Bryan's "agency of record" responsible for placing Bryan's advertisements. That letter is what induced The Plain Dealer to accept Freedman's orders and then bill Bryan, but in care of the agency, as directed by Walker in his letter. Nowhere in the letter does Walker inform The Plain Dealer that Freedman was its "independent contractor" of record and that Bryan had already paid Freedman for whatever ads it might order from The Plain Dealer.

The evidence is also sufficient to find that an agency relationship existed under the related equitable theory of agency by estoppel. An agency by estoppel is created where a principal holds an agent out as possessing authority to act on the principal's behalf, or the principal knowingly permits the agent to act as though the agent had such authority. *Mortgage Elec. Registration Sys. v. Mosley*, 8th Dist. No. 93170, 2010-Ohio-2886, ¶41. The essence of the doctrines of apparent authority and agency by estoppel is that the purported principal has done something that it should expect a third party to rely on to conclude that the agent was acting for the principal. Where Bryan held out Freedman as its "agency of record" it invited media representatives to rely on that representation and conclude that they were dealing with Bryan, not Freedman, as the ultimately responsible party. By arranging its affairs and acting as it did, it is only fair that Bryan, not The Plain Dealer, bear the risk of Freedman not paying for the ads.

CONCLUSION

Because the plaintiff proved by a preponderance of the evidence both that Bryan cloaked Freedman with the apparent authority to act and that Bryan, having held Freedman out as its agent, is estopped from denying an agency relationship, the court finds on the complaint in favor of the plaintiff The Plain Dealer Publishing Company, Inc. and against the defendant Bryan Equipment Sales, Inc. and hereby enters judgment in favor of the plaintiff and against the defendant in the total amount of \$27,000, interest at the statutory rate from January 25, 2011 (the date the amount owed was liquidated¹) and court costs.

IT IS SO ORDERED:

Judge John P. O'Donnell

Date: _____

¹ See plaintiff's exhibit G, December 31, 2010 invoice showing a due date of January 25, 2011.

SERVICE

A copy of this journal entry was sent by email this 13th day of November, 2012, to the following:

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