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**STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2422**

Wells Fargo Bank, N. A.,
Plaintiff,

vs.

American Muslim Community Center,
Appellant,

Mohamed R. El-Gamal,
Defendant and Third Party Plaintiff,

vs.

Rishma Adam, et al.,
Third Party Defendants,

Kallas & Associates, Ltd.,
Respondent.

**Filed January 15, 2008
Reversed
Shumaker, Judge**

Hennepin County District Court
File No. 27CV05-7074

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Considered and decided by Klaphake, Presiding Judge; Shumaker, Judge; and Worke, Judge.

UNPUBLISHED OPINION

SHUMAKER, Judge

Appellant contends that the district court erred in applying the law of apparent authority by ordering appellant to pay respondent law firm for legal services. Because we conclude that appellant's former president and director lacked apparent authority at the time that he retained respondent, purportedly on behalf of appellant, we reverse.

FACTS

Appellant American Muslim Community Center (AMCC) was incorporated on June 28, 2000, as a nonprofit corporation. Mohamad Ramadan El-Gamal was AMCC's named president. Shortly after incorporation, AMCC set up a business account at Wells Fargo Bank. The account application, as well as a subsequent addendum to a certificate of authority, identified El-Gamal as the authorized signer. AMCC bylaws did not go into effect until April 16, 2004, and the board of directors at that time was comprised of Rishma Adam, Ahmed Naumaan, Mohamed El-Gamal, Saoudy Saoudy, and Autif Sayyed.

Sometime in early 2005, a dispute over the Wells Fargo bank accounts arose at AMCC. On March 3, 2005, AMCC's financial committee, of which El-Gamal was a member, approved a proposal that required two signatures for checks drawn on the AMCC accounts and empowered the board to change the individuals designated as authorized to sign checks. The next day, before these proposals were adopted by

AMCC's board, El-Gamal went to Wells Fargo and transferred \$30,000 into a certificate of deposit (CD). The board adopted the proposed changes on March 6, 2005.

When the board discovered El-Gamal's unauthorized transfer of the funds in AMCC's account with Wells Fargo, it held a meeting on March 8, 2005, at which the board voted to remove El-Gamal as an AMCC director. On that same day, the board filed with Wells Fargo an "Addendum to Certificate of Authority," deleting El-Gamal as an authorized signer on the AMCC account. The board also notified Wells Fargo that on March 9, 2005, El-Gamal had been removed as president of AMCC. Perceiving a dispute as to the ownership of the accounts, Wells Fargo froze the accounts on March 22, 2005.

On March 29, 2005, AMCC filed with the Minnesota Secretary of State amended articles of incorporation which provided in part that the "management of the affairs of the corporation shall be vested in the board of directors." The articles then listed the directors as Rishma Adam, Saleem Adam, Onaiza Ansar, Ashfaque Patel, Saoudy Saoudy, and Autif Sayyed. Noticeably, El-Gamal was not named as an AMCC director.

Apparently purporting to act on behalf of AMCC, on April 11, 2005, El-Gamal signed a retainer agreement with respondent Kallas & Associates, Ltd. (K & A) for legal services to be rendered. El-Gamal signed the retainer as president of AMCC, and he also provided his personal guarantee. Even though the written retainer was not signed until April 11, K & A began its representation on April 7, 2005. The agreement is silent as to the particular matter for which El-Gamal retained K & A.

In May 2005, Wells Fargo brought an interpleader action, naming AMCC and El-Gamal as defendants and requesting that the court determine the rights of the parties in all AMCC accounts at Wells Fargo.

K & A served an answer on behalf of AMCC and El-Gamal and included a third-party complaint naming the AMCC directors as third-party defendants.

K & A withdrew from representation of AMCC and El-Gamal on September 7, 2005, and on June 7, 2006, moved to establish and foreclose on an attorneys' lien for services rendered to AMCC and El-Gamal. In its order of June 26, 2006, the district court granted to K & A an attorneys' lien in the sum of \$4,900.12.

After a bench trial on July 24, 2006, on the interpleader and third-party actions, the court concluded that the third-party defendants constituted AMCC's board of directors; the board acted within its powers when it removed El-Gamal as an AMCC director; the board had the right to amend AMCC's articles of incorporation, which it did and filed with the secretary of state on March 29, 2005; that El-Gamal did not own or have rights to AMCC's funds on deposit at Wells Fargo; and that

[t]he original articles then in effect did not make El-Gamal the "board of directors" (and a non-profit corporation has to be run by a board according to statute), nor did the articles give him authority to act individually on behalf of the corporation, nor did the Bylaws of April 2004 grant El-Gamal any such privilege, nor did his role as sole signatory (as of March 4, 2005) give him the authority to do as he wished with the organization's money.

The court also provided in its order that the third-party defendants could bring a motion to reconsider the attorneys' lien the court previously granted to K & A. The

third-party defendants claimed that El-Gamal had no authority to retain K & A on behalf of AMCC and that there should be no lien on AMCC's funds for the fees K & A incurred.

The court heard the motion but declined to reconsider its grant of the attorneys' lien and ordered that the lien could be satisfied from AMCC's accounts at Wells Fargo. The basis for the court's ruling was its determination that, even though El-Gamal was not an AMCC director or authorized signatory on the accounts at Wells Fargo, "at the time Mohamed El-Gamal sought representation for AMCC from Kallas, El-Gamal had the apparent authority to act on AMCC's behalf."

It is the court's determination that El-Gamal had apparent authority to bind AMCC to K & A's retainer agreement that is challenged on appeal.

DECISION

"Whether an agent is clothed with apparent authority is a question of fact." *Powell v. MVE Holdings, Inc.*, 626 N.W.2d 451, 457 (Minn. App. 2001), *review denied* (Minn. July 24, 2001). On review, however, this court determines if the district court erred as a matter of law. *Id.*

An agent can bind its principal if the agent has actual or apparent authority. *Duluth Herald & News Tribune v. Plymouth Optical Co.*, 286 Minn. 495, 499, 176 N.W.2d 552, 555 (1970). "Apparent authority is that authority which a principal holds an agent out as possessing, or knowingly permits an agent to assume." *Foley v. Allard*, 427 N.W.2d 647, 652 (Minn. 1988). To find apparent authority:

The principal must have held the agent out as having authority, or must have knowingly permitted the agent to act on its behalf; furthermore, the party dealing with the agent must have actual knowledge that the agent was held out by the principal as having such authority or had been permitted by the principal to act on its behalf; and the proof of the agent's authority must be found in the conduct of the principal, not the agent.

Id. (quoting *Hockemeyer v. Pooler*, 268 Minn. 551, 562, 130 N.W.2d 367, 375 (1964)); *see also West Concord Conservation Club, Inc. v. Chilson*, 306 N.W.2d 893, 897 (Minn. 1981) (explaining that apparent authority must be founded on the actions of the principal, “since no agent by his own act can create evidence of authority”). “[A] job title alone will not conclusively establish apparent authority for a contract.” *Powell*, 626 N.W.2d 451 at 459.

“An agent’s apparent authority results from statements, conduct, lack of ordinary care, or other manifestations of the principal’s consent, whereby third persons are justified in believing that the agent is acting within his authority.” *McGee v. Breezy Point Estates*, 283 Minn. 10, 22, 166 N.W.2d 81, 89 (1969); *Roof Depot, Inc. v. Ohman*, 638 N.W.2d 782, 787 (Minn. App. 2002) (“Apparent authority is usually based on an affirmative act of the principal.”), *review denied* (Minn. Apr. 16, 2002). “[T]he scope of apparent authority is determined not only by what the principal knows and acquiesces in, but also by what the principal should, in the exercise of ordinary care and prudence, know his agent is doing.” *McGee*, 283 Minn. at 22, 166 N.W.2d at 89.

The district court concluded that El-Gamal had apparent authority to act on AMCC’s behalf based on documents identifying El-Gamal as an initial incorporator,

director, and president of AMCC and as the sole signatory on the Wells Fargo accounts. AMCC contends such information cannot be the basis for apparent authority in this case because the board of directors expressly disclaimed El-Gamal's authority by revoking his tenure as a board member on March 8, 2005.¹ We note at the outset that there is no dispute as to the dispositive facts and no claim that the district court erred in any factual finding.

AMCC can only be held to El-Gamal's agreement with K & A, if K & A's belief that El-Gamal had authority to make the agreement is reasonable and traceable to AMCC. *Powell*, 626 N.W.2d at 458. "Minnesota law has always placed the burden of reasonableness, and diligence, upon any person dealing with an agent to examine whether that agent has the authority to complete the proposed act." *N. Star Mut. Ins. Co. v. Zurich Ins. Co.*, 269 F. Supp. 2d 1140, 1152-53 (D. Minn. 2003) (citations omitted); *see also Truck Crane Serv. Co. v. Barr-Nelson, Inc.*, 329 N.W.2d 824, 827 (Minn. 1983) ("[O]ne who deals with an agent is put to a certain burden of reasonableness and diligence.").

Arguably, it was reasonable for K & A to conclude that El-Gamal had authority to retain K & A to represent AMCC after reviewing documents identifying him as the president, director, and incorporator of the organization and a signatory on the accounts. *See Traxler v. Minneapolis Cedar & Lumber Co.*, 128 Minn. 295, 296, 150 N.W. 914, 914 (1915) (concluding that corporation's president had implied authority to retain

¹ The district court concluded that the third-party defendants constituted AMCC's board of directors and that the board of directors "was acting within its powers and duties to protect the organization when it removed El-Gamal from the board." No one on appeal has challenged the legitimacy of this decision.

counsel for a corporation, when the corporation had previously retained the attorney in other matters);² *see also Temple, Brissman & Co. v. Greater St. Paul Corp.*, 189 Minn. 236, 237, 248 N.W.2d 819, 819 (1933) (concluding that a corporation’s president had apparent authority to bind corporation to pay for an audit, where the president had ordered two previous audits that had been paid for by the corporation). But that conclusion could not be reasonable in light of the actions taken by AMCC—all of which occurred before the retainer agreement was entered into and before any representation began.

The record reflects that AMCC expressly disclaimed El-Gamal’s purported authority when the board of directors revoked his tenure as a board member on March 8, 2005, showing that control of the management of AMCC was vested in the directors and El-Gamal was not named as a director; filed amended articles of incorporation on March 29, 2005; and attempted to remove El-Gamal from the AMCC bank accounts by filing a written deletion of his authority as signatory, which led Wells Fargo to freeze the accounts on March 22, 2005, and ultimately resulted in the underlying interpleader action. AMCC took all of these actions *before* El-Gamal signed the retainer agreement

² Implied authority is not the same as apparent authority. *See Winkel v. Eden Rehabilitation Treatment Facility, Inc.*, 433 N.W.2d 135, 139 (Minn. App. 1988) (distinguishing apparent and implied authority). “[I]mplied authority is actual authority circumstantially proved and is dependent upon the intention of the parties” Apparent or ostensible authority, on the other hand, is not actual authority but is that which the principal holds the agent out as possessing or knowingly permits the agent to assume.” *Derrick v. Drolson Co.*, 244 Minn. 144, 152-53, 69 N.W.2d 124, 130 (1955) (footnote omitted); *see also Tullis v. Federated Mut. Ins. Co.*, 570 N.W.2d 309, 313 (Minn. 1997) (examining the difference between implied authority and apparent authority).

on April 11, 2005. After public notice of El-Gamal's lack of authority to do business on behalf of AMCC, K & A could not reasonably believe that El-Gamal had authority to retain it to represent signatory, AMCC. See *McGee*, 283 Minn. at 22, 166 N.W.2d at 89 (stating that third persons must have reasonable grounds to believe an agent has apparent authority and explaining that apparent authority is created by the principal); *Powell*, 626 N.W.2d at 458 (explaining that the principal can only be held to the agreement if the third party's belief that the agent had authority to make the agreement is reasonable); cf. *Truck Crane Serv. Co.*, 329 N.W.2d at 826-27 (concluding that an employee, who was formerly the corporation's secretary-treasurer, lacked apparent authority to bind the defendant-corporation to an agreement with the plaintiff, where the corporation's president had expressly disclaimed liability and explaining that the denial of liability from the corporation's president, had "put the plaintiff on inquiry as to the authority of any other [employee of the corporation] to countermand such a position"); *Barton-Parker Mfg. Co. v. Wilson*, 96 Minn. 334, 335, 104 N.W. 968, 968-69 (1905) (concluding as a matter of law that a general manager of a retail store lacked apparent authority to contract for a new line of goods where the store owner had first told the plaintiff he did not want the new line of goods). Thus, K & A's belief that El-Gamal had authority to bind AMCC was not justified or reasonable.

Additionally, unlike *Traxler*, in which the Minnesota Supreme Court concluded a corporation was required to pay for services rendered by an attorney hired by the corporation's president, K & A had never been previously retained by AMCC. 128 Minn. at 296, 150 N.W. at 914. Likewise, there is no evidence suggesting that AMCC's

board of directors expressly authorized El-Gamal to retain an attorney, nor did AMCC accept or profit by K & A's services. *Cf. id.* (requiring a corporation to pay for services rendered by an attorney hired by the corporation's president, where the president had implied authority to hire the attorney, evidence suggested that the board of directors had expressly authorized the president to retain the attorney and the corporation had "accepted and profited by [the attorney's] services").

Further, K & A's belief that El-Gamal had authority to bind AMCC is not traceable to AMCC since AMCC took affirmative public steps to disclaim El-Gamal's authority. *See Powell*, 626 N.W.2d at 458 (explaining that the principal can only be held to the agreement if the third party's belief that the agent had authority to make the agreement is traceable to the principal). The filing of amended articles of incorporation gave notice that El-Gamal was no longer a director of the organization. Similarly, the nature of the underlying interpleader action arising from the dispute over control of the bank accounts should have alerted K & A to the possibility that El-Gamal lacked authority to bind AMCC and should have, at the very least, prompted further inquiry by K & A.

Because the undisputed facts fail, as a matter of law, to support a finding of apparent authority in El-Gamal sufficient to bind AMCC to K & A's retainer, the district court erred in concluding that El-Gamal had apparent authority to retain K & A to represent AMCC. Because El-Gamal lacked authority to retain K & A to represent AMCC, AMCC is not obligated to pay legal fees incurred as a result of that representation, and the court erred in awarding the attorneys' lien.

AMCC also contends that even if the lien was properly awarded, the district court erred in requiring AMCC to pay for fees that were related to K & A's representation of El-Gamal. Because we hold that the district court erred in awarding the attorneys' lien and in directing that the lien may be satisfied from AMCC's funds at Wells Fargo and AMCC is not liable for K & A's fees, we do not reach this issue.

Reversed.