IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 7, 2000 Session

VINCENT J. CUSANO, a/k/a-p/k/a VINNIE VINCENT v. STERLING/McFADDEN PARTNERSHIP, d/b/a METAL EDGE, ET AL.

Appeal from the Chancery Court for Davidson County
No. 96-4088-III Ellen Hobbs Lyle, Chancellor

No. 2000-00161-COA-R3-CV - Filed October 16, 2002

The plaintiff filed this action for damages for breach of contract alleging that he telephoned the publisher's office of a specialty magazine to discuss the insertion of an ad extolling and advertising his talents and product, and that the ad coordinator to whom he talked agreed to insert the ad. The ad coordinator called the plaintiff a few days later and informed him that the proposed ad was not acceptable. A principal issue was whether the ad coordinator, as agent, had the apparent authority to bind the magazine. The Chancellor concluded that the agent had the requisite apparent authority because, in effect, he never told the plaintiff that he had no authority to bind the magazine, but that the plaintiff was entitled to recover only nominal damages. The judgment is reversed upon a finding that agency cannot be proved solely by statements of the agent.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed and Dismissed

BEN H. CANTRELL, P.J., M.S., WILLIAM C. KOCH, JR., J., WILLIAM B. CAIN, J.

Daniel Mark Nolan and Jason Matthew Mill, Clarksville, Tennessee, for the appellant, Vincent J. Cusano.

J. William Lincoln, III, Nashville, Tennessee, and Theodore M. Greenberg, New York, New York, for appellees, Sterling/McFadden Partnership, d/b/a Metal Edge Magazine and Sterling's Magazines, Inc.

OPINION
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I.

This is an action for damages for breach of contract. The plaintiff is a musician, songwriter, performer, and sole owner of Metaluna Records, LLC. The defendants are (1) Sterling/McFadden Partnership, d/b/a *Metal Edge Magazine* and (2) Sterling's Magazines, Inc.

The plaintiff alleged that on May 13, 1996 he telephoned Mel Goldman "who is the Marketing and Sales Director[1] of *Metal Edge Magazine*, and who is also the Agent of Sterling/McFadden and/or Sterling's Magazines" and enquired about placing a full-page color advertisement in a special *Metal Edge Magazine* issue to be released several months later. The ad would extol, for commercial purposes, the entertainment quality of a CD produced and manufactured by the plaintiff.

He alleged that he discussed with Mr. Goldman the nature, content, and makeup of the ad[2] which was confirmed subject to the receipt by Mr. Goldman of the required data. Seven days later, the plaintiff alleged that he again called Mr. Goldman that a check in partial payment of the ad was in transit and that Mr. Goldman again confirmed that the ad would be inserted in the KISS issue.[3] A few days later, the check was returned and Mr. Goldman called to advise the plaintiff that the proposed ad would not be placed because Gene Simmons, co-founder of KISS, had refused to take the ad. The plaintiff alleged that he was not informed by "anyone at *Metal Edge*" that Simmons had the right to approve or disapprove any "advertisement going into the KISS issue."

The plaintiff then alleged "upon information and belief" (1) that the actions of "Mr. Goldman and Mr. Vincent"[4] constituted a binding contract, (2) that the refusal to place Mr. Vincent's ad in the KISS issue constituted a breach of contract, and (3) that he suffered a loss of business as a result.

The defendants denied that the plaintiff was authorized to place the ad, but admitted that Mr. Goldman stated the basic terms to reserve space for an ad placement should the ad be accepted. They denied that the required art work was received, a necessary pre-requisite for the ad; they denied any agreement to accept an ad, because Goodman lacked the required authority.

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[1] There is no evidence in the record to support this allegation.

[2] Which required sophisticated artwork to be supplied by the plaintiff.

[3] KISS was a "heavy metal" group, recognized by a special issue of *Metal Edge Magazine*.

[4] Vinnie Vincent is the trade or stage name of the plaintiff.

II.

The Chancellor dismissed Sterling/McFadden Inc. owing to the lack of proof connecting this defendant to the "facts and issues of this case."

Whether Mr. Goldman, an ad coordinator of the magazine, had the apparent authority to bind the magazine contractually was a pivotal issue at the trial. The Chancellor found that

> [W]hen the plaintiff called the magazine and stated that he wanted to place an ad, the magazine directed the plaintiff to Mr. Goldman thereby indicating that Mr. Goldman was the person at the magazine to discuss the matter. Moreover, Mr. Goldman exercised authority by giving the plaintiff information and instructions, *i.e.*, Mr. Goldman told the plaintiff the location of the ad in the magazine, the rate of the ad space, the deadline to submit the art work and that he could contract with the magazine by sending a written confirmation. Furthermore, Mr. Goldman did not forward the confirmation to the allegedly appropriate magazine employee. Also significant to the Court is that Mr. Goldman admitted that at no time did he tell the plaintiff that Mr. Goldman did not have the authority to make such a contract . . .

The Chancellor then found

> [B]ut most significant in establishing agency is the action of the principal. The magazine, through Mr. Tuller, acquiesced or made it appear that Mr. Goldman did have authority to contract by instructing Mr. Goldman to contact the plaintiff to reject the ad . . .

After finding that the parties contracted as alleged by the plaintiff, the Chancellor concluded that the defendant magazine breached the contract by refusing to insert the ad and that the plaintiff suffered damages as a result, the amount of which was revealed by the proof as too speculative to award other than the nominal amount of $750.00.

The plaintiff appeals, and presents for review the issues of whether the Chancellor erred in failing to award compensatory damages, and in dismissing Sterling's Magazine, Inc. from the case. The defendants present for review the issues of whether the Chancellor erred in finding a contract as alleged by the plaintiff, and in failing to consider whether the plaintiff properly mitigated his damages.

III.

Appellate review is *de novo* on the record accompanied with the presumption that the judgment is correct unless the evidence otherwise preponderates. Rule 13(d) Tenn. R. App. P. As to conclusion of law, there is no presumption of correctness. ***Union Carbide Corp. v. Huddleston***, 854 S.W.2d 87 (Tenn. 1993).

IV.

On May 13, 1996, the plaintiff called *Metal Edge Magazine*. He had not called the magazine previously, and had no knowledge of its business practices. He enquired about placing an ad and was connected to Mr. Goldman, an ad coordinator, who confirmed that a "special issue was coming out," that it "was a wonderful place to premier my CD" and that he would "make certain that I had the right-hand side of the magazine . . . within the first 20 pages or so." The plaintiff testified that he was instructed to fax a reservation for the space and that Goldman assured him "the space was mine." In relating what was necessary for him to do next, the plaintiff testified that the artwork for the ad and a down payment of $355.00 were required. A few days later he called Goldman to enquire if he could pay $500.00 down instead of $355.00, and was assured that he could.

On May 24, 1995, Goldman called the plaintiff to advise him that the magazine would "not run your ad," because Gene Simmons said, no. The check was returned. The plaintiff had been, in years past, a member of the band KISS, which twice fired him with lingering effects. KISS enjoyed a special relationship with the magazine.

Andrew Tuller is the CEO of Sterling/McFadden Partnership. He testified that he learned that the plaintiff wanted to advertise in the magazine, and that he decided not to accept the space reservation for it and instructed Mr. Goldman to tell "Mr. Vincent that we cannot run his ad" because of the conflict between him and KISS. He testified that only he, Morton Fuller and Peter Callahan, both or whom are senior partners, had authority to contract on behalf of the magazine, and that no authority to contract had ever been delegated to Mr. Goldman.

V.

As indicated by the Chancellor, the pivotal issue requires an in-depth consideration and analysis of the apparent authority of the agent, Mr. Goldman, to bind the defendants. The law in this jurisdiction touching upon the issue has been well settled and expounded upon for generations: Agency must be proved by the party asserting it, and "*may not be proved solely by the statements of the agent.*" ***John J. Heirigs Const. Co. v. Exide***, 709 S.W.2d 604 (Tenn. Ct. App. 1986). (Emphasis supplied). *See, also,* ***Action Ads Inc. v. Wm. B. Tanner Co.***, 592 S.W.2d 572 (Tenn. Ct. App. 1979); ***Robertson v. Lyons***, 553 S.W.2d 754 (Tenn. Ct. App. 1977); ***Haury &Smith Realty Co. v. Piccadilly Partners I*** , 802 S.W.2d 612 (Tenn. Ct. App. 1990). In ***Edmond Bros. Supply Co. v. Boyle and Adams***, 44 S.W.3d 530, (Tenn. Ct. App 2000) we held "apparent authority of an agent must be determined by the *acts of the principal* and not those of the agent." (Emphasis supplied).

In ***V. L. Nicholson Co. V. Transcon Investment and Financial Ltd., Inc.***, 595 S.W.2d 474 (Tenn. 1980), one of the issues was whether an architect had apparent authority to bind Transcon. The litigation involved extra work performed on a construction project. Such extra work was orally approved by the architect, who admittedly was not Transcon's actual agent. The Supreme Court held that the architect was "cloaked with the apparent authority to act on Transcon's behalf, including the meetings with Nicholson and the letter asking the architect to certify sufficient cause to terminate Nicholson." The Court further reasoned that

> [i]n order to determine whether an agency has been established, the relationship of the parties is to be scrutinized, and the facts will establish agency whether the parties so intended or understood. Apparent authority in an agent is such authority as the principal knowingly permits the agent to assume or which he holds the agent out as possessing . . . such authority as a reasonably prudent man, using diligence and discretion, in view of the party's conduct, would naturally suppose the agent to possess. If it can be shown that . . . the person dealing with the agent knew of the facts and acting in good faith had reason to believe, and did believe, that the agent possessed the necessary authority, then the general rule on apparent authority may be applied. (Citations omitted).

The apparent agency of Mr. Goldman, if any, must be gleaned from these factual findings: (1) the plaintiff called the magazine and stated that he wanted to place an ad; (2) he was directed to Mr. Goldman, who gave the plaintiff explicit instructions and information, such as the location of the ad in the magazine, the rate of the required space, the deadlines to submit the artwork, and that he could contract with the magazine by sending written confirmation;[5] (3) the confirmation was sent, and Mr. Goldman retained it, *i.e.*, he did not forward it to anyone else; (4) Mr. Goldman at no time informed the plaintiff that he had no authority to contract, notwithstanding that he did, in fact, tell the plaintiff "that we have a contract"; and (5) CEO Tuller, of the magazine, instructed Mr. Goldman to reject the ad owing to a conflict with the KISS organization.

The defendants rely upon ***Nicholson*** in support of their insistence that the facts justify a finding of apparent agency. The operative language of ***Nicholson*** ["such authority as a reasonably prudent man, using diligence and discretion, in view of the parties conduct, would naturally suppose the agent to possess"] is inapposite here in light of all the circumstances.

The plaintiff admitted that he had twice been fired by the KISS band. He also admitted that at the time he called the magazine to place his ad a serious dispute existed between him and KISS which later developed into bitter litigation. The plaintiff testified

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[5] The confirmation letter sent by the plaintiff appears to be, as insisted by the defendants, a confirmation of a space reservation rather than the confirmation of a contract, and stereotypical.

Q. Under those circumstances, is it a surprise to you that KISS might not want you to place an ad in a KISS dedicated magazine?
A. No.
Q. If, instead of rejecting your ad, the company had received your artwork and then rejected your ad because it disapproved of your artwork,[6] would you . . . have believed that the company broke any contract with you?
A. I don't know. It would depend on the circumstances at a given time I think.

A reasonably prudent man "using diligence and discretion" would hardly assume the apparent agency of Mr. Goldman in light of the circumstances. Moreover, when the principal learned of the ad request, the plaintiff was promptly informed that his proposed ad was rejected.

The only evidence of an agency relationship appears from the testimony of the purported agent. There is no evidence that the principals of the magazine authorized Mr. Goldman to make an agreement binding the magazine, and no evidence that the magazine knowingly permitted Mr. Goldman to assume authority, or hold himself out as possessing the authority to bind the magazine. We therefore conclude that the plaintiff failed to carry his burden of proving the agency of Mr. Goldman to bind the magazine. This conclusion is dispositive of the case and the remaining issues are pretermitted. The judgment is reversed and the complaint is dismissed at the costs of the appellant.

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[6] The artwork submitted by the plaintiff was himself, *dressed in his KISS costume*, which doubtlessly cast a somewhat chilling effect upon a decision to accept the ad.