

STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

THOMAS HOSPITALITY GROUP,  
INC., a Michigan corporation,

Plaintiff,

vs.

Case No. 2014-2406-CK

MORNING STAR GROUP, INC.,  
a Michigan corporation,

Defendant.

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OPINION AND ORDER

The parties have filed cross-motions for summary disposition pursuant to MCR 2.116(C)(10). Each party has also filed a response to the opposing party's motion.

*Facts and Procedural History*

Defendant was formed in 2007 by Rafida Salem. Rafida Salem was Defendant's president, secretary and treasurer, as well as its sole incorporator. Emil A. Salem is Rafida Salem's husband, and a shareholder, but not an officer, of Defendant.

Defendant's business included operating a restaurant/lounge business from leased space at 52963 Van Dyke, Shelby Township, MI ("Subject Property"). On November 15, 2012, Plaintiff and Mr. Salem, as Defendant's "Authorized Representative" on its behalf entered into an Exclusive Marketing Agreement ("Agreement"). Under the Agreement Plaintiff agreed to market Defendant's business in an effort to find a suitable buyer.

At around the same time, Defendant's landlord in connection with the Subject Property initiated a landlord-tenant action with the 41-A District Court based on Defendant's outstanding

rent balance of almost \$80,000.00. On April 8, 2013, the district court issued an Order of Eviction, which has caused Defendant to cease operations at the Subject Property.

On June 17, 2014, Plaintiff filed its complaint in this matter containing claims for: Count I- Breach of Contract, and; Count II- Claim and Delivery. The parties have since filed cross motions for summary disposition. On April 2, 2015, the Court held a hearing in connection with the motions and took the matter under advisement.

#### *Standard of Review*

A motion under MCR 2.116(C)(10) tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121.

#### *Arguments and Analysis*

In its motion, Plaintiff contends that it is entitled to recover \$35,000.00 of commission pursuant to the Agreement based on Defendant's alleged default.

In its response, Defendant contends that it is not bound by the Agreement because Mr. Salem did not have authority to execute the Agreement on its behalf.

In its reply, Plaintiff avers that Mr. Salem had the apparent authority to execute the Agreement, and that Defendant is estopped from contesting Mr. Salem's authority where its

president/secretary/treasurer Mrs. Salem was present at all material times, including when the Agreement was executed.

With respect to Mr. Salem's apparent authority, an agency relationship may arise when there is a manifestation by the principal that the agent may act on his account. *Meretta v Peach*, 195 Mich App 695, 697, 491 NW2d 278 (1992). The authority of an agent to bind a principal may be either actual or apparent. *Id.* at 698. Apparent authority may arise when acts and appearances lead a third person reasonably to believe that an agency relationship exists. *Id.* at 698-699. Apparent authority must be traceable to the principal and cannot be established by the acts and conduct of the agent. *Id.* at 699. In determining whether an agent possesses apparent authority to perform a particular act, the court must look to all surrounding facts and circumstances. *Id.* The question is whether an ordinarily prudent person would be justified in assuming that the agent had the authority to do the act. *Id.* When a principal has placed an agent in a situation in which a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in assuming that such agent was authorized to perform on behalf of the principal the particular act, and the act has been performed, the principal is estopped from denying the agent's authority to perform it. *Id.* at 699-700.

In support of its motion/response, Plaintiff relies on the affidavit of Michael Scheid, its president. (*See Exhibit A to Plaintiff's response to Defendant's motion for summary disposition.*) Mr. Scheid testified that he met with Mr. and Mrs. Salem to discuss selling Defendant's business after he verified that Mr. and Mrs. Salem were Defendant's shareholders. (*Id.* at ¶1-2). Mr. Scheid also testified that Mrs. Salem actively participated in the meeting, was present while the terms of the Agreement were being negotiated, and did not object at any time. (*Id.* at ¶ 3-5.)

Further, Mr. Scheid delivered the Agreement to Mrs. Salem for review, and Mrs. Salem was present at the time the Agreement was executed. (Id. at ¶ 6-8.)

After reviewing Mr. Scheid's testimony, and based on the fact that Plaintiffs have failed to provide any evidence contradicting Mr. Scheid's testimony, the Court is convinced that Mr. Salem had the apparent authority to bind Defendant, and that Defendant is estopped from contesting Mr. Salem's authority. Defendant's principal was involved throughout the negotiation process, was aware of the Agreement's terms, and stood by while her husband executed the Agreement. Based upon the facts and circumstances surrounding the preparation and execution of the Agreement, the Court is convinced that Defendant is estopped from contesting whether it is bound by its terms. Consequently, the Court is satisfied that Defendant's position is without merit.

In addition, Defendant contends that it should be excused from its obligations under the Agreement pursuant to the doctrine of impossibility. The defense of impossibility arises when unknown circumstances exist when a Contract is formed or later arise that render performance impossible. *Bissell v LW Edison Co*, 9 Mich App 276, 156 NW2d 623 (1967). In this matter, Defendant contends that it did not know that its landlord could seize its assets and evict it from the Subject Property. However, the Court is convinced that it is certainly foreseeable, if not expected, that failing to pay tens of thousands of dollars in rent could result in being evicted and/or having your assets seized. Consequently, the Court is satisfied that Defendant's impossibility defense is without merit.

Defendant also contends that Plaintiff is not entitled to a commission because no commission has been earned. In its response, Plaintiff asserts that Defendant defaulted under the Agreement, and that based on the default it is entitled to collect its commission.

The Agreement's default provision provides in pertinent part:

If a sale or lease is not consummated because of [Defendant's] inability, failure or refusal to perform, or [Defendant's] withdrawal of the Property from the market, then the full commission shall be due and payable upon such occurrence.

*See* Agreement at ¶ 9.

In this case, Defendant concedes that it was unable to sell its assets due to the fact that they had been seized by its landlord due to Defendant's failure to pay almost \$80,000.00 in back rent. (*See* Defendant's Brief in support of its motion for summary disposition at p. 8.) While Defendant did not voluntarily withdraw its assets from the market, its actions, i.e. its failure to pay rent, resulted in the assets being unavailable for sale. Consequently, the Court is convinced that Defendant's actions caused its assets to be withdrawn from the market, thereby amounting to a default under the terms of the Agreement. As a result, Defendant is liable to Plaintiff for the full commission pursuant to the Agreement. The commission amount under the Agreement is \$35,000.00, which is 10% of the \$350,000.00 minimum purchase price. *See* Agreement, at ¶6.

In addition, Plaintiff contends that it is entitled to recover the attorney fees it has incurred in connection with this matter. The Agreement provides, in pertinent part:

Should any arbitration or litigation be commenced between the parties to this Agreement concerning the rights and duties of either party in relation to this Agreement, [Plaintiff] shall be entitled to, in addition to any other relief that may be granted, actual attorney fees incurred in the arbitration or litigation.

*See* Agreement, at ¶9.

In its response, while Defendant does not appear to contest that it is liable for the reasonable attorney fees Plaintiff has incurred in connection with this matter, Defendant contends that Plaintiff's request for attorney fees should nevertheless be denied because Plaintiff has failed to establish that the requested fees are reasonable and recoverable under *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008). Indeed, while Plaintiff has requested attorney

fees it has failed to provide the Court with any evidence establishing that the requested amount is reasonable. Consequently, the Court is convinced that an evidentiary hearing must be held on the issue of attorney fees.

Finally, Plaintiff requests that the Court allow it to sell Defendant's liquor license and to apply the proceeds of that sale to the balance owed by Defendant. However, Plaintiff has failed to provide an outline as to how it proposes to sell the license, and has not provided any evidence as to what amount the license should be worth. Consequently, the Court is convinced that this issue should remain open and should also be addressed at the evidentiary hearing.

*Conclusion*

Based upon the reasons set forth above, Plaintiff's motion for summary disposition is GRANTED. Specifically, Plaintiff is entitled to \$35,000.00 in commissions pursuant to the Agreement. The issues related to attorney fees and Plaintiff's ability to foreclose on its lien(s) on Plaintiff's property shall be addressed at an evidentiary hearing on a date to be set by Plaintiff's counsel. Defendant's motion for summary disposition is DENIED. This *Opinion and Order* neither resolves the last claim nor closes the case.

IT IS SO ORDERED.

/s/ John C. Foster  
JOHN C. FOSTER, Circuit Judge

Dated: April 13, 2015

JCF/sr

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