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ARKANSAS COURT OF APPEALS

DIVISION II
No. CA12-436

Opinion Delivered January 23, 2013

TITAN TRANSPORTATION, INC.
APPELLANT

V.

O.K. FOODS, INC.
APPELLEE

APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, FORT SMITH DISTRICT [NO. CV-09-2158]

HONORABLE J. MICHAEL FITZHUGH, JUDGE

AFFIRMED

LARRY D. VAUGHT, Judge

This appeal involves the liability associated with the negligent handling of a load of frozen poultry being transported from Fort Smith, Arkansas, to Denver, Colorado. Although our approach to resolving this case differs slightly from that of the trial court, we see no error in the trial court's assessment of damages against appellant, Titan Transportation, Inc., and affirm the order.

Titan is a freight-brokerage company. It agreed to handle a shipment of frozen poultry for appellee, O.K. Foods, Inc., in response to a list of available shipments that O.K. Foods submitted to potential carriers on June 17, 2008. Titan agreed that it would handle the shipment from Zero Mountain, Inc., located in Fort Smith, Arkansas, to SYGMA, Inc., in Denver, Colorado.

In response, O.K. Foods prepared a cover sheet and confirmation of the agreement, which set forth the date, the carrier, the pick-up and delivery locations, and that the load had to be transported at negative-ten degrees. Unbeknownst to O.K. Foods, Titan contracted Southwind Transportation, Inc., to handle the actual transportation of the shipment. On January 18, 2008, Southwind picked up the load at Zero Mountain; a bill of lading was prepared by Zero Mountain and provided to Southwind.

However, when the delivery arrived in Denver, Colorado, SYGMA refused the goods due to the shipment's being out of the required negative-ten-degree-temperature range. As a result, O.K. Foods sued Southwind and Titan alleging that it sustained a loss of $29,566.99 for the ruined product and incurred transportation costs of $1940. The complaint also alleged that Southwind's negligence should be imputed to Titan because it was negligent in failing to oversee Southwind and in selecting Southwind as a carrier due to the fact that Southwind's corporate charter had been revoked approximately eight months prior to the date of the shipment. Southwind failed to answer the complaint or to appear.

Titan answered the complaint, contending that it was merely a freight broker and owed no duty to O.K. Foods. Titan argued that O.K. Foods implicitly understood that Titan would locate a motor carrier to transport the load. Titan also filed a motion for summary judgment contending that there were no genuine issues of material fact to justify imputing Southwind's negligence to Titan to which O.K. Foods responded with a cross-motion for summary judgment. In an order entered on September 28, 2010, the trial court denied Titan's summary-judgment motion. It also denied the summary-judgment motion filed by O.K.

Foods. Titan then filed an amended answer and, on February 9, 2012, O.K. Foods and Titan filed stipulations with the court.

After a bench trial, on March 5, 2012, the trial court entered an order of default judgment against Southwind in the sum of $31,506.99. The trial court found that the documents associated with the transaction (stipulated to by the parties) did not set forth that Titan was a broker. The trial court specifically noted that the page entitled "Contact Information" showed "various images of carriers" and that on the page entitled "Welcome to Titan Transportation, Inc.," it showed "the same images and sets [sic] a multitude of hauling services including refrigerated and frozen freight." The trial court also found that Southwind's corporate status "had been administratively dissolved on October 19, 2007, by the Missouri Secretary of State and as such could not carry on any business except to wind up its business." Also in relation to Southwind, the trial court found that "hauling a load on June 18, 2008, pursuant to a new brokered agent with Titan is not winding up its business but rather is a continuation of its business." Based on these facts, the trial court concluded that "Titan failed to properly supervise the load, that it hired a carrier that was not authorized to conduct business and insure the requirements of [O.K. Foods] were met" and entered judgment (joint and several with Southwind) against Titan in the sum of $31,506.99. Titan filed its timely notice of appeal on March 14, 2012.

On appeal, Titan contends that the trial court's decision imputing Southwind's negligence to Titan was clearly erroneous and asks us to reverse the judgment. Titan's entire argument is predicated on a determination that Southwind was an independent contractor and

relies on *Arkansas Pools, Inc. v. Beavers*, 281 Ark. 109, 661 S.W.2d 395 (1983), for the proposition that there is no applicable exception to the general rule that an employer is not liable for the negligence of an independent contractor. O.K. Foods argues that the independent-contractor argument is a "red herring" and is inapplicable to the case at bar because there was no evidence of such a relationship between Titan and Southwind.

In bench trials, the standard of review on appeal is not whether there is substantial evidence to support the finding of the trial court, but whether the trial court's findings were clearly erroneous or clearly against the preponderance of the evidence. Ark. R. Civ. P. 52(a); *Cochran v. Bentley*, 369 Ark. 159, 251 S.W.3d 253 (2007). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a firm conviction that a mistake has been committed. *Cochran*, 369 Ark. at 165, 251 S.W.3d at 259. Disputed facts and determinations of credibility are within the province of the fact-finder. *Id.*, 251 S.W.3d at 259. However, a trial court's conclusion on a question of law is reviewed de novo and given no deference on appeal. *Kelly v. Kelly*, 341 Ark. 596, 19 S.W.3d 1 (2000).

We begin our analysis by noting that the trial court did not find Titan to be a carrier. Instead, the trial court found that "Titan did not set forth that it was a broker." Although admittedly semantical, this finding is essential to our resolution of the case.[1] Here, O.K. Foods

[1]The Carmack Amendment to the Interstate Commerce Act makes common carriers liable to shippers for the actual loss or damage to shipments in interstate commerce. 49 U.S.C. § 14701. The purpose of the Carmack Amendment is to enable interstate carriers to assess their risks and predict their potential liability for damages, and the carrier's liability is limited to actual loss or injury to the transport of property. *Id.* Because the trial court did not specifically find

contracted with Titan, who advertised that it offered "carrier services." Titan did not disclose that it was merely a brokerage firm and not a transportation company. And, Titan failed to disclose the name of the actual transportation company—Southwind—to O.K. Foods. Further, in the confirmation of the contract that O.K. Foods sent to Titan, the "carrier" was identified as Titan. According to our record, the document was returned to O.K. Foods by Titan without disclosing the actual carrier to be Southwind.

Although it is well established that a broker cannot be held personally liable to the third party upon a contract for a disclosed principal; and if the third party knew, or had sufficient knowledge to create an inference, that the broker was acting for another, then the broker is not liable. But, *if he does not disclose his principal nor the fact that he is acting as a broker* and deals personally, then he is liable, although in fact he acted as broker, and his principal may be held liable after disclosure, but this does not prevent his personal liability if the third party elects to hold him instead of his after-disclosed principal. *Shulze v. Price*, 213 Ark. 732, 735, 213 S.W.2d 365, 366–67 (1948) (emphasis added).

If an agent seeks to avoid liability on a contract that it entered for another, it must prove both that it affirmatively declared it was acting merely as an agent and that it disclosed the name of the principal. *Cooley v. Ksir*, 105 Ark. 307, 151 S.W. 254 (1912). Here, the trial court specifically found that Titan did not disclose that it was a broker and instead held itself out to be a carrier by confirming the load assignment with Titan listed as the carrier and by

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Titan to be a common carrier, it is not necessary for us to remand the case, sua sponte, for the trial court to consider the implication, if any, of the Carmack Amendment.

various business materials highlighting its ability to provide "carrier services." There is ample support for these findings in the record, and we affirm the trial court's conclusion that Titan did not disclose that it was merely a broker. However, we are left with the question of whether Titan and Southwind were in an agency relationship as O.K. Foods argues or in an independent-contractor relationship as Titan contends.

Arkansas has adopted the Restatement definition of agency in a number of cases. *Evans v. White*, 284 Ark. 376, 682 S.W.2d 733 (1985). The Restatement (Second) of Agency § 1 cmt. b (1957), provides that the relationship of agency does not depend on the intent of the parties to create it, nor the belief that they have done so. To constitute the relationship there must be an agreement, but not necessarily a contract, between the parties; if the agreement results in the factual relationship between them to which are attached the legal consequences of agency, an agency exists although the parties did not call it agency and did not intend the legal consequences of the relationship to follow. The Restatement further provides that the "relationship of master and servant can be created although there is no mutual agreement to give and receive assistance. It is only necessary that there be submission by the one giving service to the direction and control of the one receiving it as to the manner of performance." Restatement (Second) of Agency § 221 cmt. c (1957).

Our courts have defined an independent contractor as one who, exercising an independent employment, contracts to do work according to his own methods and without being subject to the control of the employer, except as to the results of the work, and have held that the right to control and not the actual control determines whether one is a servant

or an independent contractor. *Wilson v. Davison*, 197 Ark. 99, 122 S.W.2d 539 (1938). Our supreme court further defined the distinction in *Blankenship v. Overholt*, 301 Ark. 476, 786 S.W.2d 814 (1990), where it listed ten factors to be considered in determining whether an agency relationship or independent contract existed, as found in § 220 of the Restatement (Second) of Agency, and stated that the right of control is the principal factor to be considered in making the determination. *Howard v. Dallas Morning News, Inc.*, 324 Ark. 91, 99–100, 918 S.W.2d 178, 182–83 (1996). The intent of the parties is not included among these factors. *Id.* at 100, 918 S.W.2d at 183.

By accepting the load at the pre-determined shipping price, but not disclosing which transportation company would actually handle the load, Titan was able to accept the business at the rate specified but was able to shop among various carriers and maximize its profit on the transaction. Presumably, if Titan had selected a solvent, reputable transportation company, with the actual capacity to maintain the refrigeration requirements of the load, its profit may have been diminished. Conversely, although Titan would receive a smaller profit, O.K. Foods' shipment would have presumably been more secure and well-handled.

In this transaction, because Titan controlled the risk, it can only avoid liability for the contractual breach if it disclosed the principal's identity so that O.K. Foods could confirm that it was willing to bail its property to the third party (Southwind). *See Schulze*, 213 Ark. at 735, 213 S.W.2d at 366–67. And, the trial court found that the risk that was in Titan's control was ill managed—Titan failed to insure that Southwind was an existing corporation, that it had

authority to enter into a contract, and that it had the type of equipment required to deliver the time- and temperature-sensitive load.

As Titan had the right of control and was acting on behalf of a undisclosed principal, it is treated as an agent under our prevailing law. *Morrison v. Bland*, 226 Ark. 514, 291 S.W.2d 243 (1956). An agent who acts for an undisclosed principal is liable on any contract that is made. Restatement (Second) of Agency, §§ 321, 322. The Restatement at § 4(2) states that a principal is "undisclosed" if the customer knows that he is dealing with an agent, but does not know the principal's identity. The facts of this case are even more compelling because the agent held itself out to be the principal, but in fact was not. O.K. Foods was unaware of the actual transportation company's identity, and it had no opportunity to investigate its suitability for the job (or to know that Southwind had lost its corporate charter).

It is the well-settled law of this state that, where an agent makes a contract for an undisclosed principal, both the principal and the agent may be held liable at the election of the party who dealt with the agent. *Beatrice Creamery Co. v. Garner*, 179 S.W. 160, 162 (Ark. 1915). Here, O.K. Foods sought damages against both the principal and the agent, and the trial court's decision granting joint and several judgment against Titan and Southwind was not clearly erroneous. Based on our law of agency, the judgment upon the facts and the law on the whole case is correct and will therefore be permitted to stand. *Pullen v. Pullen's Estate*, 249 Ark. 489, 496, 460 S.W.2d 753, 757 (1970) (affirming the judgment despite the fact that the appellate court's conclusion differs from the reason given by the trial court).

Finding no error in the conclusion reached by the trial court, albeit by slightly different means, we affirm the trial court's judgment against Titan in the amount of $31,506.99.

Affirmed.

GLADWIN, C.J., and GLOVER, J., agree.

Conner & Winters, LLP, by: *G. Alan Wooten*, for appellant.

Smith, Cohen & Horan, PLC, by: *Don A. Smith*, for appellee.