NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2602-06T2

21ST CAPITAL CORP.,

Plaintiff-Appellant,

v.

TIFFANY AND COMPANY,

Defendant/Third-Party
Plaintiff-Respondent,

and

TROY CORP., MIZUHO SECURITIES USA, INC., UNITED WATER, INC., TECH SYSTEMS & SERVICES, INC., TECHNOLOGY SCIENCES & SERVICES, INC., and RICHARD A. SPAIR, JR.,

Defendants,

v.

TECH STAFF SOLUTIONS, INC.,

Third-Party Defendant.

Argued January 23, 2008 - Decided February 6, 2008

Before Judges Coburn, Fuentes and Grall.

On appeal from Superior Court of New Jersey, Law Division, Morris County, Docket No. L-1988-04.

Gregg P. Tabakin argued the cause for appellant (Fein, Such, Kahn & Shepard, attorneys; Mr. Tabakin, of counsel and

on the brief).

Frederick W. Alworth argued the cause for respondent (Gibbons P.C., attorneys; Mr. Alworth and Lisa Lombardo, on the brief).

PER CURIAM

Plaintiff, 21st Capital Corp. appeals from the order of the Law Division dismissing its collection cause of action against defendant Tiffany and Company. The matter came before the trial court on the parties' cross-motions for summary judgment. Plaintiff's case is premised on the theory of apparent authority in one of defendant's employees.

The salient facts are relatively straight forward. Plaintiff is a factoring financier. It purchased accounts receivable from an information technology consulting company that performed information technology (IT) services for defendant. Plaintiff brought this collection action against defendant claiming that it had a right to receive payment based on the face amount reflected on the invoices, regardless of whether these invoices were fraudulent, or duplicative of past work previously paid by defendant.

In support of its claim, plaintiff submitted verification forms signed by Fernando Vega, a Tiffany employee, that: (1) purport to confirm the debt Tiffany owed plaintiff regarding the IT company's factored accounts receivable; and (2) purport to

waive all defenses regarding the factored accounts, including any challenge to the underlying invoices' validity.

In response, defendant argued that the employee in question was not authorized either to confirm its debt to plaintiff or waive any defenses. Defendant further argued that the underlying invoices are fraudulent, precluding plaintiff's collection on them.

After reviewing the record, and considering the arguments of counsel, Judge Wilson granted Tiffany's summary judgment motion, and, as a consequence, denied plaintiff's cross-motion. We affirm.

In reviewing a trial court's decision on a motion for summary judgment, the Appellate Division applies the same standards as those that govern the trial court below. Jolley v. Marquess, 393 N.J. Super. 255, 267 (App. Div. 2007). A trial court should grant a motion for summary judgment only when there is no "genuine issue of material fact" in dispute. Liberty Surplus Ins. Corp. v. Nowell Amorso, P.A., 189 N.J. 436, 446 (2007) (quoting Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995)). In making this determination, the court must view the evidence in the light most favorable to the non-moving party. Brill, supra, 142 N.J. at 540. Here, it must be

emphasized that both parties moved for summary judgment, thus conceding that there are only legal issues at stake.

We will first address the issue of apparent authority. The doctrine of apparent authority applies "where the actions of a principal have misled a third party into believing that a relationship of authority existed." Lobiondo v. O'Callaghan, 357 N.J. Super. 488, 497 (App. Div.), certif. denied, 177 N.J. 224 (2003) (quoting Rodriguez v. Hudson County Collision Co., 296 N.J. Super. 213, 221 (App. Div. 1997)). The doctrine looks to the actions of the principal, and not of the alleged agent. Busciglio v. DellaFave, 366 N.J. Super. 135, 140 (App. Div. 2004). The alleged agent cannot create apparent authority on his own accord, but must be held out as having such authority by the principal. Blaisdell Lumber Co. v. Horton, 242 N.J. Super. 98, 103 (App. Div. 1990).

The apparent authority doctrine states that:

> [t]he principal is bound by the acts of his agent within the apparent authority which he knowingly permits the agent to assume, or which he holds the agent out to the public as possessing. The question in every case depending upon the apparent authority of the agent is whether the principal has by his voluntary act placed the agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform the particular act in question . . . .

> [Lobiondo, supra, 357 N.J. Super. at 497 (quoting Legge Indus. v. Joeseph Kushner Hebrew Acad., 333 N.J. Super. 537, 560 (App. Div. 2000)).]

Here, plaintiff has not produced any evidence that Tiffany held out Fernando Vega as being authorized to obligate the company. Indeed, in his deposition, plaintiff's principal Jack Ford stated that he did not remember how he came to be in contact with Mr. Vega. Further, Ford never inquired into Vega's authority or verified Vega's position at Tiffany. According to Ford, it was Vega who informed him that he (Vega) was authorized to verify the factored accounts receivable.

We also reject plaintiff's argument based on a "course of dealing." The record before us indicates that the invoice acknowledgment forms and open invoice reports sent to Vega were entirely separate from the actual invoices that Tiffany was required to pay. Ford acknowledged this in his deposition. There is also no evidence refuting Tiffany's claim that it was unaware that Vega was signing the acknowledgment forms or communicating with Ford or plaintiff.

Finally, plaintiff also failed to present any evidence before the motion judge to refute Tiffany's well-documented claim, supported through a report prepared by an internal forensic accountant, that the invoices presented were

fraudulent. Plaintiff's argument that, despite these uncontroverted facts, it is entitled to receive full payment, based only on the amounts reflected on the face of these invoices, ($1,181,564.50), is untenable as a matter of law.

Our State's version of the Uniform Commercial Code provides that:

> (a) Assignee's rights subject to terms, claims, and defense; exceptions. Unless an account debtor has made an enforceable agreement not to assert defenses or claims, and subject to subsections (b) through (e), the rights of an assignee are subject to:
> (1) all terms of the agreement between the account debtor and assignor and any defense or claim in recoupment arising from the transaction that gave rise to the contract;
> . . .
>
> [N.J.S.A. 12A:9-404.]

The comment to the section clarifies the intent by stating that:

> Subsection (a), like former Section 9-318(1), provides that an assignee generally takes as assignment subject to defenses and claims of an account debtor. Under subsection (a)(1), if the account debtor's defenses on an assigned claim arise from the transaction that gave rise to the contract with the assignor, it makes no difference whether the defense or claim accrues before or after the account debtor is notified of the assignment. . . . Of course, an account debtor may waive its right to assert defenses or claims against an assignee under Section 9-403 or other applicable law.
>
> [N.J.S.A. 12A:9-404, cmt. 2.]

In James Talcott Inc. v. H. Corenzwit & Co., 76 N.J. 305 (1978), (a case involving a factoring relationship), our Supreme Court applied the general principle, expressed in N.J.S.A. 12A:9-404, that an assignee "steps into the shoes" of an assignor. The Court held that: "It is clear then that the rights of the assignee of an account receivable are subject to contract defenses or claims of the account debtor arising by virtue of the terms of the contract out of which the receivable was created." Id. at 310. We have recently reaffirmed the continued vitality of these legal principles. See N.J. Lawyers' Fund for Client Prot. v. Pace, 374 N.J. Super. 57, 66 n.8 (App. Div.), certif. denied, 183 N.J. 216 (2005); Lech v. State Farm Ins. Co., 335 N.J. Super. 254, 258 (App. Div. 2000).

Thus, plaintiff's claims must fail, given the absence of any evidence of apparent authority, and given defendant's uncontroverted evidence of the underlying invoices' fraudulence.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.
CLERK OF THE APPELLATE DIVISION