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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 05/12/2011
RUTH A. WILLINGHAM,
CLERK
BY: GH

AUBADE CREATIVE, LLC,) 1 CA-CV 10-0661
)
Plaintiff/Appellant,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
)
) (Not for Publication -
DELBERT RUSTY LOUIS DEES, JR.,) Rule 28, Arizona Rules of
dba RND STRATEGIC MARKETING,) Civil Appellate Procedure)
)
Defendant/Appellee.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-050947

The Honorable Robert A. Budoff, Judge

AFFIRMED

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J O H N S E N, Judge

¶1 Aubade Creative, L.L.C. ("Aubade") appeals from the superior court's entry of summary judgment in favor of Delbert Rusty Louis Dees, Jr., dba RND Strategic Marketing ("Dees" or

"RND"). The court held RND was acting as the agent for disclosed principals when it contracted with Aubade's predecessor and that RND therefore was not liable for the principals' breach of contract. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Aubade is the successor in interest to LBC Advertising ("LBC"), which produced advertising for national furniture retailers, including Ashley Furniture Industries, Inc. ("AFI") and Ashley Furniture HomeStore Ltd. ("AFHS").¹ RND is an advertising agency that works with Ashley Furniture stores and acts as their agent to obtain advertising.

¶3 In January 2007, Natalie McKinney, who was LBC's vice president, general manager and its Ashley senior account coordinator, met with Roy Corn, owner of five companies that operated Ashley Furniture stores in California. Dees and a representative from AFHS also were present. McKinney presented a proposal for LBC to provide advertising services. Corn informed LBC that he was interested in obtaining LBC's services and that his stores would engage LBC's services through RND. He told LBC that RND would handle payment arrangements and that Corn and his stores would pay for the advertising services. Use of an agent

¹ AFI manufactures furniture sold at Ashley Furniture HomeStore locations, which in turn are owned by licensees of AFHS.

to arrange for advertising services is a commonplace practice in the retail furniture industry.

¶14 LBC provided an order form labeled "Ashley Furniture Television Order Form," which RND completed and on which RND indicated it was the "Sales Rep" to which LBC should send invoices. LBC completed forms for the advertising in which it acknowledged that the "client (advertiser)" was Ashley Furniture. RND placed two orders with LBC for advertising production services for an Ashley Furniture store located in Murrieta, California. The Murrieta store was owned by a company called Empty Heads, Inc., which Corn owned. RND also ordered television advertising for the benefit of three Ashley Furniture stores located in what is known as the Fremont market. Those stores were owned by three other Corn companies, Fairfield Furniture Solutions, Inc., Rohnert Park Furniture Solutions, Inc., and Fremont Furniture Solutions, Inc., respectively. A fourth store, owned by California Furniture Solutions, Inc., also owned by Corn, was added to the Fremont market, and RND ordered advertising from LBC for the collective benefit of the four Fremont market stores.

¶15 After LBC's invoices for the services it provided went unpaid, LBC filed a complaint against RND, alleging breach of

contract, open account and unjust enrichment.² RND asserted as an affirmative defense that, as "an agent of a disclosed principal, it [was] not liable in contract for the breach of the principal." RND eventually moved for summary judgment on the breach of contract and open account claims, arguing it acted as an agent for Corn and his Ashley Furniture stores in contracting for LBC's services. In response, LBC acknowledged it knew RND acted as an agent for its principals, but argued RND had not disclosed the actual names of the corporations that owned and operated the stores.

¶16 The court granted RND's motion for summary judgment. Aubade filed a timely notice of appeal. We have jurisdiction under Article 6, Section 9, of the Arizona Constitution and pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

DISCUSSION

¶17 Summary judgment may be granted when "there is no genuine issue as to any material fact and [] the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c). In reviewing a motion for summary judgment, we determine *de novo* whether any genuine issues of material fact exist and whether the superior court properly applied the law. *Eller Media*

² The unjust enrichment claim later was dismissed by agreement.

Co. v. City of Tucson, 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App. 2000).

¶18 One who executes an agreement with a third party as an agent on behalf of a fully disclosed principal is not a party to that agreement and therefore is not liable to the third party if the principal breaches the agreement. *Ferrarell v. Robinson*, 11 Ariz. App. 473, 475, 465 P.2d 610, 612 (1970); Restatement (Third) of Agency § 6.01 (2006) (hereafter "Restatement").

¶19 A principal is considered "disclosed when the third party has notice that [the] agent is acting for a principal and has notice of the principal's identity." Restatement § 6.01 cmt. a. A person has notice if he or she "knows the fact, has reason to know the fact, has received an effective notification of the fact, or should know the fact to fulfill a duty owed to another person." Restatement § 1.04(4). The third party has notice of the principal's identity when he or she "has notice of facts reasonably sufficient to identify the principal." Restatement § 6.02 cmt. d. The source of the notice is irrelevant. *Id.* The burden to disclose the existence and identity of the principal is on the agent; the third party has no duty to inquire. *Myers-Leiber Sign Co. v. Weirich*, 2 Ariz. App. 534, 536, 410 P.2d 491, 493 (1966).

¶10 Aubade argues in its opening brief that RND did not provide notice to LBC of the identities of RND's principals at or

before the time it ordered the advertising. In its reply brief, however, Aubade concedes that, at the time RND ordered the advertising, LBC was aware that RND was acting as an agent for five different corporate principals and that LBC was aware of the names of those principals. Aubade contends that summary judgment in favor of RND nevertheless was error because under Arizona law, RND was required to show that LBC was on notice of the specific principal or principals involved in each separate advertising transaction.

¶11 A review of the invoices on which Aubade bases its claim, however, shows that each invoice specified whether the advertising contracted for was for the Murrieta or Fremont market, thereby giving LBC notice of the particular stores for which it provided the services reflected in each invoice. Given Aubade's concession that LBC was aware of the identity of the corporate owners of the stores in those markets, the record conclusively shows that LBC had notice of RND's principals with respect to each of the relevant transactions. As the agent of disclosed principals, RND therefore was not a party to the contracts and is not liable for any breach.

CONCLUSION

¶12 For the reasons stated above, we affirm entry of judgment in favor of RND. RND has requested its costs and attorney's fees on appeal pursuant to A.R.S. §§ 12-341 (2003) and

12-341.01 (2003). We grant RND its costs and, in our discretion, also grant RND its reasonable attorney's fees contingent on its compliance with ARCAP 21.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
MARGARET H. DOWNIE, Judge

/s/
JON W. THOMPSON, Judge