NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

DIVISION ONE
FILED: 02/14/2012
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

HOWARD and KATHY SVEBACK,	No. 1 CA-CV 11-0266
Plaintiffs/Appellants,	DEPARTMENT B
v.	**MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)
CLAYTON HOMES, INC.,	
Defendant/Appellee.	

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-092972

The Honorable Karen A. Potts, Judge

AFFIRMED

Howard Sveback and Kathy Sveback — Mesa
Plaintiffs/Appellants, *In propria persona*

The Cavanagh Law Firm — Phoenix
By Kerry M. Griggs, Taylor C. Young, and Kelton G. Busby
Attorneys for Defendant/Appellee

K E S S L E R, Judge

¶1 Plaintiffs/Appellants Howard and Kathy Sveback appeal from the superior court's summary judgment in favor of

Defendant/Appellee Clayton Homes, Inc. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 CMH Homes, Inc. ("CMH") is a subsidiary of Clayton Homes, Inc., which formerly conducted manufacturing operations in Arizona. CMH is a manufactured home retail dealership and operates under several dba's, including Clayton Mesa and Clayton Homes. In October 2007, the Svebacks entered into a sales agreement with a dealership in Mesa, Arizona, to buy a new manufactured home and to have the new home attached to their real property in Mesa. Waleed A. Hammad was the general manager of the Mesa dealership at the time. The contract identified Clayton Mesa as the seller. The Svebacks subsequently sought to cancel their purchase contract and enter into a replacement contract. Clayton Mesa agreed, and the replacement contract closed on November 16, 2007. In conjunction with the purchase, the Svebacks contracted to have their existing 1968 model manufactured home demolished and removed from the property in preparation for the new home. Approximately three days after executing the replacement contract, the Svebacks rescinded that second contract.

¶3 By letter, CMH sought recovery of the costs of removing the 1968 model and preparing the property for the new home. CMH engaged a third-party company, Construction Notice

Services, Inc., to file a mechanics' lien on the Svebacks' property. Hammad signed the order form as the general manager of "Clayton Homes." He listed the company contracting for the lien services as "Clayton Homes, Inc." A Notice of Claim of Mechanic's and Materialmen's Lien was recorded on November 28, 2007. It listed the claimant as Clayton Homes, Inc. and was signed "Debra A. Pope, Limited Agent for Clayton Homes, Inc., Lien Claimant." The lien was released December 4, 2007.

¶4 On August 19, 2009, the Svebacks filed a complaint against Clayton Homes, Inc., seeking damages for the demolished home and for filing a false lien. In its answer to the complaint and counterclaim, CMH asserted it had been improperly referred to in the complaint as Clayton Homes, Inc. but that it was the proper party.

¶5 The Svebacks filed a motion to dismiss the counterclaim and contended that they had dealt only with Clayton Homes, Inc., and that the lien was filed by Clayton Homes, Inc. After a series of disputes dealing with discovery, the Svebacks requested a ruling that CMH be "disposed" from the case. CMH then withdrew its answer.

¶6 Clayton Homes, Inc. then made a special appearance by filing a motion to dismiss, arguing that the Svebacks were not entitled to relief under any facts susceptible of proof because Clayton Homes, Inc. was not a party to the transaction at issue

and had nothing to do with the lien placed on their property. Clayton Homes, Inc. acknowledged that CMH may have contributed to the confusion by improperly referring to itself as Clayton Homes, Inc. on at least one occasion during the sales transaction; it included declarations from Hammad and others explaining that these references were errors. Clayton Homes, Inc. noted that CMH had gone out of its way to help the Svebacks understand that CMH was the correct defendant.

¶7 In response, the Svebacks pointed out that the lien was obtained at the direction of Hammad in the name of Clayton Homes, Inc. and that the lien and the subsequent lien release were signed by Debra Pope as "limited agent" for Clayton Homes, Inc.

¶8 Clayton Homes, Inc. provided a declaration from Hammad avowing that CMH had engaged Construction Notice Services, Inc. to obtain the lien, that Debra A. Pope was an employee of that service and not an employee of CMH or Clayton Homes, Inc., and that CMH had no authority to act for Clayton Homes, Inc. The record already included another declaration by Hammad and a declaration by Gary Pritchard, Associate General Counsel of CMH Services, Inc., a subsidiary of Clayton Homes, Inc., in which each avowed he had personal knowledge of the corporate structure of CMH. Each avowed that Clayton Homes, Inc. was the parent company of CMH, that the two were separate corporations, that

Clayton Homes, Inc. had previously conducted manufacturing in Arizona but did not conduct retail sales, and that CMH conducted retail operations and was sometimes referred to as Clayton Homes. They also avowed that Clayton Homes, Inc. was not a party to or involved in the transaction with the Svebacks, that CMH and not Clayton Homes, Inc. had arranged for work to be done on the property and had arranged for the lien to be placed on the property, and that CMH and its employees, including Hammad, were not agents for or employees of Clayton Homes, Inc., and did not have authority to act on behalf of Clayton Homes, Inc.

¶9 The superior court treated Clayton Homes' motion to dismiss as a motion for summary judgment and granted the motion. It found that documents submitted by Clayton Homes, Inc., supported by affidavits reflected that the Svebacks were doing business with CMH and not Clayton Homes, Inc. Those documents included: a form titled Consent to Manufactured Home Being Converted to Real Property noting "CMH Homes, Inc. (Seller)" and Hammad's signature beneath "(CMH HOMES, INC.)"; a form titled Manufactured Home Rider to Security Instrument initialed by the Svebacks noting "CMH HOMES, INC. ('Seller')" and directing that the document be returned after recording to "CMH Homes, Inc."; a form signed by the Svebacks declaring that the manufactured home would be their primary residence and noting "CMH HOMES, INC. DBA Clayton MESA – 'Retailer'"; and a document titled AFFILIATED

BUSINESS ARRANGEMENT DISCLOSURE STATEMENT stating “From: (1) CMH Homes, Inc.” and “CMH [and others] are each indirect, wholly owned subsidiaries of Clayton Homes, Inc. (‘Clayton’). Thus, each is an affiliate of the other and under the control of Clayton.” The court found no evidence that Clayton Homes, Inc. and the Svebacks had a contractual relationship. The court noted that while the Svebacks relied on documents referring to “Clayton Homes” and “Clayton Mesa” and the lien order form, the recorded lien, and the lien release, which all referred to the lien claimant as “Clayton Homes, Inc.,” the Svebacks produced no evidence that the documents were prepared by Clayton Homes, Inc. or anyone authorized by Defendant, and that Hammad, with whom the Svebacks dealt, testified that he acted on behalf of CMH and had no authority to act on behalf of Clayton Homes, Inc. Thus, the court concluded that the Svebacks had presented sufficient evidence that they reasonably believed they were transacting with Clayton Homes, Inc., but that there was no evidence of actual or apparent authority that Hammad or anyone acted on behalf of Clayton Homes, Inc. The Svebacks appealed. This Court has jurisdiction pursuant to Arizona Revised Statutes (“A.R.S.”) section 12-2101(A)(1) (Supp. 2011).

DISCUSSION

¶10 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 trial court properly applied the law. *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App. 2000).

¶11 We find no error by the superior court in granting summary judgment to Clayton Homes, Inc. because there is insufficient evidence for summary judgment purposes to show a contractual arrangement between the Svebacks and Clayton Homes, Inc. or of express or apparent agency between CMH and Clayton Homes, Inc.

¶12 As recognized by the superior court, various documents in the transaction identify CMH as the entity with which the Svebacks contracted, including the "Consent to Manufactured Home Being Converted to Real Property," the declaration by the Svebacks that the home would be used as a primary residence, the "MANUFACTURED HOME RIDER TO SECURITY INSTRUMENT," and the "AFFILIATED BUSINESS ARRANGEMENT DISCLOSURE STATEMENT." In addition, the record includes a page from a "DEED OF TRUST AND ASSIGNMENT OF RENTS" that directs the document to be returned

"after recording" to "CMH Homes, Inc.," as well as a copy of a refund check to the Svebacks from CMH Homes, Inc. The declarations of Hammad and Pritchard also demonstrate that CMH and not Clayton Homes, Inc. was the corporate entity with which the Svebacks dealt.

¶13 The Svebacks point to the sales agreement as evidence that Hammad, who signed the agreement for the seller, had acted and had authority to act on behalf of Clayton Homes, Inc. They also point to the lien as evidence that Hammad, Pope, and others were acting on behalf of Clayton Homes, Inc.

¶14 The sales agreement on its face identifies the seller as Clayton Mesa, not Clayton Homes, Inc. and therefore does not in itself support the existence of any contractual relationship between the Svebacks and Clayton Homes, Inc. or the existence of a relationship between Hammad and Clayton Homes, Inc. The order for the lien does identify the claimant as Clayton Homes, Inc. and it is signed by Hammad as general manager of "Clayton Homes." Similarly, the notice of lien and release of lien identify Clayton Homes, Inc. as the claimant and are signed by Debra Pope as the limited agent of Clayton Homes, Inc. These documents on their face suggest a relationship between Clayton Homes, Inc. and the activities conducted on the Svebacks' property as well as the existence of a relationship between Hammad and Pope, and Clayton Homes, Inc. However, declarations

by Hammad and by Gary Pritchard, Associate General Counsel with CMH Services, Inc., explained that CMH, not Clayton Homes, Inc. had arranged for the work to be done on the Svebacks' property and to have a lien placed on the property. Hammad also avowed that CMH, not Clayton Homes, Inc., had engaged Construction Notice Services, Inc. and that Debra Pope was employed by that company. Both Hammad and Pritchard also avowed that Hammad was general manager of the Mesa manufactured homes dealership for CMH Homes, Inc., and was not an agent for and had no authority to act on behalf of Clayton Homes, Inc., which was a separate, distinct corporation. Hammad acknowledged that he sometimes mistakenly referred to Clayton Homes, Inc. instead of CMH Homes, Inc. These declarations were not contradicted.

¶15 In addition, the record does not contain evidence of an agency relationship between Hammad, Pope, or CMH, and Clayton Homes, Inc. An agency relationship can be either express or apparent. *Ruesga v. Kindred Nursing Ctrs. W., L.L.C.*, 215 Ariz. 589, 597, ¶ 28, 161 P.3d 1253, 1261 (App. 2007). An express agency relationship is created by an express agreement between the principal and agent or by facts and circumstances between the principal and agent implying such an agreement. *Id*. at 597, ¶ 29, 161 P.3d at 1261. Apparent authority arises when the principal induces a third person to believe that a person is its agent although no authority was conferred. *Id*. Apparent

authority cannot be established by the actions of the purported agent alone. *Reed v. Gershweir*, 160 Ariz. 203, 205, 772 P.2d 26, 28 (App. 1989).

¶16 The actions on which the Svebacks base their complaint were taken by Hammad, Pope, and CMH. The record, however, contains no evidence of an agreement, express or implicit, between Hammad, Pope and/or CMH, on the one hand, and Clayton Homes, Inc., on the other, whereby Clayton Homes, Inc. conferred on them the authority to act on its behalf. The record does contain express avowals that CMH and its employees did not have authority to act on behalf of Clayton Homes, Inc. Similarly, no evidence appears in the record that Clayton Homes, Inc. took any actions that could have induced the Svebacks to believe that Hammad, Pope, or CMH were acting on behalf of Clayton Homes, Inc. Hammad's and Pope's representations in the lien documents that Clayton Homes, Inc. was the claimant could not bind Clayton Homes, Inc. absent either express or apparent authority from Clayton Homes, Inc. as the principal.

¶17 We find no error in the superior court's determination that no issue of material fact exists, that Clayton Homes, Inc. was not the entity that engaged in the conduct that was the basis of the Svebacks' complaint, and that no evidence showed that Clayton Homes Inc. had authorized Hammad, Pope, or CMH to act on its behalf.

CONCLUSION

¶18 The judgment of the superior court is affirmed.

_/S/_____
DONN KESSLER, Judge

CONCURRING:

_/S/_____
DIANE M. JOHNSEN, Presiding Judge

_/S/_____
MARGARET H. DOWNIE, Judge