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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

DIMITRIOS VOULGARAKIS,

Plaintiff and Respondent,

v.

MICHAEL BRADLEY,

Defendant and Appellant.

F062565

(Super. Ct. No. 638389)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Stanislaus County. William A. Mayhew, Judge.

The Struck Firm and James D. Struck for Defendant and Appellant.

Warda & Yonano and Michael S. Warda for Plaintiff and Respondent.

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Defendant, Michael Bradley, appeals from the judgment entered against him for breach of five contracts entered into by his brother, Robert Bradley, and plaintiff. The trial court concluded Robert was exercising ostensible authority as Michael's agent when

* Before Hill, P. J., Cornell, J. and Gomes, J.

he entered into the contracts. Accordingly, it held Michael liable for the failure to repay money loaned by plaintiff pursuant to the contracts. We find substantial evidence supports the trial court's finding of ostensible authority and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant, Michael Bradley, owned Bradley Auto Sales (BAS), which operated a used car lot. He employed his brother, Robert Bradley, and his nephew, Ryan Bradley, to manage the car lot on a daily basis.¹ The dealer's license, business license, and seller's permit for the business were all in Michael's name and were displayed on the wall of the office on the premises. Michael had no written contract with Robert or Ryan, but he orally authorized Robert to sell vehicles, enter into contracts to finance sales of vehicles, pay sales tax, pay bills of the business, acquire vehicles, sign Department of Motor Vehicles (DMV) paperwork, and acquire and sell assets for the business. Both Robert and Ryan were authorized to use the BAS checking account. Michael was to receive \$100 per car sold from the profits of the business.

Michael had owned the car lot for approximately 10 years at the time of trial. Before that, Robert had owned it for 15 or 20 years. Robert lost his dealer's license because of a problem with sales taxes. Michael testified that, because Robert had previously owned the car lot, the average person probably believed he was still the owner. Plaintiff testified he understood BAS was a family owned business and the licenses were in Michael's name. The only action Michael took to let people know that Robert's authority was limited was to put his own name on the wall.

In November 2007, Robert and Ryan entered into a contract with plaintiff by which plaintiff was to finance the purchase of vehicles for BAS. Plaintiff would advance the funds to purchase a particular vehicle and Robert and Ryan promised to repay that amount, plus an agreed upon return on investment, within 30 days. The vehicles

¹ For convenience and clarity, we will refer to these individuals by their first names because they share a last name. No disrespect is intended.

purchased with this financing belonged to BAS; Michael conceded they were part of his inventory. Under this arrangement, BAS sold “a couple hundred” vehicles. In February 2009, because plaintiff had not been paid for five of the vehicles he financed, plaintiff had Robert sign a loan agreement and promissory note reflecting the total owed for the five vehicles.

In February 2009, Robert passed away. Michael learned for the first time that Robert and Ryan had a financing arrangement with plaintiff. Michael had told Robert at the outset that he did not want any outside funding; Robert and Ryan were not authorized to borrow money for BAS. Michael assumed all vehicles sold by BAS were purchased with the proceeds from prior sales. He did not check the records of the business, except to confirm the sales taxes were being paid. At the time of Robert’s death, plaintiff had not been paid for five vehicles he financed, although the vehicles had been sold. Michael refused to pay the amount owed, and plaintiff sued Michael and Ryan; after a court trial, the trial court entered judgment for plaintiff, finding Robert was acting as the ostensible agent of Michael when he borrowed the funds from plaintiff. Michael appeals.

DISCUSSION

“An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency.” (Civ. Code, § 2295.) “An agency is either actual or ostensible.” (Civ. Code, § 2298.) “An agency is actual when the agent is really employed by the principal.” (Civ. Code, § 2299.) “An agent has such authority as the principal, actually or ostensibly, confers upon him.” (Civ. Code, § 2315.)

“Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess.” (Civ. Code, § 2317.)

There was no dispute that Robert and Ryan were agents of Michael for purposes of operating the BAS used car lot. Michael testified that he owned BAS, employed Robert and Ryan, and gave them the authority to buy and sell vehicles and perform various related tasks on behalf of BAS. The issue addressed at trial was the extent of that agency,

and whether it included the authority to contract with plaintiff to finance the purchase of vehicles to be sold by BAS. The question before this court is whether substantial evidence supports the trial court's conclusion that Robert and Ryan were acting within the scope of their ostensible authority when they financed the purchase of vehicles for BAS by borrowing from plaintiff.

Ostensible authority is created by the statements, acts or omissions of the principal, not the agent. (*J. L. v. Children's Institute, Inc.* (2009) 177 Cal.App.4th 388, 404.) "[I]f a principal by his acts has led others to believe that he has conferred authority upon an agent, he cannot be heard to assert, as against third persons who have relied thereon in good faith, that he did not intend to confer such power." (*Gainey v. Austin* (1943) 58 Cal.App.2d 250, 260.) The principal need not directly interact with the third person in order for ostensible authority to result.

"Although it is established that ostensible authority can be created only by the acts or declarations of the principal, not by those of the agent [citation], the principal need not have been in direct contact with the third party; the manifestation of the principal may be to the community at large, and may consist of appointing the agent to a particular position. [Citation.] '[Where] ... an agent is by his principal put in charge of a business as the apparent manager thereof, he is clothed with apparent authority to do all things that are essential to the ordinary conduct of such business at that place, and third persons, acting in good faith, and without notice of or reason to suspect any limitations on his authority, are entitled to rely on such appearance....' [Citation.] 'The theory of ostensible agency is that the agent's position facilitates the consummation of the fraud, in that from the point of view of the third person, the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him.' [Citation.]" (*Meyer v. Ford Motor Co.* (1969) 275 Cal.App.2d 90, 102, italics omitted.)

In *Safeway Stores, Inc. v. King Lumber Co.* (1941) 45 Cal.App.2d 17 (*Safeway*), Oeschger, the manager of the defendant's lumber yard, had a practice of endorsing checks that he received in the course of his employment as payment for merchandise and cashing them at local businesses. They were endorsed in the name of King Lumber, by Oeschger as manager. Oeschger cashed at least 30 of these checks at the Safeway store

without incident. He claimed he needed cash to make disbursements as manager. Oeschger's duties as manager included selling merchandise, receiving money and checks on account of sales, advertising, hiring and firing employees, and paying wages and certain bills out of the receipts of the business. (*Id.* at p. 19.) An officer of King Lumber testified that Oeschger was not authorized to endorse checks payable to the company.

Oeschger cashed a check for \$337.32 at the Safeway store, but did not apply the payment to the customer's account. King Lumber asserted the endorsement on the check was forged; it claimed it had no knowledge Oeschger had been endorsing checks. It had not notified any local merchant that Oeschger did not have authority to cash checks payable to King Lumber. The court concluded substantial evidence supported the trial court's finding that Oeschger had ostensible authority to endorse the checks. Oeschger's conduct and the length of time during which it occurred were "sufficient to establish, by implication, that such authority was given notwithstanding the direct testimony of the principal that the agent had no such authority." (*Safeway, supra*, 45 Cal.App.2d at p. 22.) "The only fair inference to be drawn from the facts is that [Safeway] knew and relied on the ostensible authority of Oeschger to perform the acts in question, and that there is abundant proof of want of ordinary care on the part of [King Lumber] in the conduct of its business which was sufficient to lead [Safeway] to believe that Oeschger was clothed with full and ample power and authority in the premises." (*Ibid.*) The court explained:

"Where a principal makes it possible, through his acts, for his own agent to inflict injury, the result of such injury should not be passed on to innocent persons who have dealt with the agent in good faith under his apparent authority. The law forbids the principal to deny authority in the agent where his own conduct has invited those dealing with him to assume that the agent possessed such authority. In such a case, a principal is bound by his acts and is estopped by his own conduct from denying the authority of the agent to act. [Citation.] Where, as here, an agent is by his principal put in charge of a business as the apparent manager thereof, he is clothed with apparent authority to do all things that are essential to the ordinary conduct of such business at that place, and third persons acting in good faith and without notice of, or any reason to suspect, any limitations of his authority,

are entitled to rely on such appearance. [Citation.]” (*Safeway, supra*, 45 Cal.App.2d at p. 23.)

In *Leavens v. Pinkham & McKevitt* (1912) 164 Cal. 242 (*Leavens*), the plaintiff sued on his own behalf and as assignee of others, to recover on contracts for the sale of citrus fruit to the defendant. The defendant contended it received the fruit on consignment and owed the plaintiff only the net proceeds of the sales. The trial court found in favor of the plaintiff—that he contracted with the defendant’s ostensible agent for the outright purchase of the fruit by the defendant. (*Id.* at pp. 243-244.)

The defendant operated packing houses; it received fruit from growers either on consignment or by outright purchase from the growers. The contracts in issue were made by H. G. Hand, the manager of one of the defendant’s packing houses. It was undisputed Hand did not have actual authority to make the contracts. (*Leavens, supra*, 164 Cal. at p. 244.) Hand had an automobile with a sign on it that identified him as a manager of the defendant, which the defendant knew about. He had printed contract forms for purchase by the defendant of citrus fruit, which had the defendant’s name printed on them and were furnished by the defendant; they were used in making the subject contracts. (*Ibid.*) The previous year, Hand had purchased fruit from the plaintiff and his assignors, and those contracts were recognized as binding by the defendant; the plaintiff and his assignors were paid with checks signed by the defendant. Hand made similar purchases as agent for the defendant during the subject year. The defendant contended some of those purchases, including the plaintiff’s and his assignors’, were unauthorized and identified by Hand as consignments. (*Id.* at p. 247.)

The court concluded there was no question the situation shown by the evidence reasonably supported “a conclusion that defendant by want of ordinary care allowed Hand to appear to the growers ... as having the authority to enter into, on its behalf, such contracts of purchase of fruits as he made.” (*Leavens, supra*, 164 Cal. at p. 247.) Hand was the general manager of the packing house and the defendant’s sole representative at that location; “[h]e was apparently acting within the scope of a general employment to

represent defendant in its business at that place, and such business included ... the purchase of fruit.” (*Ibid.*)

“It will not be questioned, we assume, that where an agent is by his principal put in charge of a business in a certain locality as the manager thereof, he is clothed with apparent authority to do all things that are essential to the ordinary conduct of the business at that place. If the business consists in large part of the buying of fruit, as we must assume under the evidence it did in this case, he is apparently clothed with authority to buy for his principal. Such acts are within the apparent scope of his employment, and third persons acting in good faith and without notice of or reasons to suspect any limitation on his authority, are entitled to rely on such appearances. (*Leavens, supra*, 164 Cal. at p. 248.)

After Robert lost his dealer’s license, Michael bought BAS and employed Robert and Ryan to manage it for him. Michael did nothing to determine that Robert had the financial ability to pay cash for vehicles to start the business; Michael believed Robert used money he received from the sale of his automobile repair shop to finance opening the car lot. Robert ran the business virtually without oversight; Michael did not check the records of the business. Robert was authorized to acquire and sell vehicles, pay sales tax and bills, sign checks on Michael’s BAS checking account, execute contracts for financing sales of vehicles to customers, sign DMV paperwork, and acquire and sell assets for the business.

As in *Safeway* and *Leavens*, Michael’s appointment of Robert as manager of BAS clothed him with ostensible authority to do everything necessary to the ordinary operation of the business. Michael authorized Robert to operate the business under Michael’s licenses, then apparently permitted Robert to run it as he had when he owned the business, checking only to make sure that the state taxes were being paid monthly.²

² Apparently Michael’s supervision of the payment of taxes was inadequate; Michael testified that, even prior to Robert’s death, the tax authorities levied on Michael’s bank account for unpaid taxes. At the time of Robert’s death, BAS owed approximately \$35,000 to \$40,000 in back taxes.

Michael told Robert he did not want any outside funding; he believed vehicles were being purchased with the proceeds of prior sales, through a reserve account.

Plaintiff began financing BAS's purchases of vehicles in November 2007 and continued through September 2008. The contracts were on BAS letterhead, signed by plaintiff and either Robert or Ryan. The five unpaid contracts in issue were dated June 27, 2008, July 8, 2008, August 15, 2008 (two contracts), and September 22, 2008. At least 45 financing contracts dated prior to June 27, 2008, were admitted at trial; an additional 10 were dated between June 27 and September 22, 2008. All of these other contracts for the financing of vehicles for BAS were paid. Thus, at the time the first of the five contracts in issue was made, plaintiff had entered into numerous contracts over the course of several months, apparently with BAS, Michael's sole proprietorship business, and all of those contracts had been honored and performed. Michael, due to his neglect to supervise BAS and the activities of Robert and Ryan, failed to discover or repudiate the financing arrangements or to disavow responsibility for the debts they represented. From plaintiff's perspective, over the course of several months, Robert entered into financing contracts on behalf of BAS, plaintiff financed the purchase of the vehicles by BAS, the vehicles were sold by BAS to customers, and plaintiff was paid in accordance with the contracts.

The trial court found that, after Michael took over ownership of BAS, he "left it pretty much up to Robert Bradley to run it. Robert Bradley could buy and sell cars, he would sign documents regarding financing on vehicles sold and he could write checks on the checking account." Michael testified "customers probably thought Bob was the owner." Further, Michael "clearly did not adequately check the books and records of the car lot." Accordingly, the trial court concluded Michael was "liable to the Plaintiff under the General Doctrine of Ostensible Agency." Robert and Ryan "appeared to the general public as owners, the car lot needed cars to sell and a car lot often needs financing or flooring in order to have an inventory of cars to sell."

Substantial evidence supports the factual findings and conclusions of the trial court. To paraphrase *Safeway*, Robert “was permitted by [Michael] to conduct [his] business under such methods and for such a length of time as was sufficient to warrant the conclusion that he was authorized” to enter into the transactions in issue. (*Safeway, supra*, 45 Cal.App.2d at p. 22.) “The only fair inference to be drawn from the facts is that [plaintiff] knew and relied on the ostensible authority of [Robert] to perform the acts in question, and that there is abundant proof of want of ordinary care on the part of [Michael] in the conduct of [his] business which was sufficient to lead [plaintiff] to believe that [Robert] was clothed with full and ample power and authority in the premises.” (*Ibid.*)

Michael argues that some cases discussing implied authority have concluded that implied authority to borrow money can be found only when the exercise of that power is practically indispensable, not when it is merely convenient or advantageous, to the operation of the business. The cases he cites, however, interpret Civil Code section 2319, which grants an agent authority “[t]o do everything necessary or proper and usual, in the ordinary course of business, for effecting the purpose of his agency.” (Civ. Code, § 2319, subd. (1); see *Purdy v. Bank of America Nat’l Trust & Sav. Assn.* (1935) 2 Cal.2d 298; *Consolidated Nat’l Bank v. Pacific Coast S.S. Co.* (1892) 95 Cal. 1.) Ostensible authority is governed by Civil Code section 2317, which defines it as authority “a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess.” That section does not mention necessity or indispensability. In *Safeway* and *Leavens*, the court did not require necessity or indispensability. It recognized ostensible authority based on a course of dealing or past practices between the agent and the plaintiff, which were not repudiated by the principal and which created the appearance that the agent was authorized to enter into the transaction in issue on behalf of the principal. “As between two innocent persons, one of whom must suffer, the loss should fall on the principal who has armed the agent with apparent authority and thus has

enabled him to obtain the advantage of the person with whom he trades, rather than on the [third person], where the agent acts within the apparent scope of his authority and there is nothing in the transaction to put the [third person] on notice that the agent is exceeding his authority.” (*Gaine, supra*, 58 Cal.App.2d at p. 262.) Thus, it is the apparent scope of the authority, rather than the necessity of the act to the conduct of the agent’s business, that determines whether a particular transaction falls within the agent’s ostensible authority.

Michael takes issue with the statements in the court’s statement of decision that Robert and Ryan “appeared to the general public as owners, the car lot needed cars to sell and a car lot often needs financing or flooring in order to have an inventory of cars to sell.” He characterizes these statements as findings of fact and argues that there was no evidence to support a finding that “a car lot often needs financing or flooring in order to have an inventory of cars to sell.” We interpret this statement not as a substantive finding of material fact, but as an explanation of the court’s conclusion that the financing contracts were within the apparent scope of Robert’s ostensible authority. Michael’s testimony recognized that financing or flooring arrangements may be employed by used car dealerships in order to provide inventory for their businesses; he testified he told Robert from the outset that he did not want outside financing or flooring and he did not want Robert to borrow in order to purchase vehicles for BAS. The court recognized that it would not be unreasonable for a third person, such as plaintiff, who was unaware of Michael’s instructions, to believe that executing a financing agreement was within the scope of the authority of a manager or co-owner of a used car lot.

In Michael’s reply brief, he argues for the first time that plaintiff’s negligence in failing to determine whether Robert had authority to enter into the financing contracts defeats plaintiff’s claim of ostensible authority. Civil Code section 2334 provides: “A principal is bound by acts of his agent, under a merely ostensible authority, to those persons only who have in good faith, and without want of ordinary care, incurred a

liability or parted with value, upon the faith thereof.” Michael asserts plaintiff made no inquiry into Robert’s authority to borrow on behalf of BAS or Michael, and therefore he was negligent and cannot rely on ostensible authority. “It is elementary that points raised for the first time in a reply brief are not considered by the court. [Citation.]” (*Levin v. Ligon* (2006) 140 Cal.App.4th 1456, 1486.) Michael has forfeited this argument by failing to present it in his opening brief.

DISPOSITION

The judgment is affirmed. Plaintiff is entitled to his costs on appeal.