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IN THE COURT OF APPEALS OF IOWA
CLERK SUPREME COURT

TELECOMM SYSTEMS OF IOWA,	)	
INC.,	)	
	)	Filed May 20, 1977
Appellee,	)	
	)	
vs.	)	
	)	
CONO CHRISTIAN SCHOOL	)	5
VOCATIONAL ENTERPRISES,	)	<u>2-57570</u>
INC.,	)	
	)	
Appellant.	)	

Appeal from Buchanan District Court - C. F. Engelkes,
Judge.

Defendant appeals jury verdict for damages arising out
of a repudiation of an oral contract. - Modified and affirmed.

David M. Elderkin and Mark Belz, of Cedar Rapids, for
appellant.

William S. Smith, of Waterloo, for appellee.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger
and Carter, JJ.

SNELL, J.

This is a law action brought by Telecomm Systems of Iowa, Inc., against Cono Christian School Vocational Enterprises, Inc., for damages arising out of an alleged breach of an oral contract. Telecomm, an Iowa corporation, claims that it contracted to sell electronic equipment to Cono, also an Iowa corporation. The equipment was never delivered. Telecomm elected to treat Cono's refusal of delivery as an anticipatory breach of contract, sued for damages and obtained a jury verdict of \$24,710. Cono moved for a directed verdict at the close of Telecomm's evidence asserting there was no evidence that a contract of any kind was made between the parties. The motion was overruled. Subsequently, Cono moved for judgment notwithstanding the verdict, or in the alternative, a new trial. The trial court overruled the motion for judgment notwithstanding and sustained the motion for new trial on the issue of damages only, if plaintiff failed to file a remittitur and did not appeal. Telecomm neither filed a remittitur nor appealed. Cono appealed.

The decision by Telecomm not to file a remittitur resulted in the entry of judgment by the trial court granting Cono a new trial on the issue of damages only. Our review is of that judgment and the rulings inhering therein.

Telecomm is a two-person corporation consisting of Paul Buchanan and his wife as stockholders. It is engaged in selling electronic equipment as an authorized Iowa dealer for Talos Systems Inc., a foreign corporation doing business in Scottsdale, Arizona. The defendant, Cono Christian School Vocational Enterprises, Inc., is an Iowa profit corporation

engaged in several enterprises, including the sale of electronic equipment to schools. These schools are organized into a network called Cono Educational Network and are located at Walker, Iowa; Waterloo, Iowa; Cedar Rapids, Iowa; Sparta, Illinois; Metamora, Michigan and Prospect Heights, Illinois. The electronic equipment is used by teachers at the schools for audio visual teaching. The teaching utilizes telephone communication between the schools so that a teacher can teach in a number of schools at the same time. The teacher's lecture and written illustrations are transmitted by telephone to member schools whose students are able to respond by the same communication method to the teacher. Cono has seven schools hooked together on the network.

In the spring of 1973, Cono was using equipment it had manufactured and was also using the Victor Electronic Writer. The equipment consisted of amplifiers, microphones, tape recorders and electronic writing gear that enabled a person to write in one city and have the writing flashed on the screen in another city.

Telecomm was engaged in selling similar electronic gear manufactured by Talos.

Telecomm, by virtue of various conversations, claims that an oral agreement was reached between Telecomm and Cono for the purchase by Cono of six Tele-Note Ten Machines, six Tele-Note 100E with audio machines, and six projector kits for a total purchase price of \$20,280. One condition of sale was that a three-point system employing three Tele-Note 100A machines be set up with Cono's audio network in satisfactory working order not later than June 19, 1973. A further condi-

tion was that the entire system of six units was to be installed and working not later than August 10, 1973.

Telecomm claims that the agreement was subsequently modified by Cono's agreeing to purchase seven units, plus special adaptors, for a total purchase price of \$24,710 and that the date for setting up the three-point system prototype was extended to June 25, 1973. Telecomm had a meeting with Cono's representative on June 25, 1973, at which time Telecomm claims it performed the condition. Telecomm ordered the manufacturing of the necessary equipment from Talos but was informed on July 9, 1973, by defendant, that it would not take delivery of any of the equipment. Telecomm thereupon elected to treat Cono's refusal as a breach of contract and sued for damages. The jury awarded \$24,710, the maximum amount submitted by the trial court.

Telecomm makes no claim that a written contract between the parties was consummated. Telecomm's claim is that an oral contract arose on June 7, 1973 from the discussions held then between the parties. The persons present at the June 7th meeting were Paul Buchanan, president of plaintiff, Jack Suiter, salesman for plaintiff, William Calhoun, an employee of defendant and Eric Doerrer, an employee of Talos Manufacturing Co. Telecomm does not claim that William Calhoun had any express authority to enter into a contract binding Cono. Telecomm does claim, however, that Calhoun had apparent authority such as is sufficient under the law to legally obligate Cono to the provisions of a contract entered into by Calhoun.

At the June 7th meeting a written instrument was prepared by Jack Suiter representing plaintiff and given to William Calhoun to look over and sign. Calhoun signed this instrument but immediately thereafter, a typing error was discovered so

it was destroyed. Jack Suiter then typed another written instrument, presented it to the parties and obtained thereon the signature of Paul Buchanan on behalf of Telecomm. Through inadvertance, this instrument was not signed by Calhoun, but the omission was not immediately noticed. The omission was later noticed by Eric Doerrerr of Talos who called it to Calhoun's attention. Calhoun thereupon authorized Doerrerr to sign Calhoun's name, in Scottsdale, Arizona, to the document. This was done. Plaintiff makes no claim that this constituted a written contract and relies on the discussions of June 7th to have created a contractual obligation.

A great deal of evidence was presented showing the presence of Talos representatives during the negotiations between Telecomm and Cono. Eric Doerrerr, Talos salesmanager, was present at the June 7th meeting and William Jacobi, systems engineer for Talos, was present at the demonstration of equipment on June 25th. No claim is made by Telecomm, however, that either of these men, or any representative of Talos was in any manner an agent or a representative of Telecomm. The written instruments, aforementioned, were sales forms provided by Talos with Talos' printed name as "seller" on the form. Jack Suiter attempted to convert Talos' form to a sales contract between Telecomm and Cono by impressing a rubber stamp bearing the name of Telecomm on the form. While Talos' representatives may have aided plaintiff in resolving technical electronic problems, they certainly compounded the confusion as to who was buying what from whom. No claim, however, was made that Talos had a sales contract with Cono.

The officers of Cono were Leroy Gardner, president, Wendell Graves, vice-president and manager, Max Belz, secretary, and Marvin Graves, treasurer. The same persons, and

no others, are directors as well as officers. William Calhoun's position with Cono was neither as officer nor director of the corporation. Nor was he a general manager of the corporation. In testimony he was referred to as the engineer for Cono in charge of what was variously called the electronics shop or the machine shop. Paul Buchanan testified that he was told by William Calhoun that he was totally in charge of the network and that is why the dealings had been primarily with him, that he was the designer and fabricator of the system and that he purchased the accompanying equipment used in the system. No testimony by William Calhoun was presented at trial either in person or by deposition.

Calhoun, in fact, had no authority to make contracts for the corporation. Calhoun did make day to day purchases, but only upon approval of the general manager, Wendell Graves. Graves wouldn't necessarily approve the ordering of every nut, bolt, or small ingredient, but did approve the purchase of equipment and individual parts. Graves testified that this applied to everything.

Jack Suiter testified that he observed William Calhoun ordering seven tape recorders at a store in Cedarloo. However, this transaction took place on June 26th, long after the purported contract of June 7th and Graves testified that this purchase had been specifically authorized by him.

Wendell Graves testified that he knew nothing of Telecomm's contract claim until sometime after June 28th. He further testified that at that meeting neither Paul Buchanan nor Jack Suiter made any claim that there was already a contract commitment. The June 28th meeting involved primarily a discussion of leasing the equipment, which was never resolved.

At the outset defendant contends it is entitled to judgment in its favor because plaintiff did not plead its contract as an exception to the Statute of Frauds. Section 554.2201, The Code, is cited. An exception to the statute is provided in §554.2201(3) (a) where goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made a substantial beginning in their manufacture.

In this case part of the equipment manufactured by Talos at the direction of Telecomm was suitable for sale to Talos customers generally. Other parts were suitable only for Cono's peculiar telephone system and were manufactured specially for this purpose.

"[I]t has been held that where a contract calls for two or more kinds of goods some of which are not resellable in the seller's ordinary business, the entire contract may be enforced as there is no justification for holding one part of a contract enforceable and the other not." 72 Am. Jur.2d §142.

See Distribu-Dor, Inc. v. Karadanis, 11 Cal. App.3d 463, 90 Cal. Rptr. 231.

Plaintiff's petition alleged that damages were incurred in development, manufacture and sale to Cono. We find plaintiff has satisfied the requirements of §554.2201(3) (a).

Defendant claims that no contract was ever agreed to because Cono never decided whether to purchase outright or lease the equipment from Telecomm. Cono contends that mode of payment is an essential term to a finding of a contract; without that term, the contract is indefinite and therefore unenforceable. Section 554.2204(3), The Code, states "Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract

and there is a reasonably certain basis for giving an appropriate remedy." We find the alleged contract does not fail as a matter of law for indefiniteness as to what the terms of a lease arrangement would be since there was evidence as to definitely agreed terms sufficient to create a jury question whether a contract was consummated.

Defendant contends the trial court erred in not granting a new trial as to all issues instead of limiting it to damages only. Motions for new trial are governed by rules 242 and 243, Rules of Civil Procedure. A new trial may be granted where a party's substantial rights have been materially affected due to error in fixing the amount of recovery in a contract action, excessive damages which appear to have been influenced by passion or prejudice or a verdict which is not sustained by sufficient evidence as is contrary to law. Rule 244(d), (e), (f), R.C.P.

As long as any one of the grounds alleged in a motion for new trial is well founded, the grant of a new trial is required. A consideration of the other grounds which the court upheld is unnecessary. *Klein v. Swift & Co.*, 248 Iowa 563, 569, 81 N.W. 2d 469 (1957).

The trial court granted a new trial on the issue of damages on the ground the evidence did not support the jury verdict of \$24,710 and was therefore excessive. The remittitur ordered and rejected by Telecomm was in the amount of \$16,257.50, thereby reducing the judgment to \$8,452.50, had Telecomm filed a remittitur.

Our review of the record confirms the trial court's judgment that the verdict was excessive. Two factors may have caused or contributed to the excessive verdict.

The trial court permitted Telecomm to introduce evidence of considerable cost and expense incurred in demonstrating and

constructing specially fabricated equipment. These items were incurred prior to sale. They were itemized on a blackboard. Later the court determined the evidence was inadmissible and instructed the jury to disregard it. Because of its size and impact, we find the jury may well have failed to disregard these items as the court instructed.

Instruction No. 11 instructed on the measure of damages. It included the measure of damage as set out by Section 554.2708 (1) and (2) and as provided by §554.2709, The Code. We find it was error to include the law provided in §554.2709 since there was no evidence of attempts by Telecomm to resell the goods or that Telecomm had possession. In the instant case, the trial court's grant of a new trial was limited to the issue of damages only.

As a general rule, new trials will be granted as to the whole case and on all of the issues, and seldom on the issue of damages only, except where the liability of a defendant is definitely established. *Householder v. Town of Clayton*, 221 N.W.2d 488, 493 (Iowa 1974); *Myers v. Vosmek*, 261 Iowa 1324, 157 N.W.2d 925 (1968); *Allbee v. Berry*, 254 Iowa 712, 119 N.W.2d 230 (1963). *See also Schmatt v. Arnez*, 176 N.W.2d 771, 775 (Iowa 1970). Liability in this case must be established, if at all, on the theory of apparent authority.

Where one deals with an agent of a corporation solely upon the latter's representation as to his own authority, the liability of the corporation depends not on such representations but on the actual authority conferred upon the agent in the particular transaction. *See* 19 Am. Jur. 2d, §1165, P. 592; *Hodson v. Wells & Dickey Co.*, 31 N.D. 395, 154 N.W. 193 (1915). *See also Howland Bros. v. Barre Savings Bank*, 89 Vt. 290, 95 Atl. 679, 682 (1915).

In this case, William Calhoun made certain representations to Telecomm's president and salesman. He told them that he was totally in charge of the network, putting together the systems for the individual schools, and that he purchased the accompanying equipment that went into the system. The record indicates that when he made these purchases it was only upon the authority of Wendell Graves, vice-president and general manager. Evidence of his actual authority to bind the corporation was nonexistent.

A person dealing with a corporation is bound to know whether the officer or agent who represents it and acts in its name is authorized to do so. *Credit Co. v. Howe Machine Co.*, 54 Conn. 357, 8 Atl. 472, 479 (1886).

Concerning whether any apparent authority derives from Calhoun's title, we find no authority that a person in the position of "engineer," without more, has any authority to bind a corporation. There is no inherent power even in the title "secretary" to bind a corporation. *Mayrath Co. v. Helgeson*, 258 Iowa 543, 550, 139 N.W.2d 303 (1966); *Cobb v. Glenn Boom & Lumber Co.*, 67 W. Va. 49, 49 S.E. 1005 (1905). See also *Newberry v. Barth, Inc.*, #2-55098 (Iowa, filed April 20, 1977).

The general rule of agency, that a person dealing with an agent must use reasonable diligence and prudence to ascertain whether the agent acts within the scope of his powers and is, therefore, presumed to know the extent of the agent's authority, is fully applicable to persons dealing with another as the officer or agent of a corporation. 19 Am. Jur. 2d, *supra*. Moreover, the burden of proving the authority of corporate agents, or an estoppel to deny such authority, is on the person seeking to hold the corporation liable. 19 C.J.S., §1026, p. 510. *Spencer Concrete Products Co. v. Spencer*, 254 Iowa 87, 116 N.W.2d 455 (1962).

Apparent authority must be determined by what the principal does, rather than by any acts of the agent. In re Estate of Thornwall, 233 Iowa 626, 10 N.W.2d 35 (1943). See Grismore v. Consolidated Products Co., 232 Iowa 328, 335, 5 N.W.2d 646 (1942); Boylan v. Workman, 206 Iowa 469, 473, 220 N.W. 49 (1928); Anderson v. Patten, 157 Iowa 23, 28, 137 N.W. 1050 (1912).

In Mayrath Co. v. Helgeson, 258 Iowa 543, 548, 139 N.W.2d 303 (1966):

"The liability of the principal for the acts and contracts of his agent is not limited to such acts and contracts of the agent as are expressly authorized, necessarily implied from express authority, or otherwise actually conferred by implication from the acts and conduct of the principal. All such acts and contracts of the agent as are within the apparent scope of the authority conferred on him are also binding upon the principal. Apparent authority, or ostensible authority, to do such acts or to make such contracts, is that which, although not actually granted, has been knowingly permitted by the principal or which he holds the agent out as possessing."

There is no evidence that anyone in authority or not in authority associated with Cono told Telecomm's representatives that William Calhoun was authorized to act for the corporation in purchasing equipment. Newberry v. Barth, Inc., #2-55098 (Iowa, filed April 20, 1977). Paul Buchanan, president of Telecomm never checked to see who the officers of Cono were. Jack Suiter, Telecomm's salesman, testified he knew on March 13th that Cono was a corporation but he never did check who the officers were. Also, he never determined what connection French and Belz had with the corporation. Paul Buchanan knew that French was an instructor at the school and Belz was principal because Bill Calhoun told him that. At the June 7th meeting, William Calhoun produced a written memo from French which he showed to Jack Suiter. Suiter testified that by the memo he knew that Calhoun was getting instructions from someone else,

namely, French. Knowing that, however, he did not go to French and ask him whether or not he had authorized the agreement. If he had he would have discovered that French was employed by the educational network and had no employment or agency relationship whatever with defendant Cono. Newberry, *supra*. No claim is made by Telecomm that Belz or French ever made any agreements binding Cono. Notwithstanding, Belz as school superintendent and secretary of Cono had knowledge of the fact Calhoun was working on designing a system with Telecomm and was present at the February demonstration.

From an examination of the whole record we find the evidence of apparent authority in William Calhoun to bind Cono is short of establishing definite liability. Accordingly, defendant should be granted a new trial as to the whole case and on all issues. *Householder v. Town of Clayton*, 221 N.W.2d 488, 493 (Iowa 1974).

Modified and affirmed.