

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

MCI TELECOMMUNICATIONS)
CORPORATION)
)
v.) C.A. No. 91-0141L
)
TELCO COMMUNICATIONS, INC.)
)
_____)
MCI TELECOMMUNICATIONS)
CORPORATION)
)
v.) C.A. No. 91-0144L
)
TCI MAIL, INC., f/k/a)
SAVE A LIFE PUBLICATIONS,)
INC.)

MEMORANDUM AND ORDER

RONALD R. LAGUEUX, United States District Judge.

I. INTRODUCTION

Plaintiff, MCI Telecommunications Corporation ("MCI"), brought this action against Telco Communications, Inc. ("Telco"), and TCI Mail, Inc. ("TCI"), formerly known as Save a Life Publications, Inc., seeking to recover a deficiency in payment for telephone services. Specifically, MCI claims that TCI owes MCI \$80,774.39 for services rendered to TCI,¹ that Telco owes MCI \$10,301.91 for services rendered to Telco,² and that Telco is also liable to MCI for \$51,017.13 of TCI's \$80,774.39 debt.³ TCI filed a counterclaim alleging misrepresentation and breach of contract.

¹ MCI v. TCI, Complaint, para. 6.

² MCI v. Telco, Amended Complaint, para. 14.

³ MCI v. Telco, Amended Complaint, para. 12.

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Some of the facts of this case are set forth in MCI Telecommunications Corp. v. TCI Mail, Inc., 772 F. Supp. 64, 65-66 (D.R.I. 1991). In the matter now before the Court, MCI and Telco have filed cross-motions for summary judgment, pursuant to Fed. R. Civ. P. 56. MCI seeks summary judgment against TCI's counterclaim, in favor of MCI's claim against TCI, and in favor of MCI's claims against Telco. Telco seeks summary judgment solely against MCI's claim that Telco is liable for debts owed to MCI by TCI Mail. TCI has not moved for summary judgment.

For the reasons that follow, MCI's motion for summary judgment is granted in part and denied in part. Telco's cross-motion for summary judgment is denied.

II. DISCUSSION

A. Summary Judgment Standards

Rule 56(c) of the Federal Rules of Civil Procedure provides the standard for ruling on a summary judgment motion:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

A dispute over some facts does not preclude summary judgment if all the facts and reasonable inferences drawn from them support judgment for the moving party. King v. Sullivan, 776 F. Supp. 645, 649 (D.R.I. 1991). The Court, however, cannot grant a motion for summary judgment if genuine issues of material fact exist. Id. Any fact that could affect the outcome of the suit is material. Ryan, Klimek, Ryan Partnership v. Royal Ins. Co. of

Am., 728 F. Supp. 862, 866 (D.R.I.), aff'd, 916 F.2d 731 (1st Cir. 1990). The Court must view the record in the light most favorable to the party opposing the motion, indulging all inferences favorable to that party. King, 776 F. Supp. at 649.

B. TCI Drops Counterclaim and Concedes \$80,774.39 Debt

In open court on April 3, 1992, TCI stated that it will not pursue its counterclaim against MCI. TCI does not oppose MCI's motion for summary judgment against TCI's counterclaim. See Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Cross-Motion for Summary Judgment, pp.2-3. TCI was apparently unable to produce evidence of intentional misrepresentation by MCI.

TCI also does not oppose MCI's motion for summary judgment in favor of MCI's claim against TCI. TCI concedes that it owes MCI approximately \$80,774 for unpaid telephone invoices. Id.

Accordingly, MCI's motion for summary judgment, both against TCI's counterclaim and in favor of MCI's claim against TCI, is granted.

C. Telco Concedes Its \$10,301.91 Debt

Telco concedes that it owes MCI approximately \$10,301 for unpaid telephone invoices. Id. Accordingly, the Court grants MCI's motion for summary judgment on this portion of its claim against Telco. A hearing will be necessary to determine pre-judgment interest and costs of collection, including attorney's fees, owing to MCI.

D. Background Facts of the Remaining Claim

Telco does not concede that it owes MCI \$51,017.13 for debts incurred by TCI. This \$51,017.13 claim is all that remains for the Court to adjudicate. MCI seeks judgment that Telco has joint and several liability for this amount, and Telco seeks judgment that it is not liable for it. The dispute turns on questions of Massachusetts and Rhode Island agency law and Rhode Island corporation law.

Telco and TCI are separate Rhode Island corporations, although they are closely related by common ownership. TCI has only one shareholder, Mark Hayes. Telco has two shareholders: Mark Hayes, the majority owner, and Kathleen Hayes, Mark's wife. Mark Hayes is president and director of both Telco and TCI. TCI is not a subsidiary of Telco.

Telco employed Derick Denby in February 1990 to assume some of the duties of chief financial officer, a position formerly held by Richard Power. Denby carried the title of Chief Financial Officer. His duties included accounting, preparing financial reports, and managing other employees. When Power was Telco's Chief Financial Officer, he had explicit authority to enter into agreements on Telco's behalf. Denby, however, received no such explicit authority when he took over. Telco claims that Denby was not an officer of Telco and that he lacked check-signing authority. Telco did not inform MCI that Denby, unlike Power, was a Chief Financial Officer with no explicit authority to enter into agreements for Telco.

When Power left Telco in January 1990, MCI and Telco were in the midst of negotiating a long-distance telephone service contract. MCI was advised that it should continue its negotiations with Peter Brooks, Telco's attorney. MCI claims that when Denby joined Telco a few weeks later, Brooks directed MCI to conduct its negotiations with Denby. MCI's representative in these talks was Brian Gonsalves. According to Telco, when Gonsalves asked Denby about payments on overdue invoices in late February or early March, Denby explained that he did not have authority to commit Telco's funds, and he referred Gonsalves to Brooks.

On March 13, 1990, after negotiations lasting several weeks, Denby signed a Corporate Service Plus Enrollment Form (known in this litigation as the "CAS+ Agreement") on behalf of Telco. On its face, the CAS+ Agreement binds Telco to pay the obligations of TCI -- then known as Save a Life Publications -- to MCI. Neither Brooks nor Mark Hayes signed the CAS+ Agreement, and both claim that they never saw the proposed agreement before Denby signed it.

On March 29, 1990, Telco paid MCI \$20,476.58 for TCI's and Telco's previous debts. Brooks signed all the checks making up this payment. MCI claims that this payoff ratified the CAS+ Agreement. Telco claims that it made the payment simply to avoid a threatened disconnection of telephone service, not in recognition of an obligation to cover the debts of TCI.

E. Analysis

Telco raises two defenses to the CAS+ Agreement. First, Telco claims that Denby lacked authority to sign the CAS+ Agreement on Telco's behalf. Second, Telco claims that the CAS+ Agreement is void under a Rhode Island statute, R.I. Gen. L. § 7-1.1-4.2. This statute requires shareholder approval before a Rhode Island corporation can make guarantees that are not in furtherance of its corporate purpose. It is undisputed that Telco's shareholders never authorized Denby or Telco to guarantee TCI's debts.

1. Denby's Authority

The parties do not dispute that Denby had no explicit authority to bind Telco to the CAS+ Agreement. MCI argues, however, that Telco's behavior gave Denby apparent authority to bind Telco to the CAS+ Agreement.

The legal criteria for apparent authority are well known. Although the parties seem to agree that Massachusetts law controls this issue, the Court is hesitant, in light of the parties' substantial activities in Rhode Island, to accept this premise without further investigation. Instead of conducting an involved choice-of-law analysis, however, the Court notes for present purposes that the law of apparent authority in Massachusetts and Rhode Island is similar and leads to the same result.

In Rhode Island, in order to establish the apparent authority of an agent to do a particular act,

. . . facts must be shown that the principal has manifestly consented to the exercise of such authority or has knowingly permitted the agent to assume the exercise of such authority; that a third person knew of the fact and, acting in good faith, had reason to believe and did actually believe that the agent possessed such authority; and that the third person, relying on such appearance of authority, has changed his position and will be injured or suffer loss if the act done or transaction executed by the agent does not bind the principal.

Soar v. National Football League Players Ass'n, 438 F. Supp. 337, 342 (D.R.I. 1975), aff'd, 550 F.2d 1287 (1st Cir. 1977).

Apparent authority depends not on what the principal manifests to the agent, nor on what the agent does or says, but by what the principal manifests to the third party and what the third party reasonably believes. See Restatement (Second) of Agency § 27 (1958).

The test is the same in Massachusetts. Apparent authority "results from conduct by the principal which causes a third person reasonably to believe that a particular person . . . has authority to enter into negotiations or to make representations as his agent." Hudson v. Massachusetts Property Ins. Underwriting Ass'n, 386 Mass. 450, 457 (1982) (quoting W.A. Seavy, Agency § 8D, 13 (1964)), cited in Veranda Beach Club Ltd. Partnership v. Western Sur. Co., 936 F.2d 1364, 1377 (1st Cir. 1991); see also Weisman v. Saetz, 11 Mass. App. Ct. 440, 442 (1981) (apparent authority results from "conduct of the principal which, reasonably interpreted, causes a third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him"). As in Rhode Island, apparent authority in Massachusetts depends on what the principal

manifests to the third party and what the third party reasonably believes.

Some undisputed facts suggest that MCI could have reasonably concluded that Denby had authority to bind Telco to the CAS+ Agreement. Telco held Denby out to the world as its Chief Financial Officer, and the person who had previously held that position had carried explicit authority to enter into agreements on Telco's behalf. Telco never informed MCI that Denby, unlike Power, had no explicit authority to enter into agreements. And when Denby joined Telco, Brooks directed MCI to conduct its negotiations with Denby. These actions by Telco, the principal, might lead a third person reasonably to believe that Denby had authority to negotiate and execute the CAS+ Agreement for Telco.

But one undisputed fact also suggests that Denby did not have authority to sign the CAS+ Agreement on Telco's behalf. Although Power had carried explicit authority to bind Telco to agreements, Denby received no such explicit authority when he took over. Because Telco did not openly cloak Denby with the same authority it had given to Power, a third party's assumption that Denby carried the same authority as Power might be unreasonable. Still other material facts are in dispute. According to Telco, when Gonsalves asked Denby about payments on overdue invoices in late February or early March, Denby explained that he did not have authority to commit Telco's funds, and he referred Gonsalves to Brooks. This conversation may be disputed, but Telco, in alleging its occurrence, has clearly raised a

genuine issue of material fact. Additionally, Telco's March 29 payment of \$20,476.58 to MCI for TCI's and Telco's previous debts was either a ratification of the CAS+ Agreement or simply a realistic reaction by Telco to avoid a threatened disconnection of telephone service. The facts demonstrated to this Court support neither interpretation conclusively.

Because some material facts are in dispute and the undisputed facts do not clearly favor either side, the Court cannot conclude, as a matter of law, that Denby had apparent authority to bind Telco to the CAS+ Agreement. Therefore, the Court cannot grant MCI's motion for summary judgment on its \$51,017.13 claim against Telco.

By the same measure, the Court also cannot conclude, as a matter of law, that Denby lacked apparent authority to bind Telco to the CAS+ Agreement.

2. R.I. Gen. L. § 7-1.1-4.2

Telco's reliance on R.I. Gen. L. § 7-1.1-4.2 in support of its motion for summary judgment against MCI's \$51,017.13 claim fails to justify judgment in Telco's favor. Rhode Island law does not require Telco to secure shareholder approval before entering into a contract such as the CAS+ Agreement, as Telco claims. The Rhode Island Business Corporation Statute provides:

General Powers. -- Each corporation shall have the power:

* * * *

(8) To make contracts and guarantees and incur liabilities

R.I. Gen L. § 7-1.1-4 (Michie 1985). The statute continues:

Guarantee authorized by shareholders. -- Each corporation shall have the power to make guarantees, although not in furtherance of its corporate purpose, when authorized at a meeting of shareholders by the affirmative vote of the holders of a majority of the shares of the corporation entitled to vote thereon, or such greater percentage as may be provided in the articles of incorporation or by-laws. If authorized by a like vote, a corporation shall have the power to mortgage, pledge or give a security interest in all or any of its property, franchises, and income to secure such guarantee or to secure obligations other than its own.

Id § 7-1.1-4.2.

Telco's reading of the statute distorts its plain meaning. Section 7-1.1-4(8) gives general permission for guarantee contracts. Section 7-1.1-4.2 then places restrictions on guarantees that are not in furtherance of the guarantor's corporate purposes. Section 7-1.1-4.2 does not, however, require shareholder approval for all guarantee contracts made by Rhode Island corporations. The statute only requires shareholder approval for guarantees that are ultra vires, or not in furtherance of the company's stated corporate purposes. If the CAS+ Agreement was made in the furtherance of Telco's corporate purpose, then no shareholder approval was necessary.

The CAS+ Agreement clearly was made in furtherance of Telco's corporate purposes and business. Telco's stated corporate purposes are "[t]o publish magazines and conduct advertising campaigns, and any other lawful purpose." Telco Communications, Inc., Original Articles of Incorporation, Art. III (1985). TCI's corporate purposes are identical. See Save A Life Publications, Inc., Original Articles of Incorporation, Art. III (1985). A large part of Telco's business at the time in

question included long-distance telephone communication. The evidence shows that the CAS+ Agreement was merely a business contract for telephone services. The CAS+ Agreement provided volume discounts on long-distance calls. Part of the deal was Telco's assumption of some of TCI's past debts to MCI. This enabled Telco and TCI to combine their accounts in order to qualify for the discount. In short, the CAS+ Agreement was merely a complicated telephone service contract.

The CAS+ Agreement was not ultra vires and, thus, did not require shareholder approval. Therefore, the Court cannot grant Telco's motion for summary judgment.

III. CONCLUSION

Accordingly, MCI's motion for summary judgment is granted on its claim against TCI, and also on TCI's counterclaim. MCI's motion for summary judgment on its \$10,301.91 claim against Telco is granted. MCI's motion for summary judgment on its \$51,017.13 claim against Telco as guarantor for TCI is denied, and Telco's cross-motion for summary judgment on that claim is also denied. No judgment will be entered until the remaining issues are resolved.

It is so ordered.



Ronald R. Lagueux
United States District Judge
May 19, 1992