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Case Comments

Agency: Effect of Written Agency Authorization Statutes on Agent's Indemnification From Principal

Plaintiff corporation orally agreed with the defendant to act in its own name in selling apricot kernels as the defendant's agent.¹ When the market price of apricot kernels rose sharply,² the defendant refused to deliver the kernels necessary to perform a written contract that plaintiff had made with a third party pursuant to the agency agreement. Plaintiff satisfied the judgment which the third party subsequently obtained against it³ and then sought recovery from the defendant based on an implied promise of indemnity in the agency agreement for liability incurred in its performance.⁴ The California Supreme Court affirmed the judgment for the plaintiff, one justice dissenting, and *held* that section 2309 of the California Civil Code, which requires an agent's authority to enter into contracts within the Statute of Frauds to be in writing,⁵ is not a defense to an agent's action for indemnification

1. Plaintiff was to deal in its own name because it was well known in the field.

2. The price agreed upon for the sale of the kernels was 17½¢ a pound. Later a fire destroyed a large part of the California apricot kernel stock and defendant sold 431 tons of pits for 46¢ a pound and 110 tons for 65¢ a pound. (The pits had to be cracked at the buyer's expense to obtain the kernels.)

3. Plaintiff appealed in this action but lost. *Sunset-Sternau Food Co. v. American Almond Prod. Co.*, 259 F.2d 93 (9th Cir. 1958).

4. See *Rimington v. General Acc. Group of Ins. Cos.*, 205 Cal. App. 2d 394, 397, 23 Cal. Rptr. 40, 42 (1962); *Walkof v. Fox*, 90 Misc. 338, 340, 153 N.Y. Supp. 27, 28 (Sup. Ct. 1915); RESTATEMENT (SECOND), AGENCY § 438 (1957). The *Restatement* provides:

In the absence of terms to the contrary in the agreement of employment, the principal has a duty to indemnify the agent where the agent (a) makes a payment . . . made necessary in executing the principal's affairs or . . . (b) suffers a loss which, because of their relation, it is fair that the principal should bear.

5. CAL. CIV. CODE § 2309 provides that "an oral authorization is sufficient for any purpose, except that an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing." Cal. Stat. 1931, ch. 1070, § 13, at 2261 (replaced by CAL. COMM. CODE § 2201), provided that "a contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upward shall not be enforceable by action unless . . . some note or memorandum in writing of the contract or sale be signed by the party to be charged. . . ." Since the total sales price in the contract between plaintiff and the third party was \$26,750, plaintiff needed written authorization to enter into the sales contract with the third party, on defendant's behalf.

even though the third party could not have enforced the contract against the principal. *Sunset-Sternau Food Co. v. Bonzi*, 60 Cal. 2d 834, 389 P.2d 133, 36 Cal. Rptr. 741 (1964).

The problem treated in *Bonzi* is not peculiar to California. At least one other State has a similar statute dealing with an agent's authorization for a sale of goods contract and several States impose the written authorization requirement for real property transactions.⁶ In the absence of a statute requiring an agent's authorization to be in writing, any recognized form of authorization enables an agent to bind his principal and a third party.⁷ Furthermore, the authorization operates as an implied promise by the principal to compensate the agent for any loss which he incurs in the course of the agency.⁸ *Bonzi* considers the effect that a written agency requirement has on a principal's duty to indemnify his improperly authorized agent.

Absent ratification⁹ and estoppel,¹⁰ section 2309 does not permit a third party to recover from a principal on a contract which is required by law to be in writing when the agent executing the contract was not given written authority.¹¹ Section 2309, however, has been held not to be a defense to a defectively authorized agent's action against his principal for an earned commission on the grounds that the subject of suit is an agency agreement rather than the sales contract at which the section is directed.¹² The court in *Bonzi* concluded from the commission cases that section 2309 can not be used as a defense by a principal in an indemnity action brought by an agent. The *Bonzi* situation, however, seems more like the third party suit — the agent recovers

6. Montana has the same requirement as § 2309. MONT. REV. CODES ANN. § 2-116 (1947). Other state statutes provide that contracts for interests in land are void unless signed by the party sought to be charged or his agent authorized in writing. IDAHO CODE ANN. § 9-505 (5) (1948); MICH. COMP. LAWS § 566.108 (1948); MINN. STAT. § 513.05 (1961); N.J. REV. STAT. § 25:1-1 (1937); UTAH CODE ANN. § 25-5-1 (1953). These statutes present the same problem of interpretation as § 2309 if the agent binds himself to a third party without written authorization from the principal and the principal subsequently refuses to perform.

7. *E.g.*, *Bibb v. Allen*, 149 U.S. 481 (1892); *Rodman v. Weinberger*, 81 N.J.L. 441, 79 Atl. 338 (Ct. Err. & App. 1911).

8. See note 4 *supra* and accompanying text.

9. *McBride v. McCartney*, 53 Cal. App. 707, 200 Pac. 756 (1921); CAL. CIV. CODE § 2307.

10. See *Seymour v. Oelrichs*, 156 Cal. 782, 106 Pac. 88 (1909).

11. *E.g.*, *McNear v. Petroleum Export Corp.*, 208 Cal. 162, 280 Pac. 684 (1929); *Seymour v. Oelrichs*, *supra* note 10; *cf.* *Georgia Peanut Co. v. Famo Prods. Co.*, 96 F.2d 440 (9th Cir. 1938).

12. *E.g.*, *Marks v. Walter G. McCarty Corp.*, 33 Cal. 2d 814, 205 P.2d 1025 (1949); *Meadows v. Clark*, 33 Cal. App. 2d 24, 90 P.2d 851 (1939).

from the principal the amount the third party could not have directly recovered from the principal because the agency agreement was not in writing. Thus, the result forbidden by section 2309 is reached by indirection.

The *Bonzi* court, in construing section 2309, considered only two factors as evidence of the intent of the legislature. The Code Commissioner's note to the chapter containing section 2309 implies that the chapter does not apply to the agent-principal relationship.¹³ In addition, the California Civil Code requires a real estate broker to have written authorization to recover his commission;¹⁴ since the sale of real property is within the California Statute of Frauds,¹⁵ this would be surplusage if section 2309 were applied to an agent's rights against his principal. Although these points are relevant in construing section 2309,¹⁶ they are not a substitute for considering the purpose of the statute.¹⁷ Section 2309 appears to have the purpose of protecting a principal from a third party who attempts to avoid the Statute of Frauds by falsely claiming that the contract sought to be enforced was executed by the principal's agent. The section seeks

13. The Code Commissioner's note reads as follows:

Note—Under this head the representations of one person by another is the only subject treated. The rights acquired by third persons against both principal and agent are here stated. The mutual relations of principal and agent are a branch of *SERVICE* and are defined in the title on that subject.

Comment, 5 *So. CAL. L. REV.* 233, 236 n.22 (1932). This is an oversight on the part of the Code Commissioner. *CAL. CIV. CODE* § 2295-2300 ("Definition of Agency") relates to the principal-agent relationship.

14. *CAL. CIV. CODE* § 1624.5 provides that "an agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission" is invalid unless it is in writing and subscribed by the party to be charged.

15. *CAL. CIV. CODE* § 1624.4 provides that "an agreement for the . . . sale of real property . . ." is invalid unless it is in writing and subscribed by the party sought to be charged.

16. See *Baranov v. Scudder*, 177 Cal. 458, 465, 170 Pac. 1122, 1124 (1918); *People v. Parvin*, 74 Cal. 549, 555, 16 Pac. 490, 493 (1888).

17. In construing a statute the court should look to the problem the legislature wished to solve. *Fasulo v. United States*, 272 U.S. 620, 629 (1926) (dictum); *United States v. Chase*, 135 U.S. 255, 261 (1890) (dictum); 2 *SUTHERLAND, STATUTORY CONSTRUCTION* § 4501 (3d ed. 1943). It is the purpose of a statute which should be considered when its true meaning is sought. See *Hines v. Stein*, 298 U.S. 94 (1935). When the language of a statute is plain, it should be accepted by the court as evidence of the intent of the legislature. See *Caminetti v. United States*, 242 U.S. 470 (1917); *United States v. First Nat'l Bank*, 234 U.S. 245 (1914); *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399 (1914); *State v. Duggan*, 15 R.I. 403, 6 Atl. 787 (1886).

to achieve this purpose by prohibiting the enforcement of *any* contract within the Statute of Frauds if the executing agent did not have written authority. The result reached in the *Bonzi* case has the effect of allowing a principal to use section 2309 effectively as a defense only if he had the foresight to engage an insolvent agent.¹⁸ Certainly such a construction does not conform with the legislative design.

The *Bonzi* decision is largely based on the concept that the Statute of Frauds should receive a limiting interpretation when the equities clearly call for it, as they do in the *Bonzi* case, and there is some doubt as to whether the fact situation is within the statute.¹⁹ The Statute of Frauds was directed at the prevention of fraud and a court should be reluctant to allow it to be put to the use of a wrongdoer; it was intended to serve as a protector of the innocent, not as a means of fraud to be used by the unscrupulous.²⁰

This desire to construe the Statute of Frauds narrowly to avoid an unjust result in a case, such as *Bonzi*, where the contract is not denied, stems largely from a feeling that to allow a party to rely on the formal defense of the Statute of Frauds while admitting the questioned agreement would be purposeless.²¹ Perhaps

18. CAL. CIV. CODE § 2778.1 provides that "upon an indemnity against liability . . . the person indemnified is entitled to recover upon becoming liable." CAL. CIV. CODE § 2778.2 provides that "upon an indemnity against . . . damages . . . the person indemnified is not entitled to recover without payment thereof." The *Bonzi* case fits under subdivision two since the principal is only required to indemnify the agent for damages sustained. The reason for this policy is a fear that if the principal pays the agent before the damages are sustained the agent may be unjustly enriched or injured since the amount of damage is not accurately ascertainable. See note 4 *supra*.

19. See generally 2 CORBIN, CONTRACTS § 275, at 13 (1950). *Contra*, Lilienthal, *Judicial Repeal of the Statute of Frauds*, 9 HARV. L. REV. 455 (1896); Llewellyn, *What Price Contract? — An Essay in Perspective*, 40 YALE L.J. 704, 747-48 (1931).

20. Whenever it is obvious by clear evidence that the Statute of Frauds is being invoked by a wrongdoer who wants only to escape from being held to his word, the court shall refuse to allow him to find protection behind a statute that was intended to prevent fraud. Morris, *The Leading Purpose Doctrine as Applied to the Statute of Frauds*, 62 W. VA. L. REV. 339 (1960).

21. Arguably, the Statute of Frauds should be modified so as to be unavailable as a defense if the agreement is admitted. The Uniform Commercial Code provides that a contract which is within the Statute of Frauds but which has not been reduced to writing is still enforceable "if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made . . ." UNIFORM COMMERCIAL CODE § 2-201(3). Corbin would require a party who wishes to use the statute to deny under oath the existence of the questioned agreement. 2 CORBIN, CONTRACTS § 275, at 13 (1950).

section 2309 and other similar formalistic statutes should be modified or abolished by the legislature. It is argued that the Statute of Frauds has outlived its purpose;²² that it does not reflect actual practices in the business community²³ and often is invoked only to enable a party to renege on an oral business agreement which he reasonably expected to honor.²⁴ This possible need for changing section 2309, however, does not justify the court's ignoring the purpose of that section to overthrow it through strained construction. Though the court felt that to deny plaintiff recovery would be inequitable,²⁵ it may have exceeded its proper function by deciding the case as it did. The solution to a harsh law is legislative change, not unwarranted judicial interpretation.²⁶

^{22.}

The Statute of Frauds is therefore essentially and necessarily, in some of its features at least, a temporary phenomenon in the evolution of contract law. Born of a desire to prevent the imposition of liability by means of perjured testimony, the need for it must decrease as the means of discovering and punishing perjury are increased. This danger has undoubtedly been greatly lessened by alteration made during the last fifty years in the law of evidence.

2 STREET, FOUNDATIONS OF LEGAL LIABILITY 196 (1906).

^{23.} 6 HOLDSWORTH, A HISTORY OF ENGLISH LAW 396 (2d ed. 1937): "[T]he prevailing feeling both in the legal and the commercial world is, and has for a long time been, that these clauses have outlived their usefulness, and are quite out of place amid the changed legal and commercial conditions of today." *But see*, Clark & Whiteside, *The Statute of Frauds and the Business Community: A Re-appraisal in Light of Prevailing Practices*, 66 YALE L.J. 1038, 1064 (1957). The *Yale Law Journal* conducted a study of 200 Connecticut manufacturers of various sizes and concluded from the 87 responses that business practices would not be substantially changed if the Statute of Frauds were repealed since businessmen would still want written records of all large transactions to avoid the uncertainties which commonly accompany oral agreements.

^{24.} See, e.g., Stephen & Pollock, *Section Seventeen of the Statute of Frauds*, 1 L.Q. REV. 1, 5-7 (1885); Willis, *The Statute of Frauds—a Legal Anachronism* (pts. 1-2), 3 IND. L.J. 427, 528, 540-42 (1928).

^{25.} The court felt that the equities were clearly on the side of the plaintiff. "We find neither statutory provision nor legal principle to sanction the profit which the principal thus derives from his wrong." 60 Cal. 2d at 843, 389 P.2d at 139, 36 Cal. Rptr. at 747. And again: "Surely he [defendant principal] should be accountable for the liability incurred by the agent upon the agreement, particularly in the instance of the principal's own refusal to perform his obligation." 60 Cal. 2d at 842, 389 P.2d at 139, 36 Cal. Rptr. at 747.

^{26.} E.g., *United States v. First Nat'l Bank*, 234 U.S. 245 (1913); *State v. Duggan*, 15 R.I. 403, 6 Atl. 787 (1886); cf. *Baranov v. Scudder*, 177 Cal. 458, 465, 170 Pac. 1122, 1124 (1918).