

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

MJ DIRECT CONSULTING, LLC)	CASE NO. CV 13 818176
)	
Plaintiff,)	JUDGE JOHN P. O'DONNELL
)	
vs.)	<u>JOURNAL ENTRY DENYING</u>
)	<u>THE PLAINTIFF'S MOTION FOR</u>
BROOKS & STAFFORD COMPANY,)	<u>SUMMARY JUDGMENT AND</u>
)	<u>GRANTING THE DEFENDANT'S</u>
Defendant.)	<u>MOTION FOR SUMMARY</u>
)	<u>JUDGMENT</u>

John P. O'Donnell, J.:

STATEMENT OF THE CASE

This is a lawsuit alleging breach of contract and unjust enrichment. The defendant denied the allegations in the complaint. After a period of discovery both sides have now filed motions for summary judgment. The motions are fully briefed and this entry follows.

STATEMENT OF THE FACTS

The plaintiff is MJ Direct Consulting, LLC. The company was formed in 2003 by Jeffrey Levy, who is currently its sole member. MJ Direct is in the business of providing leads on prospective purchasers of insurance to insurance brokers and sales agents.

Although the complaint lists two defendants in its caption, there is really only a single defendant: the Brooks & Stafford Company, described by the plaintiff as "d.b.a. Brooks & Stafford." The defendant is an insurance agency in the business of selling insurance policies. Brooks & Stafford Company is a traditional corporation. In 2012, a separate entity known as Brooks & Stafford Direct, LLC was formed to sell insurance over the internet. The sole member of Brooks & Stafford Direct, LLC is Brooks & Stafford Company, the defendant in this case.

Brooks & Stafford Direct, LLC is not a party to this lawsuit.

On September 5, 2012, the contract at issue in this case was made. The contract is captioned as a "Lead Delivery Agreement" and its first paragraph says that the agreement is entered into between MJ Direct Consulting, LLC and "Brooks & Stafford."¹ Throughout the rest of the contract "Brooks & Stafford" is referred to as B&S. The contract was drafted by Levy, and nowhere in it is there a reference to Brooks & Stafford Company or to Brooks & Stafford Direct, LLC.

The contract was signed for MJ Direct Consulting, LLC by Jeff Levy as president and for "Brooks & Stafford" by Eugene L. Calhoun as a director. When making the contract Levy knew that Brooks & Stafford Direct, LLC was a new business and his only dealings leading up to the contract were with Calhoun.

Calhoun met Levy around 2002 when they both worked at Progressive Insurance Company. Calhoun was an original member of MJ Direct Consulting, LLC but had sold his units to Levy by 2011. Calhoun was hired by Brooks & Stafford Direct, LLC – through its president, John Kunze – on July 1, 2012, as its director of web-based sales. Calhoun had no authority to act as an agent for Brooks & Stafford Company.

The contract is not a paragon for the precise, comprehensible and grammatical use of the English language. Nevertheless, its general terms are apparent. MJ Direct agreed to provide leads – a lead being the name, phone number and other information of a person who, through the

¹ "Brooks & Stafford" is put in quotes throughout this entry because an issue in the case is whether this means Brooks & Stafford Direct, LLC or Brooks & Stafford Company.

use of a web site run by MJ Direct, has expressed an interest in acquiring health insurance² – and "Brooks & Stafford" would pay fifteen dollars per lead.

After the contract was signed MJ Direct began to provide leads – the names, addresses and phone numbers of people shopping for health insurance – to Brooks & Stafford Direct, LLC. While the contract was performed, the leads were sent to Calhoun, as were MJ Direct's invoices. The first couple of invoices were paid by Brooks & Stafford Company because Brooks & Stafford Direct, LLC did not have a checking account and did not have its own accounting department. But that money was booked by Brooks & Stafford Company as loans to Brooks & Stafford Direct, LLC.

MJ Direct continued to provide leads into the spring of 2013 but the invoices went unpaid beginning around November 2012, resulting in this lawsuit.

LAW AND ANALYSIS

Breach of contract

In seeking to hold Brooks & Stafford Company responsible for paying for the leads provided under the contract, MJ Direct's first obligation is to prove that Brooks & Stafford Company is a party to the contract.

A corporation, being an artificial person, can act only through agents. *James G. Smith & Associates, Inc. v. Everett*, 1 Ohio App. 3d 118, 120 (10th Dist. 1981). Here there is no genuine issue of material fact that Calhoun was not an agent of defendant Brooks & Stafford Company. In order to bind Brooks & Stafford Company to the contract, then, MJ Direct must rely on the doctrine of apparent authority.

² As Gene Calhoun explained in his deposition, MJ Direct "[m]arket[ed] online to consumers that are looking for specific products and captur[ed] that data and [sent] that data to vendor partners." Calhoun deposition, page 8, lines 19-21.

Apparent authority, also known as agency by estoppel, exists where a principal either holds someone out to the public as possessing sufficient authority to act as an agent for the principal or knowingly permits someone to act as if he has authority to speak for the principal, and the person dealing with the purported agent knew of the facts and acted in good faith believing that the agent possessed the necessary authority. *Logsdon v. ABCO Construction Company*, 103 Ohio App. 233, 241-242 (2nd Dist. 1956).

The first part of the test for apparent authority focuses on whether the purported principal – Brooks & Stafford Company, in this case – took an affirmative step to hold out the purported agent – Calhoun in this case – as having authority to act for it. Brooks & Stafford Company is only responsible for the acts of Calhoun if Brooks & Stafford Company's acts or conduct clothed Calhoun with the appearance of the authority, but is not liable where Calhoun's own conduct created the apparent authority. *Id.*, syllabus one. MJ Direct appears to misunderstand how an agency by estoppel is created by arguing that: "Calhoun negotiated the Agreement . . . on behalf of" Brooks & Stafford Company; Calhoun used Brooks & Stafford Company's "long-standing history and reputation in the industry . . . as selling points" to MJ Direct; and Calhoun thought he was an employee of Brooks & Stafford Company. Plaintiff's motion for summary judgment, pages 10-11. But what Calhoun did and said is entirely beside the point: a person doesn't become a principal's agent just by acting that way. The principal must do something to give the impression to outsiders that the agent does have authority to act for it, and none of these facts involve conduct by Brooks & Stafford Company that would lead third parties to think Calhoun had authority to act for it.

The same holds true for the claim by the plaintiff that Calhoun bound Brooks & Stafford Company by not changing Levy's initial draft of the contract referring to the other party as "Brooks & Stafford, an Ohio corporation with a local office located at 55 Public Square."

Nor is there any evidence that if Brooks & Stafford Company did not hold Calhoun out as its agent it did knowingly permit him to act as if he were an agent for Brooks & Stafford Company as a principal. To the contrary, Calhoun's employment agreement was with Brooks & Stafford Direct, LLC and he knew he was a "director" of the limited liability company.

The test for apparent authority also focuses on what the third party knew and whether it acted in good faith in trying to hold the apparent principal liable. Levy knew he was not dealing with Brooks & Stafford when he acknowledged in a pre-contract email to Calhoun that "this is a new venture for B&S and the reality is there is some degree of likelihood that it doesn't work out and there is significant and devastating risk on my part if it doesn't." Defendant's brief in opposition to plaintiff's motion for summary judgment, Exhibit F, p. 3.

Taking into account all of the record evidence, and construing it most favorably toward MJ Direct, no reasonable fact finder could conclude that Brooks & Stafford Company took any action justifying a belief by MJ Direct that Calhoun was its agent. Not only was Calhoun not Brooks & Stafford Company's actual agent, he was not its apparent agent and Brooks & Stafford Company is therefore not a party to the contract.

Additionally, Brooks & Stafford Company did not bind itself to the contract by paying MJ Direct's invoices or ultimately receiving the leads. Payment of another's obligation does not obligate the payor to perform the other's contract. As for getting the leads, that was a matter between Brooks & Stafford Direct, LLC and Brooks & Stafford Company. MJ Direct had a

contract to provide leads to Brooks & Stafford Direct, LLC; what happened to the leads after that was of no concern to MJ Direct.

Unjust enrichment

The complaint also includes an equitable claim for unjust enrichment. The elements of a cause of action for unjust enrichment are: (1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment. *Lycan v. City of Cleveland*, Cuyahoga App. No. 94353, 2010-Ohio-6021, ¶7.

There are two impediments to the plaintiff on this claim. The first is the express contract between MJ Direct and Calhoun's principal, Brooks & Stafford Direct, LLC. That contract precludes the quasi-contract claim for unjust enrichment. *Kucan v. General Am. Life Ins. Company*, Franklin App. No. 01AP-1099, 2002-Ohio-4290, ¶35. Second, the benefit – the insurance leads – was conferred on Brooks & Stafford Direct, LLC, not on the defendant Brooks & Stafford Company.

CONCLUSION

For all of the reasons given in this opinion, the plaintiff MJ Direct Consulting, LLC's motion for summary judgment is denied, the defendant Brooks & Stafford Company's motion for summary judgment is granted, and judgment is hereby entered on the complaint in favor of the defendant at the plaintiff's costs.

IT IS SO ORDERED:

Judge John P. O'Donnell

Date: January 3, 2016

SERVICE

A copy of this journal entry was sent by email, this _____ day of January, 2016, to the following:

Craig W. Relman, Esq.
CRELMAN@AOL.COM
Yale R. Levy
LEGAL@LEVYLAWLLC.COM
Attorneys for the plaintiff

Christopher A. Holecek, Esq.
caholecek@wegmanlaw.com
Angela M. Lavin, Esq.
amlavin@wegmanlaw.com
Attorneys for the defendant

Judge John P. O'Donnell