Michigan Law Review

Volume 49 | Issue 3

1951

AGENCY-ELECTION TO SUE UNDISCLOSED PRINCIPAL OR AGENT

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AGENCY—ELECTION TO SUE UNDISCLOSED PRINCIPAL OR AGENT—Plaintiff brought action against a principal and his agent to foreclose a mechanic's lien on the principal's real property, alleging that he had expended labor and materials in the improvement of the principal's land pursuant to a contract between himself and the agent. Though plaintiff joined the agent as a party defendant, he did not pray for relief against him. Both defendants moved to dismiss the action. *Held,* action dismissed as to the agent. Whether or not the principal was disclosed at the time the contract arose, the action was properly dismissed as against the agent. If the principal was disclosed, the agent was not liable on the contract; and if the principal was undisclosed, the creditor had to elect whether to proceed against the agent or the principal. Failure to seek relief against the agent constituted an election to sue the principal. *Campbell v. Murdock,* (D.C. Ohio 1950) 90 F. Supp. 297.

When a third party has made a contract with the agent of an undisclosed principal, he has a right to hold either the agent or the principal liable on the contract.[1] The agent is liable for his negligence in failing to disclose his principal and because he has seen fit to contract in his own name; and the principal may be held liable when it is established that the agent, acting within his authority, made a contract on his principal's behalf.[2] This is an alternative liability, however, not joint nor joint and several. Therefore, according to the great weight of authority, the third party must elect the party from whom to seek satisfaction.[3] The courts are not in agreement as to what constitutes an election. The majority view, followed in the principal case,[4] is that commencement of a suit against an agent, after identity of the principal is known, conclusively indicates an election.[5] However, once the third party has received a judgment, though unsatisfied, against either the principal or the agent, the decisions are in almost unanimous accord that the creditor has made an election, and a subsequent action against the other party is barred.[6] The basis of the election requirement

[1] 1 WILLISTON, CONTRACTS, rev. ed., §289 (1936). Generally authorities have not distinguished between situations where the fact of agency is unknown and where this fact is known but the identity of the principal is unknown.

[2] Klinger v. Modesto Fruit Co., 107 Cal. App. 97, 290 P. 127 (1930).

[3] 21 L.R.A. (n.s.) 786 (1909); 119 A.L.R. 1316 (1939); 2 AM. JUR., Agency, §§402, 403 (1936); Berry v. Chase, (6th Cir. 1906) 146 F. 625; Limousine & Carriage Mfg. Co. v. Shadburne, 185 Ill. App. 403 (1914).

[4] Principal case at 298.

[5] 21 L.R.A. (n.s.) 786, 793 (1909); Barrell v. Newby, (7th Cir. 1904) 127 F. 656; Booth v. Barron, 29 App. Div. 66, 51 N.Y.S. 391 (1898).

[6] 119 A.L.R. 1316 at 1320 (1939); Kingsley v. Davis, 104 Mass. 178 (1870); E. J. Codd v. Parker, 97 Md. 319, 55 A. 623 (1903). According to several decisions, both the agent and the principal may be joined in the same action, but an election must be made before judgment is rendered. On this point see 118 A.L.R. 682 (1939); Hospelhorn v. Poe, 174 Md. 242, 198 A. 582 (1938). If the principal is not discovered until after commencement of the suit or judgment, the creditor may proceed against the principal, since he could not have made an election without knowledge of the facts. See 119 A.L.R. 1316 at 1319, 1324 (1939); Steele Smith Grocery Co. v. Potthast, 109 Iowa 413, 80 N.W. 517 (1899); Old Ben Coal Co. v. Universal Coal Co., 248 Mich. 486, 227 N.W. 794 (1929).

is lost in obscurity, yet most courts continue to follow it blindly without consideration of possible detriment to the creditor, and though there is no offsetting policy argument to be urged. A respectable minority of courts, however, follow the so-called Pennsylvania rule,[7] under which the creditor may pursue both the agent and the undisclosed principal without election until there has been one satisfaction.[8] Both Mechem[9] and Story[10] have supported this view, and serious consideration was given to its adoption in the *Restatement*.[11] The basis for the rule seems to be that the agent is liable on the contract and cannot discharge his liability otherwise than by satisfaction by himself or by the principal.[12] A further reason to justify a creditor's recovery from the principal though he has already received an unsatisfied judgment against the agent is his enforcement of the agent's right of exoneration against the principal.[13] Whatever may be the basis for the Pennsylvania rule, this view is certainly no less logical than the majority rule and serves to give much greater protection to the innocent creditor, without placing the agent and the principal in additional jeopardy. These considerations make it appear that the minority view is by far the sounder of the two.

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[7] 1 WILLISTON, CONTRACTS, rev. ed., §289, p. 855 (1936). The leading case is Beymer v. Bonsall, 79 Pa. 298 (1875).

[8] North Carolina Lumber Co. v. Spear Motor Co., 192 N.C. 377, 135 S.E. 115 (1926); Williams v. O'Dwyer & Ahern Co., 127 Ark. 530, 192 S.W. 899 (1917); Joseph Denunzio Fruit Co. v. Crane, (D.C. Cal. 1948) 79 F. Supp. 117 at 138. New York has adopted this view by statute, N.Y. Civ. Prac. Act. §112-b added by Laws of 1939, c. 128. This minority view is analogous to the majority rule in respect to beneficiary contracts, which allows a creditor-beneficiary rights against both the original debtor and the new promisor until he receives satisfaction. 1 WILLISTON, CONTRACTS, rev. ed., §289 at p. 855 (1936), 2 id., §393.

[9] 2 MECHEM, AGENCY, 2d ed., §§1751, 1759 (1914).

[10] STORY, AGENCY, 9th ed., §§291, 295 (1882).

[11] 1 WILLISTON, CONTRACTS, rev. ed., §289, p. 856 (1936). This view was favored by Professor Seavey, the reporter, but the majority felt that it would be "too bold"; consequently, the view of election by judgment was adopted. See Merrill, "Election between Agent and Undisclosed Principal: Shall We Follow the Restatement?" 12 NEB. L. BUL. 100 at 101 (1933).

[12] Beymer v. Bonsall, supra note 7.

[13] 1 WILLISTON, CONTRACTS, rev. ed., §289, p. 856 (1936).