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3 **UNITED STATES BANKRUPTCY COURT**
4 **IN AND FOR THE DISTRICT OF ARIZONA**
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7 **In re**) **In Chapter 11 proceedings**
8 **SPARTA FAMILY LIMITED**)
9 **PARTNERSHIP,**)
10 **Debtor.**) **Case No. 2-08-bk-17362-CGC**
11 _____)
12 **P. MARK TETREAU and JILL M.**) **Adv. No. 2:09-ap-00118**
13 **TETREAU,**) **Adv. No. 2:09-ap-00129**
14 **Plaintiffs,**) **(Jointly Administered)**
15 **v.**) **UNDER ADVISEMENT DECISION**
16 **SPARTA FAMILY LIMITED**)
17 **PARTNERSHIP, et al,**)
18 **Defendants.**)
19 _____)

20 **I. Introduction**

21 The Court must decide if Ross Rogers acted as Sparta Family Limited Partnership's
22 ("SFLP") agent when he signed a photocopied lease and purchase option in 2004. Mark and Jill
23 Tetreau, the owners of a small scooter and used car lot, claim that they believed Mr. Rogers did have
24 authority to sign the lease; thus, they claim to have an enforceable purchase option. SFLP counters
25 that though Mr. Rogers signed the lease, it along with the option are unenforceable because he did
26 not have authority to sign the lease on behalf of SFLP. The Tetreaus sued SFLP to enforce the
27 alleged option. The Court held a trial to decide the issue in the Summer of 2009. After reviewing
28 the record and the post-trial briefs submitted by the parties the Court concludes that Mr. Rogers was

1 not an agent of SFLP concerning the lease and purchase option and that the Tetreus belief that Mr.
2 Rogers was an agent of SFLP, if it existed, was unreasonable. Therefore, judgment will given to
3 SFLP.

4 **II. Facts**

5 *A. Initial Leases*

6 SFLP owns real property at 5809 Miller Road, Prescott Arizona (“Property”). SFLP is a
7 limited partnership which was established as part of their father’s, Dan Nicholson¹, estate plan.
8 SFLP’s general partner is Spartin Investments, L.L.C. (“Spartin”). Sisters Myra Rogers and Anne
9 Nicholson are the managers of Spartin. Mr. Rogers is Myra Rogers’ husband and, until recently,
10 was SFLP’s area supervisor.

11 Various documents show Mr. Rogers as the responsible party or owner of the Property. For
12 instance Mr. Rogers is Animas Environmental Services, Inc.’s contact; listed as the Property owner
13 on documents submitted to the Arizona Department of Environmental Quality (“ADEQ”); and
14 shown as the Property owner on an inspection report of the Prescott Fire Department. Mr. Tetreau
15 admitted during cross examination that he did not know these documents existed until after this
16 lawsuit was filed.

17 Mark and Jill Tetreau lease the Property from SFLP, operating Scooter and Auto Source
18 where they sell new and used scooters as well as used cars. Mr. Tetreau has been in the auto
19 business for 30 years. The Tetreus leased the Property on a month-to-month bases from March
20 2002 to June 2003. When they first leased the Property, Sparta Family Investments, Inc. owned the
21 Property. The Tetreus negotiated the terms of the month-to-month lease with Mr. Rogers who was
22 Sparta Investment’s president at the time. During the month-to-month tenancy, Mr. Rogers was the
23 Tetreus’ primary contact for all business related to the Property. According to Mrs. Rogers
24 testimony, she never met with or spoke to the Tetreus.

25 The parties ended the month-to-month tenancy by entering into a one-year lease in July 2003
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27 ¹The various entities owned by the Nicholson Family are referred to as the Nicholson Companies.
28

1 (“2003 Lease”). The Tetreaus negotiated the terms of the 2003 Lease with Mr. Rogers and John
2 Dietz, a Nicholson Family attorney. Mr. Rogers testified that, during the 2003 negotiations, he told
3 Mr. Tetreau that he did not have authority to agree to lease terms; instead, the authority rested with
4 Myra Rogers or Mark Nicholson. John Dietz prepared the 2003 Lease. Myra Rogers signed the
5 2003 Lease on behalf of SFLP in her capacity as manger of Spartin. Under the 2003 Lease: rent
6 was \$350 per month; the Tetreaus were required to pay property taxes; the term was for one year;
7 and there was a purchase option of \$225,000 at the end of the lease. The Tetreaus did not exercise
8 the purchase option at the end of the 2003 Lease.

9 *B. 2004 Document/Lease*

10 In March 2004 the Tetreaus began negotiations with Mr. Rogers for a new lease. In late
11 March 2004, The Tetreaus sent a signed copy of a proposed lease to Myra Rogers via certified mail
12 at the SFLP address (“Proposed Lease”). Mr. Tetreau testified that he sent the Proposed Lease to
13 Myra Rogers because that was the address listed on the 2003 Lease. Mr. Tetreau testified that he
14 did not hear back from SFLP regarding the Proposed Lease as of late April or early May 2004 - after
15 which he turned his attention to negotiating with Mr. Rogers. Though some specifics may vary, the
16 parties agree to the essentials facts discussed to this point.

17 The controversy between the parties centers on the enforceability of a lease purportedly
18 entered in 2004 (“2004 Document/Lease”). Some of the facts involving the 2004 Document/Lease
19 are undisputed: It is a photocopy of the 2003 Lease with hand-written edits that changed the 2003
20 Lease to reflect a three year lease term and a three year period to exercise the purchase option; was
21 signed by Mr. Rogers; and contained photocopies of the Tetreaus’ signatures and of Myra Rogers’
22 signature. The circumstances surrounding the signing of the 2004 Document/Lease are hotly
23 disputed

24 Mr. Tetreau testified that he started negotiating a new lease with Mr. Rogers after not hearing
25 back from Mrs. Rogers. The Tetreaus claim that they negotiated with Mr. Rogers because he was
26 their primary contact. According to the Tetreaus, they also contacted John Dietz who advised the
27 Tetreaus that they could photocopy the 2003 Lease, make changes to it, and Mr. Rogers could
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1 execute on SFLP's behalf. According to the Tetreus, that is just what they and Mr. Rogers did after
2 a series of faxes and phone calls between them.

3 According to the Tetreus, their treatment of the 2004 Document/Lease is evidenced by their
4 making all rent payments from the end of the 2003 Lease period through June 2007 - the end of the
5 2004 Document/Lease. The Tetreus contend payments were made under 2004 Document/Lease
6 while SFLP contends payments were made as holdovers under the 2003 Lease. The Tetreus paid
7 all property taxes on the Property for 2004; according to the Tetreus, this is further evidence that
8 a lease was consummated. According to the Tetreus, SFLP never complained, either orally or in
9 writing, that the Tetreus failed to pay rent or taxes on the Property.

10 Mr. Rogers admits that he signed the 2004 Document/Lease. According to his testimony,
11 Mr. Rogers signed the 2004 Document/Lease because the Tetreus needed a lease to get financing,
12 insurance, or "some other reason." At this point, according to Mr. Rogers, he told Mr. Tetreau that
13 his signature, "wouldn't be any good if I signed," because he isn't an officer of the corporation.
14 According to Mr. Rogers, he signed the 2004 Document/Lease as a favor to a friend.

15 John Dietz testified that Mark Tetreua knew in 2003 that Mr. Rogers could not sign a lease
16 for the Property and that he told the Tetreus that the 2003 Lease had to be signed by Myra Rogers
17 personally on behalf of SFLP. According to Mr. Dietz, he recalls distinctly telling Mr. Tetreau that
18 only Myra Rogers or Anne Nicholson had authority to sign the 2003 Lease. This, according to Mr.
19 Dietz's testimony, frustrated Mr. Tetreau because he preferred dealing in person with Mr. Rogers.

20 According to Mr. Dietz, the Tetreus knew that Mr. Rogers did not have authority from
21 SFLP to enter the 2004 Document/Lease. Mr. Dietz testified that when Mr. Tetreau asked him about
22 negotiating a new Lease in 2004, Mr. Dietz advised Mr. Tetreau to talk to Bruce or Mark Nicholson.
23 According to Mr. Dietz, he and Mr. Tetreau had ten to fifteen conversations regarding a new lease.
24 Mr. Dietz, contrary to Mr. Tetreau's testimony, claims that he did not prepare the Proposed Lease.
25 Instead, he may have sent Mr. Tetreau a Microsoft Word version of the 2003 Lease. Mr. Dietz
26 denies that he helped negotiate the 2004 Document/Lease because at that time he and Mr. Tetreau
27 were discussing the possibility of forming a joint venture. While the 2004 Document/Lease was

1 being negotiated, Mr. Dietz testified that he told Mr. Tetreau that Mr. Rogers did not have authority
2 to enter a lease as a practical or a legal matter. Mr. Dietz flatly denies that he advised the Tetreaus
3 that entering into the 2004 Document/Lease was appropriate.

4 **III. Position of the Parties**

5 *A. Tetreaus*

6 The position of the Tetreaus rests on a key undisputed fact: Ross Roger signed the 2004
7 Document/Lease. The primary question is whether Mr. Rogers had either actual or implied authority
8 to sign the 2004 Document/Lease.

9 1. Actual Authority.

10 According to the Tetreaus, the facts show that SFLP held Mr. Rogers out as the SFLP's sole
11 representative for the Property and intended to imbue others with the sense Mr. Rogers had actual
12 authority. For instance, the Tetreaus point to the fact that Mr. Rogers is listed as the owner or
13 contact with Animas Environmental Services, Inc.'s, the ADEQ and the Prescott Fire Department
14 More importantly to the Tetreaus is that Mr. Rogers was the principal negotiator of the 2003 Lease
15 and, as described by Mr. Rogers and Mark Nicholson, Mr. Rogers was the primary business contact
16 in 2003 and 2004.

17 Additionally, according to the Tetreaus, Mr. Rogers obtained actual authority when SFLP
18 ratified his execution of the 2004 Lease. SFLP discovered the Tetreaus' claims with regard to the
19 2004 Lease on October 7, 2006 at the latest. SFLP then accepted the Tetreaus' lease and property
20 tax payments without comment.

21 2. Apparent Authority.

22 When the 2003 Lease was entered, Mr. Rogers was the president of Sparta Investments who
23 negotiated the 2003 Lease and accepted checks. When SFLP purchased the Property from Sparta
24 Investments, the Tetreaus did not receive notice of the sale. Though he wasn't president, Mr. Rogers
25 was SFLP's area supervisor when the 2004 Document/Lease was signed. As confirmed by Mr.
26 Rogers testimony, Myra Rogers and Anne Nicholson, the managers of SFLP, never interacted with
27 the Tetreaus at the time. After the parties agreed to 2004 Document/Lease, checks were written to
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1 Mr. Rogers personally who accepted the checks. According to the Tetreaus, these are all indicators
2 of Mr. Rogers' apparent authority.

3 *B. SFLP*

4 According to SFLP, no actual authority ever existed. Therefore, the only question is whether
5 Mr. Rogers ever had apparent authority.

6 1. Actual Authority

7 Spartin is the general partner of SFLP. Myra Rogers and Anne Nicholson are the managers
8 of Spartin. Therefore, according to SFLP, Myra Rogers and Anne Nicholson were the only parties
9 with actual authority to enter the 2004 Document/Lease on behalf of SFLP; they did not do so.

10 2. Apparent Authority

11 According to SFLP no apparent authority exists. Mark Tetreau testified that he based his
12 apparent authority belief on what he had been told by John Dietz and Mr. Rogers. However, during
13 the trial, both denied ever telling Mr. Tetreau that Mr. Rogers had authority. Even if true, according
14 to SFLP, the Tetreaus reliance on this authority is misplaced. Instead, the Tetreaus must show an
15 act by SFLP that suggests apparent authority

16 According to SFLP Mr. Rogers' ability to negotiate terms of a lease does not equate to actual
17 authority to sign the 2004 Document/Lease; instead it must be signed by either Myra Rogers or
18 Anne Nicholson. Further, though the Tetreaus originally made out their checks to Mr. Rogers, they
19 only did so for two months; thereafter they made the checks out to "Shepard Brothers" a d/b/a of
20 SFLP.

21 SFLP argues that any apparent authority evaporated with the execution of the 2003 Lease.
22 SFLP claims that this is the only valid lease. Myra Rogers executed the 2003 Lease as "Manager
23 of Spartin Investments, LLC, the General Partner of Sparta Family Limited Partnership." This,
24 according to SFLP, informed the Tetreaus precisely as to who had authority to bind SFLP to a lease
25 and purchase option. Further, argues SFLP, the Tetreaus knew that Myra Rogers did not and would
26 not sign the Proposed Lease because they sent the Proposed Lease to Myra Rogers in March 2004,
27 but she never signed it.

1 SFLP concedes that Mr. Rogers signed the 2004 Document/Lease. However according to
2 Mr. Rogers, he signed as an accommodation to Mr. Tetreau in obtaining financing. Mr. Rogers
3 claims that he had no intent to bind SFLP.

4 Further, argues SFLP, any claim by the Tetreuas that they relied on documents showing Mr.
5 Rogers ties to SFLP are disingenuous because the Tetreuas were unaware of these documents until
6 after the case commenced.

7 **IV. Analysis**

8 "In Arizona, [a]n agency relationship can derive from either actual or apparent authority."
9 *Designer Skin, LLC v. S & L Vitamins, Inc.*, 560 F.Supp. 2d 811, 825-26 (D.Ariz. 2008). "The
10 burden of proving the existence of an agency relationship is on the party asserting it." *Id.* at 826.
11 Here, the Tetreuas assert that Mr. Rogers is an agent of SFLP. As such, the Tetreuas bear the burden
12 of proof to show actual or apparent authority.

13 *A. Actual Authority*

14 "Actual authority 'may be proved by direct evidence of express contract of agency between
15 the principal and agent or by proof of facts implying such contract or the ratification thereof.'" *Ruesga v. Kindred Nursing Centers, L.L.C.*, 161 P.3d 1253, 1261 (Ariz.App.Div.2 2007) (quoting
16 *Corral v. Fidelity Bankers Life Ins. Co.*, 630 P.2d 1055, 1058 (Ariz.App. 1981) and citing to
17 RESTATEMENT (THIRD) OF AGENCY §2.01 cmt. b). "The focal point for determining whether an
18 agent acted with actual authority is the agent's reasonable understanding at the time the agent takes
19 action." RESTATEMENT (THIRD) OF AGENCY §2.01 cmt. c. Actual authority "is created by a
20 principal's manifestation to an agent that, as reasonably understood by the agent, expresses the
21 principal's assent that the agent take action on the principal's behalf." RESTATEMENT (THIRD) OF
22 AGENCY §3.01. In short, actual authority is determined by analyzing Mr. Rogers, the alleged agent,
23 interaction with SFLP, the principal.
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25 Here, the Tetreuas have not shown actual authority. There is no express contract of agency
26 between Mr. Rogers and SFLP. Absent an express contract, actual authority exists if the Tetreuas
27 show that Mr. Rogers reasonably believed he was acting on behalf of SFLP when signing the 2004
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1 Document/Lease. The Tetreus must show that SFLP implied to Mr. Rogers, not a third party, that
2 he had authority to act. Mr. Rogers directly contradicts any notion of implied actual authority when
3 he testified that he knew he did not have authority to act on behalf of SFLP when he signed the 2004
4 Document/Lease.

5 Though Mr. Rogers had authority to act on behalf of SFLP on other matters - e.g. interactions
6 regarding the environmental clean up - there is no evidence that SFLP gave Mr. Rogers express or
7 implied authority to sign the 2004 Document/Lease. The fact that he was an “area supervisor” is
8 equally unpersuasive. As described during the hearing, an area supervisor is tasked with running
9 the day-to-day operations of SFLP. He is not tasked with making over-arching business decision.
10 The Tetreus have presented insufficient evidence to show that Mr. Rogers believed he was acting
11 on behalf of SFLP when he signed the 2004 Document/Lease.

12 B. Apparent Authority.

13 "Apparent authority, in contrast, exists when the principal has intentionally or inadvertently
14 induced third persons to believe that ... a person was its agent although no actual or express authority
15 was conferred on him as agent." *Designer Skin* at 826 (internal citations omitted); *See also Miller*
16 *v. Mason-McDuffie Co. of Southern Cal.*, 739 P.2d 806, 810 (Ariz.1987). Apparent authority "does
17 not presuppose the present or prior existence of an agency relationship The definition thus
18 applies to actors who appear to be agents but are not, as well as to agents who act beyond the scope
19 of the actual authority." RESTATEMENT (THIRD) OF AGENCY §2.03 cmt. a. Apparent authority “is
20 created by a person's manifestation that another has authority to act with legal consequences for the
21 person who makes the manifestation, when a third party reasonably believes the actor to be
22 authorized and the belief is traceable to the manifestation.” RESTATEMENT (THIRD) OF AGENCY
23 §2.03. “Apparent authority is present only when a third party's belief is traceable to manifestations
24 of the principal.” RESTATEMENT (THIRD) OF AGENCY §3.03 cmt b. “A principal may also make a
25 manifestation by placing an agent in a defined position in an organization or by placing an agent in
26 charge of a transaction or situation.” *Id.*

27 Here, the Tetreus must show an action by SFLP that lead them to believe that Mr. Rogers
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1 had authority to enter the 2004 Document/Lease on SFLP's behalf. The most persuasive evidence
2 of the Tetreaus' contention is that Mr. Rogers negotiated on behalf of Sparta Investments when the
3 2003 Lease was consummated. They argue that this alleged apparent authority to act on behalf of
4 Sparta Investments or SFLP extended into 2004 when the 2004 Document/Lease was being
5 negotiated. Their argument is bolstered because Mr. Rogers did in fact have apparent authority to
6 act on behalf on SFLP in at least some capacity. He could accept checks, engage in initial
7 negotiation of a proposed lease, and as area supervisor could act otherwise on SFLP's behalf. But
8 the question the Court must answer is not whether Mr. Rogers had apparent authority in general, but
9 whether he had apparent authority to enter into the 2004 Document/Lease. The answer to that
10 question is no on two levels.

11 First, the Tetreaus have not met their burden of proof to show actions by SFLP upon which
12 they reasonably concluded that Mr. Rogers was authorized to sign the 2004 Document/Lease. Both
13 Mr. Rogers and Mr. Dietz testified that they told Mr. Tetreau explicitly that Mr. Roger was not
14 authorized to sign a lease on behalf of SFLP. Further, though Mr. Rogers was listed by SFLP as the
15 responsible party in several environmental and safety documents, there is insufficient evidence that
16 the Tetreaus relied on these documents when entering into the 2004 Document/Lease.

17 Second, "in order to hold a principal liable for his agent's acts under an apparent authority
18 theory, the third party must demonstrate that his reliance upon the agent's apparent authority was
19 reasonable." *Anchor Equities, Ltd. v. Joya*, 773 P.2d 1022, 1026 (Ariz.App. 1989). Under the
20 circumstances it was unreasonable to believe that Mr. Rogers had authority to enter the 2004
21 Document/Lease on SFLP's behalf. Myra Rogers signed the 2003 Lease as Manager of Spartin
22 Investments, L.L.C., the General Partner of Sparta Family Limited Partnership. Mr. Rogers did not
23 sign the 2003 Lease. John Dietz credibly testified that he explicitly told the Tetreaus that Mr.
24 Rogers did not have the authority to sign the 2003 Lease. In 2003 the Tetreaus were on notice that
25 Myra Rogers had authority to bind SFLP, and Mr. Rogers did not.

26 Acting on this knowledge, in March 2004, Mark Tetreau sent via certified mail a proposed
27 lease to Sparta Family Limited Partnership attn: Myra Rogers. This action is consistent with Section
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1 19 of the 2003 Lease which requires notices under the 2003 Lease to:

2 be in writing and delivered either in person to the other party or the other party's
3 authorized agent, or by United States Certified Mail, Return Receipt Requested,
4 postage fully prepaid, to the addressee set forth in this agreement, or to such other
5 address as either party may designate in writing and deliver herein as provided.

6 Myra Rogers did not respond. The Tetreaus reacted to this lack of communication by entering into
7 negotiations with Mr. Rogers. At this point, it was unreasonable to conclude that Mr. Rogers had
8 authority to enter into a new lease.

9 Finally, relying on a "whited-out" lease signed only by Mr. Rogers is on its face
10 unreasonable. Whether the 2004 Document/Lease was signed after phone calls and faxes, as
11 described by the Tetreaus, or next to a car outside of his home, as described by Mr. Rogers, is
12 immaterial. Instead of signing and dating a new lease, the Tetreaus "whited-out" provisions on
13 the 2003 Lease, placed new dates next to their signatures and relied on the signature of Mr. Rogers.
14 The reasonable course of action at this point would have been to execute a new lease.

15 C. Attorneys Fees

16 SFLP requests attorneys fees pursuant to A.R.S. § 12-341.01(A) under which, "[i]n any
17 contested action arising out of a contract, express or implied, the court may award the successful
18 party reasonable attorney fees." However, "[t]he award of fees under section 12-341.01 is
19 discretionary with the court." *Apollo Group, Inc. v. Avnet*, 58 F.3d 477, 482 (9th Cir. 1995) In
20 Arizona a court considers the following factors in a decision to award fees:

- 21 1. The merits of the claim or defense presented by the unsuccessful party;
- 22 2. Whether the litigation could have been avoided or settled and whether the
23 successful party's efforts were completely superfluous in achieving the result;
- 24 3. Whether assessing fees against the unsuccessful party would cause extreme
25 hardship;
- 26 4. Whether the successful party prevailed with respect to all the relief sought;
- 27 5. The novelty of the legal questions presented;
- 28 6. Whether the claim or defense presented had been previously adjudicated in this
jurisdiction.

29 *Lehman v. Mutual of Omaha Ins. Co.*, 806 F.Supp. 859, 865 (D.Ariz. 1992).

30 Under the *Lehman* test, reasonable fees are appropriate here. If it continues to seek fees,
31 SFLP must file an application supported by affidavit and time records within thirty days of the date

1 of this order. Tetreus will have fifteen days to respond. SFLP is to notify the court when both
2 filings have been made and the Court will thereafter render a decision.

3 **V. Conclusion**

4 The Court concludes that Mr. Rogers was not acting as SFLP's agent when he signed the
5 2004 Document/Lease. Accordingly, SFLP is entitled of back rent of \$350 per month for the months
6 that have been unpaid. Further, the Tetreus are to turnover the Property to SFLP. Counsel for SFLP
7 is to upload a form of judgment.

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9
10 **DATED:** March 24, 2010

11
12 
13 CHARLES G. CASE II
14 UNITED STATES BANKRUPTCY JUDGE

15
16 **COPY** of the foregoing mailed by the BNC and/or
17 sent by auto-generated mail to:

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