

**Idearc Media Corp. v Evergreen Country Club, Inc.**

2007 NY Slip Op 33316(U)

October 15, 2007

Supreme Court, Albany County

Docket Number: 0021842/0071

Judge: Joseph C. Teresi

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

IDEARC MEDIA CORP.  
f/k/a VERIZON DIRECTORIES CORP.,

Plaintiffs,

-against-

EVERGREEN COUNTRY CLUB, INC.,  
d/b/a EVERGREEN COUNTRY CLUB and  
d/b/a EVERGREEN GOLF & COUNTRY  
CLUB, INC., JOSEPH D. BOVE, JR. CORP.  
d/b/a EVERGREEN COUNTRY CLUB,

Defendants.

**DECISION and ORDER**  
**Index No.: 2184-07**  
**RJI No.: 01-07-090234**

Supreme Court of Albany All Purpose Term, September 14, 2007  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

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**TERESI, J**

Plaintiff, by notice of motion, seeks an order pursuant to CPLR § 3212 granting summary judgment in favor of Plaintiff. Defendant opposes the motion.

In January of 2004, David Benson (“Benson”), a premise sales representative acting on behalf of Plaintiff Idearc Media Corp. (“Idearc”), attempted to contact Joseph D. Bove, Jr. (“Bove”), the president of Defendant Evergreen Country Club, Inc. (“Evergreen”), regarding a 2004 advertising contract between Idearc and Evergreen. As Mr. Benson was unable to travel, Idearc sent David Kutel (“Kutel”), another premise sales representative, to discuss the contract with Mr. Bove. Mr. Bove ultimately signed this contract, though he claims that he told Mr. Kutel not to continue this contract beyond 2004. However, Mr. Kutel denies this claim.

Sometime in late 2004, Mr. Benson tried to contact Mr. Bove to renew the contract for 2005. Though Mr. Benson was unable to reach Mr. Bove, Mr. Benson claims that an Evergreen employee told him to contact Michele Speer (“Speer”), the “Banquet Director.” Mr. Benson contacted Ms. Speer, and the two ultimately reached an agreement to extend the advertising contract for another year. However, Defendant claims that Ms. Speer, a new employee, had no authority to enter into a contract, and that Mr. Bove held sole authority to enter into all contracts on behalf of Evergreen. Mr. Bove claims he only authorized Ms. Speer to pay the original 2004 contract. Idearc claims Mr. Bove’s actions did not express this arrangement.

Plaintiff seeks sixteen-thousand one-hundred and forty dollars and fifty cents (\$16,140.50) in owed advertising fees, three-thousand eight-hundred and fifty-five dollars and twenty cents (\$3855.20) in interest, one-thousand dollars (\$1000.00) in attorney’s fees, and four-hundred and thirty-five dollars (\$435.00) in disbursements, all together totaling twenty-one-thousand four-hundred and thirty dollars and seventy cents (\$21,430.70).

“Summary judgment is a drastic remedy and ‘should not be granted where there is any doubt as to the existence of a triable issue.’” Napierski v. Finn 229 A.D.2d 869, 870 (3d Dep’t

1996) (quoting Moskowitz v Garlock, 23 A.D.2d 943, 944 (3d Dep't 1965)). In deciding whether summary judgment is warranted, the court's primary function is issue identification, not issue determination. See Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 (1957). The party seeking summary judgment has the burden of establishing its entitlement thereto, as a matter of law, by establishing the nonexistence of material issues of fact. See Winegrad v. New York Univ. Med. Ctr., 64 N.Y. 2d 851, 853 (1985). The evidence must be construed in a light most favorable to the party opposing the motion. See Dykstra v. Winridge Condominium One, 175 A.D.2d 482, 483 (3d Dep't 1991). In order to defeat a motion for summary judgment, the party opposing the motion must produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact requiring a trial of the action. See Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980).

“Apparent or, as it is sometimes called, ostensible authority” can “bind one to a third party with whom the purported agent had contracted” in the absence of actual authority. Greene v. Hellman, 51 N.Y.2d 197, 204 (1980). “Essential to the creation of apparent authority are the words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction.” Standard Funding Corp. v. Lewitt, 89 N.Y.2d 546, 551 (1997) (quoting Hallock v. State, 64 N.Y.2d 224, 231 (1984)). The third party must demonstrate a “reasonable reliance upon the appearance of authority” to bind the principal. Id.

After a full review of the record, this court finds that there are triable issues of material fact. Plaintiff's motion for summary judgment is denied.

In particular, the Defendant claims that Mr. Bove told the Plaintiff not to extend the 2004 contract, that Mr. Bove had sole authority to enter into all contracts on behalf of Evergreen, and that Mr. Bove's actions did not give the appearance that anyone else possessed implied or apparent authority. Conversely, Plaintiff claims that Mr. Bove made no such assertions to Mr. Benson or Mr. Kutel, that Mr. Bove action's demonstrated an apparent authority on the part of Ms. Speer, and that Plaintiff reasonably relied on this apparent authority. As such, this issue of Ms. Speer's apparent authority requires issue determination, necessitating a trial of the action.

All papers, including this Decision and Order, are being returned to the attorney for Peerless Insurance Company. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

So ordered.

Dated: October 15, 2007

Albany, NY

  
JOSEPH C. TERESI, J.S.C.

**PAPERS CONSIDERED:**

1. Notice of Motion for Summary Judgment, dated July 24, 2007, with Attached Affidavit in Support of Summary Judgment Motion, of Robert J. Benson, dated July 9, 2007, with Attached Exhibits.
2. Affidavit in Opposition to Summary Judgment Motion, of Joseph Bove, dated August 6, 2007.
3. Reply Affidavit of Robert J. Benson, dated September 5, 2007.
4. Reply Affidavit of David Kutel, dated September 5, 2007.
5. Reply Affirmation of Robert O. Wilhelm, Esq., dated September 12, 2007.