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Establishing apparent authority

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In a split decision, the Appeals Court recently provided some guidance on the evidence necessary to establish apparent authority. The case involved the failure of a lawyer to properly close a real estate loan among private parties, including himself.

In *Fergus v. Ross*, attorney Stephen A. Ross loaned $260,000 to Joseph Fergus. The loan was brought to Ross by Bernard Laverty Jr., who was hired by Fergus to obtain financing for rehabilitation work on a property Fergus owned in Dorchester for which he was not able to obtain conventional financing.

Laverty, described by the court as a "flipper," had previously brought borrowers to Ross for the purpose of Ross making "hard money" loans to individuals who could not otherwise obtain conventional financing.

Other than meeting at the closing, Ross and the borrower, Fergus, had no interaction; all interaction took place through Laverty.

On relatively complicated facts, the trial court found that, at the time Laverty was arranging the loan from Ross to Fergus, Laverty also needed financing to acquire property in Marshfield. Laverty "pressured" Fergus to give him a "side loan" of $120,000 out of the proceeds of the loan from Ross to Fergus.

Laverty offered to give Fergus a "deed-in-lieu" on the Marshfield property to secure Laverty's repayment of the side loan. Fergus agreed to give Laverty the side loan, never obtained the proffered deed-in-lieu, closed his $260,000 loan transaction with Ross, repaid Ross as provided in the loan agreement, and thereupon attempted to collect on his side loan to Laverty.

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Laverty defaulted and filed for bankruptcy. Fergus then sued Ross to recover the $120,000 loaned to Laverty.

After a bench trial, the judge found in Fergus' favor on his negligence claim against Ross on a theory that Laverty, acting as Ross' agent, bound Ross to act as closing agent on the side loan such that Ross had a duty to document the side loan in a manner that would protect Fergus' interest.

The central issue before the Appeals Court was whether Laverty had the apparent authority to bind Ross to act as closing agent on the side loan.

On appeal, Ross argued that he knew nothing about the side loan, and that even if Laverty was Ross' agent with respect to the $260,000 loan, there was insufficient evidence to conclude that Laverty's apparent authority extended to the side loan.

After noting the conventional apparent authority doctrine, the court stated that only the words and conduct of the principal, and not those of the agent, are considered in determining the existence of apparent authority, and that such authority may arise from a variety of circumstances including the manner in which the principal conducts his business. See *Licata v. GGNSC Malden Dexter LLC*, 466 Mass. 793, 801 (2014); *Theos & Sons, Inc. v. Mac Trucks, Inc.*, 431 Mass. 736, 745 (2000); *Kanavos v. Hancock Bank and Trust Company*, 14 Mass. App. Ct. 326, 332 (1982).

The evidence that the Appeals Court found sufficient to support a finding of apparent authority on the side loan was:

Ross knew or should have known that the amount of the $260,000 loan greatly exceeded the stated amount required by Fergus for renovations because Ross' wife inspected the property with Laverty.

Second, Ross knew that Laverty was spending his time on the transaction even though Laverty was not receiving his customary referral fee from Ross.

Lastly, Ross knew that Laverty frequently needed to borrow money for his various real estate projects.

The court held that, "on these facts, the Judge was warranted in concluding that Ross's conduct caused Fergus reasonably to believe that Laverty had authority to bind Ross to act as closing agent on the side loan and to protect Fergus's interest in it. See *DeVaux v. American Home Insurance Company*, 387 Mass. 814, 819 (1983); *Linkage Corp. v. Trustees of Boston University*, 425 Mass. 1, 16-17, cert. denied, 522 US 1015 (1997)."

In a dissent, Judge Mark V. Green stated that the evidence was insufficient to impose liability on a theory of apparent authority or otherwise. He noted that it is wholly unremarkable that Fergus borrowed more money than his planned renovations required because owners of real property commonly do that.

Green also noted that it is similarly unremarkable that Laverty did not receive his customary referral fee because, for all Ross knew, Laverty might have arranged for a fee from Fergus.

While *Fergus* obviously stands on detailed facts, and most likely bad facts, it does establish some authority for a court to cite to take an expansive view of the scope of the apparent authority doctrine under Massachusetts law. MLW

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