

APPENDIX

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STATE OF NORTH CAROLINA
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
COUNTY OF PENDER 14-CVS-124
Donald Sullivan,
Plaintiff
v.
Robert Wayne Pugh and Karen Lloyd Pugh,
Defendants

STATE OF NORTH CAROLINA
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
COUNTY OF PENDER 15-CVS-138
TOG PROPERTIES, LLC, Plaintiff
v
KAREN PUGH, Defendant

ORDER

The matter before the Court on TOG Properties, LLC (“TOG Properties) Motion for Summary Judgment (“Motion”) as to its cross claim for declaratory judgment, pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. Having considered the brief by TOG Properties and response by Mr. Donald Sullivan (“Sullivan”), and the arguments and contentions of counsel for TOG Properties and Sullivan, the Court GRANTS the Motion, for the reasons that follow.

JURISDICTION

1. TOG Properties is a Florida corporation authorized to do business in North Carolina.

2. Sullivan is a citizen and resident of Pender County, North Carolina.

PROCEDURAL HISTORY

3. On February 3, 2015, Sullivan filed an amended complaint against Robert Wayne Pugh and Karen Lloyd Pugh alleging claims for negligence and negligence per se as a result of a fire started by Karen Pugh on April 14, 2012.
4. On April 10, 2015, TOG Properties filed a complaint against Karen Lloyd Pugh seeking to recover for damages to certain real property caused by a fire she started on April 14, 2012.
5. On April 6, 2016, seeking a declaratory judgment that it was the owner of any claims for damages against Karen Pugh for the damages caused to certain real property on April 14, 2012.
6. On May 2, 2016, Sullivan filed an answer to TOG Properties' cross-claim, which denied certain factual allegations and sought to dismiss the cross-claim pursuant to Rules 12(b) and 17 of the North Carolina Rules of Civil Procedure.
7. A hearing on Sullivan's request to dismiss the cross-claim began on July 18 in Burgaw, North Carolina and concluded on July 19, 2016 with the honorable Judge Jay D. Hockenbury presiding. An August 17, 2016, Judge Hockenbury entered an order denying Sullivan's request to dismiss the cross-claim.
8. On November 16, 2016, TOG filed the Motion, which is currently before the Court, and a brief in support of the Motion.
9. On November 30, 2016, Sullivan filed a Notice of Objection to the Motion, which argued that there were material facts at issue with the cross-claim

and that he was entitled to a jury trial to determine those issues because he had not waived his Seventh Amendment right to a jury trial.

10. A hearing on the Motion was held in Burgaw, North Carolina on January 18, 2017.

FACTUAL BACKGROUND

The Court considers the following material facts, which do not appear to be at issue and justify the judgment in this case, in reaching its conclusion.

11. On or about June 1, 2006, TOG purchased approximately 1,486.52 acres of wooded real property (the "Property) in Pender County, North Carolina from B&N Properties of Pender, LLC (B&N). At the time, B&N is a single-member limited liability company wholly owned and managed by Sullivan.
12. B&N financed the sale of the property to TOG; and, TOG executed a promissory note to B&N in the original principle amount of \$12,724,605.26.
13. That promissory note was secured by a deed of trust encumbering the Property recorded in Pender County Registry Book 2973, Pages 137 through 145.
14. On June 2, 2006, TOG Properties filed an Application for Certificate of Authority for Limited Liability Company with the North Carolina Secretary of State. Richard Weinstein, Kenner Day and Spencer Goliger were named as the managers of TOG Properties; and Day was the designated registered agent of TOG Properties.
15. On October 25, 2006, Richard Weinstein filed Articles of Amendment with the Florida Secretary of State, which named him as the registered

agent and 2MAP, LLC as the managing member of TOG Properties. Either Richard Weinstein or Matthew Weinstein, as the Manager of 2MAP, LLC, signed all annual reports for TOG Properties filed with the Florida Secretary of State for reporting years 2007 through 2016.

16. On May 2, 2007, Richard Weinstein, on behalf of 2MAP, LLC, filed the North Carolina annual report for TOG Properties and changed the registered agent from Day to himself. Subsequent annual reports filed with the North Carolina Secretary of State listed Day as the registered agent; however, there was never a subsequent endorsement authorizing the registered agent to be changed from Richard Weinstein to Day.
17. On July 16, 2010, TOG Properties filed an accelerated voluntary bankruptcy petition in the United States Bankruptcy Court for the Eastern District of North Carolina; and, listed B&N as its largest creditor. That bankruptcy petition was signed by Richard Weinstein as member-manager of 2MAP, LLC, the majority owner of TOG Properties. Sullivan and Day were served with copies of TOG Properties' bankruptcy petition.
18. On July 30, 2010, TOG Properties filed its bankruptcy schedules and statement of financial affairs. In the statement of financial affairs, TOG Properties indicated that Day's role as President of TOG Properties had been terminated on May 9, 2010. TOG Properties' bankruptcy schedules were served on all creditors and parties-in-interest, including Sullivan and Day.
19. On August 10, 2010, B&N, through Sullivan, filed a proof of claim in TOG Properties' bankruptcy case alleging to be owed \$13,982,599.20, of which

\$10,353,500.00 was secured and the remaining \$3,629,099.00 was unsecured.

20. On November 5, 2010, B&N assigned its interest in the Deed of Trust to Sullivan and recorded that instrument in the Pender County Registry Book 3847, pages 130 through 132.
21. In December of 2011, Matthew Weinstein purchased 2MAP, LLC and Seven Sixty-Seven, LLC from Richard Weinstein, Goliger and Day.
22. On April 14, 2012, Karen Pugh started a fire ("the Fire") near her home in Pender County. Her property is adjacent to the Property.
23. On the same afternoon that Defendant Karen Pugh started the fire on her property, approximately 500 acres of the Property burned.
24. When the fire occurred, TOG Properties owned the Property; and, Matthew Weinstein was the sole owner of 2MAP, LLC, the majority owner and manager of TOG Properties.
25. Sullivan nor Day owned any interest in TOG Properties on the date of the Fire.
26. On May 12, 2012, Richard Weinstein died.
27. Between April 14, 2012 and October 20, 2012, Sullivan and Matthew Weinstein exchanged emails and telephone calls regarding the damage to the Property and Sullivan's foreclosure of the deed of trust encumbering the Property.
28. On October 20, 2012, Sullivan named Jeffrey S. Sullivan as the Substitute Trustee of the Deed of Trust and recorded the Substitution of Trustee in the Pender County Registry, Book 3980, Page 113 through 114. Also on that day, a foreclosure sale of the Property was held at the Pender County Courthouse where Sullivan was the last and highest bidder of the Property. Sullivan's winning bid was \$14,278,470.00.

29. On November 16, 2012, Jeffrey S. Sullivan, substitute trustee, filed a deed in the Pender County Registry Book 4164, Pages 2 through 8, which transferred the Property to Sullivan as the high bidder at the foreclosure sale held on October 24, 2012.
30. On November 26, 2012, Jeffrey Sullivan filed a Notice of Completed Foreclosure in the Pender County Registry Book 4166, Page 261.
31. By letter dated February 28, 2013 and addressed to Farm Bureau Insurance, Day purported to release TOG Properties' "interest in the claim and/or proceeds recovered from the property damage that occurred on or about April 14, 2012,..." Day purportedly executed the aforementioned letter in his capacity as registered agent.
32. At the time Day executed the February 28, 2013 letter, he had been removed as the registered agent with the Florida and North Carolina Secretaries of State and had been removed as President of TOG Properties. Furthermore, Day did not contact Matthew Weinstein prior to sending the February 28, 2013 letter despite his not being involved with the operations or management of TOG Properties since he was removed from his position as president on May 9, 2010.
33. On or about November 20, 2014, Day and Sullivan executed a document, in which Day purported to waive TOG Properties rights to any proceeds of any insurance claim related to the Fire and giving those rights to Sullivan.
34. When the November 20, 2014 letter was executed, Matthew Weinstein was the sole owner of TOG Properties; however, Day and Sullivan executed

that letter without Matthew Weinstein's knowledge or permission.

35. Day was not authorized to act on behalf of TOG Properties when the February 28, 2013 or the November 20, 2014 letters (collectively the letters shall be referred to as the "Day Letters") were executed because he had been removed from his position as an officer of TOG Properties on May 9, 2010.
36. Sullivan knew Matthew Weinstein was the authorized representative and had exchanged emails and telephone messages with Matthew Weinstein on multiple occasions after the Fire.
37. Matthew Weinstein did not become aware of the Day Letters until 2015 and never authorized Day to act as an agent of TOG Properties in 2013 or 2014 and never authorized Day to waive any rights held by TOG Properties related to the Fire.
38. On April 10, 2015, TOG Properties filed a complaint against Karen Pugh for the damage to the Property caused by the Fire.

LEGAL STANDARD

39. Summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file; together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. 1A-1, Rule 56.
40. The moving party bears the burden of establishing there is no triable issue of material fact. *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002). All evidence must be viewed in the light most favorable to the

non-movant. *Cooper v. Marwill, Inc.*, 94 N.C. App. 335, 339, 380 S.E.2d 139, 141 (1989).

41. The moving party is entitled to summary judgment when all the facts on all the essential elements are in the movant's favor, and the non-moving party fails to show in response that a genuine issue of material facts exists, in light of all of the evidence. See *id.* at 339, 380, S.E.2d at 142.
42. Although the Court must view the record "in the light most favorable to the party opposing the motion", Rule 56(e) provides that "mere allegations or denials" alone will not defeat a motion for summary judgment. *Patterson v. Reid*, 10 N.C. App. 22,28 (1970). Rather, the opposing party must be supported by "specific facts showing that there is a genuine issue for trial." *Id.* "A genuine issue of material fact exists when properly contested facts are of such nature as to affect the result of the action." *Unitrin Auto & Home Ins. Co. v. McNeill*, 716 S.E.2d 48 (N.C. Ct. App. 2011) (citing *McNair v. Boyette*, 282 N.C. 230, 235, 192 S.E.2d 457, 460 (1972)).
43. Affidavits supporting or opposing a motion for summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." N.C. Gen. Stat.(s) 1A-1, Rule 56(e)(2005).

ANALYSIS

44. TOG Properties has moved for summary judgment on its cross-claim against Sullivan for a declaratory judgment that TOG Properties is the

proper plaintiff to recover for damages against Karen Pugh for damages caused to the Property by the Fire.

45. The Court finds the affidavit of Matthew Weinstein (the "Affidavit"), supporting TOG Properties motion for summary judgment, credible and based on his personal knowledge.
46. The affidavit mirrors most of the allegations contained in the TOG Properties complaint, and the undisputed facts for purposes of summary judgment are almost identical to the factual allegations in the TOG Properties Complaint and cross-claim, which TOG Properties now seeks summary judgment. The question for the Court is whether the facts support summary judgment as a matter of law in favor of TOG Properties.
47. Sullivan has raised the issue of standing before the Court. A party seeking standing has the burden of proving three necessary elements: Injury in fact; an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) is likely to, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Neuse River Found. V. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114, 574 S.E.2d 628 (2003). "A party has standing to initiate a lawsuit if [it] is a real party in interest", meaning the party "is one who benefits from or is harmed by the outcome of the case and by substantive law has the legal right to enforce the claim in question." *Beachcomber Props. LLC v. Station One, Inc.*, 169 N.C. App. 820, 823-824, 611 S.E.2d 441, 445 (2000). "The gist of 'standing' is whether

there is a justiciable controversy being litigated among adverse parties with substantial interest affected so as to bring forth a clear articulation of the issues before the court." *Street v. Smart Corp.*, 157 N.C. App. 303, 306, 578 S.E.2d 695, 698 (2003).

48. TOG Properties can satisfy each of the aforementioned elements. It is uncontested that TOG Properties owned the Property at the time of the Fire and the Fire damaged approximately five hundred acres of the Property. "It is basic law that for a plaintiff to recover for unlawful [setting on fire] timber under N.C. Gen. Stat. 1-539.1 that he must establish ownership of the land from which the timber was [burned]." *Hefner v. Stafford*, 64 N.C. App. 707, 710, 308 S.E.2d 93, 95 (1983). "Where the plaintiff claims damages for unlawful [burning] of timber, he is claiming permanent damages to the freehold, or damages to the ownership interest, and his right to recover depends upon his establishing Title to the described lands." *Woodard v. Marshall*, 14 N.C. App. 67, 69, 187 S.E.2d 430, 431 (1972). The plaintiff must also show that he owned the damaged property at the time the property was damaged to recover for the damages [which] were incurred. *Daniels v. Roanoke R. & Lumber Co.*, 158 N.C. 418, 74 S.E. 331, 334 (1912); See *Jones v. Georgia-Pacific Corp.*, 15 N.C. App. 515, 517, 190 S.E.2d 422, 424 (1972) ("Any person...not being the bona fide owner thereof or agent of the owner who shall without the consent and permission of the bona fide owner enter upon the land of another and injure, cut or remove valuable wood, timber, shrub or tree therefrom, shall be liable to the owner of said land of such wood,

timber, shrubs or trees so injured,, cut or removed.”).

It is also uncontroverted that Karen Pugh started a fire on the same day that the Property was burned. Thus, without making a determination on Karen Pugh’s liability, which is not currently before the Court, it is fairly traceable to Karen Pugh’s actions. Finally, with regard to standing, it is not contested that a monetary award in TOG Properties favor will redress the injury suffered by the Fire.

49. Sullivan cannot show and has admitted that he nor B&N Properties owned the Property at the time of the Fire and, therefore, cannot satisfy the standing analysis.
50. Further, the facts and allegations establish Day did not have authority, actual or apparent, to act on behalf of TOG Properties when the Say Letters were executed. Additionally, Sullivan knew or should have known that Day did not have authority to act on behalf of TOG Properties from the bankruptcy schedules and statement of financial affairs served on him during TOG Properties bankruptcy case.
51. The Day Letters were executed by Day as registered agent and former member of TOG Properties.
52. Pursuant to N.C. Gen. Stat. 53C-1-4(61), a registered agent is “the person named in the organizational documents of a company upon whom service of legal process is deemed binding upon the company.” Registered agents are not given the authority to conduct business on behalf of the company.
53. The North Carolina Limited Liability Company Act specifically provides that a “company official”

is, "any person exercising any management authority over the limited liability company whether the person is a manager or referred to as a manager, director, or officer or given any other title."

54. The Day Letters do not waive any rights of TOG Properties because Day lacked any authority to conduct business on behalf of TOG Properties.
55. The undisputed and admitted facts establish that TOG Properties is entitled to summary judgment on its claim for declaratory relief as a matter of law against Sullivan.

Now, therefore, based upon the foregoing, it is hereby ORDERED that:

1. TOG Properties Motion for Summary Judgment as to its cross-claim for Declaratory Judgment against Sullivan is GRANTED.
2. The Court enters the following DECLARATORY JUDGMENT pursuant to G.S. 1-253 regarding the rights, status and other legal relations of TOG Properties and Sullivan:
 - a. TOG Properties owned the Property on April 14, 2012;
 - b. TOG Properties is the sole holder of any claims for damages against the Defendants for damage to the Property as a result of the Fire; and,
 - c. Day did not have authority, actual or apparent, to act on behalf of TOG Properties when he executed the Day Letters.

SO ORDERED, this is the 13th day of February, 2017.

Ss/Honorable Phyllis M. Gorham, Superior Court Judge, Presiding

IN THE COURT OF APPEALS OF NORTH
CAROLINA
No. COA17-450
Filed: 3 April 2018

Pender County, No. 14-CVS-124
DONALD SULLIVAN, Plaintiff,
v.
ROBERT WAYNE PUGH and
KAREN LLOYD PUGH, his legal wife, Defendants.

Pender County, No. 15-CVS-348
TOG PROPERTIES, LLC, Plaintiff,
v.
KAREN PUGH, Defendant.

Appeal by plaintiff TOG Properties, LLC from order entered 14 February 2017 by Judge Phyllis M. Gorham in Pender County Superior Court.

Heard in the Court of Appeals 5 October 2017.

Donald Sullivan, pro se, plaintiff-appellant.

The Law Offices of Oliver & Cheek, PLLC, by Ciara L. Rogers, for plaintiff/appellee TOG Properties, LLC.

BERGER, Judge.

Donald Sullivan (“Sullivan”) appeals a February 14, 2017 order granting summary judgment to TOG Properties, LLC (“TOG Properties”) on its cross-claim for declaratory judgment. This dispute arose over which party, Sullivan or TOG Properties, owned certain timbered property at the time it was

damaged by a fire allegedly set by Karen Pugh ("Pugh") on April 14, 2012. Whichever party owned the property at the time of the fire would hold any legal claims against Pugh resulting from the damages to the property as a result of the fire. Sullivan appeals, arguing that the trial court erred in granting TOG Properties' summary judgment motion because this ruling denied him his right to a jury trial and because there was a genuine issue of material fact which should have precluded the trial court from granting the motion.

We disagree.

Factual and Procedural Background

On June 1, 2006, TOG Properties purchased approximately 1500 acres of timbered real property in Pender County, North Carolina from B&N Properties of Pender, LLC ("B&N"). B&N financed the sale to TOG Properties, secured by a deed of trust. At the time of the sale, Kenner Day ("Day") was a manager of TOG Properties as well as the designated registered agent of TOG Properties in North Carolina. On May 9, 2010, Day was terminated as TOG Properties' president and was removed from the company. On July 16, 2010, TOG Properties filed for bankruptcy, and B&N subsequently filed a proof of claim as senior creditor with a claim to the real property and assigned its interest to Sullivan, its sole shareholder and manager.

On April 14, 2012, Pugh set a fire near her home on property adjacent to the property at issue in this appeal damaging approximately 500 acres of timber.

At the time of the fire, TOG Properties still maintained ownership of the property. Sullivan subsequently foreclosed on the property, and on October 20, 2012, Sullivan purchased the property in a foreclosure sale at the Pender County Courthouse. In the following months, Day, the former president and manager of TOG Properties, sent letters and executed documents purporting to transfer TOG Properties' legal and equitable interests in any proceeds or claims related to the fire to Sullivan.

Sullivan filed an amended complaint against Robert Wayne and Karen Pugh on February 3, 2015 alleging negligence and negligence per se seeking damages for the burning of the timber on the property now owned by Sullivan. On April 10, 2015, TOG Properties also filed a complaint against Pugh seeking to recover damages resulting from the fire. TOG Properties additionally filed a cross-claim against Sullivan seeking a declaratory judgment that it was the owner of the property at the time of the fire and was, therefore, the sole owner of any claims against Pugh. On November 16, 2016, TOG Properties filed a motion for summary judgment on its cross-claim for declaratory judgment. The trial court granted summary judgment in TOG Properties' favor on February 14, 2017, and it is from this order that Sullivan timely appeals.

Analysis

Sullivan argues first that his constitutional right to a trial by jury was denied when the trial court granted TOG Properties' motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. He asserts that, although Rule 56 is

"a commendable attempt by the judiciary to extend its power in order to reduce its docket and render the courts more efficient," it is nevertheless "blatantly unconstitutional," treasonous, and should not be tolerated. In support of his argument, Sullivan cites our North Carolina Constitution, Article I, Section 25, which states that "[i]n all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable." N.C. Const. art. I, § 25.

It is true that "[t]he right to a jury trial is a substantial right of great significance." *Mathias v. Brumsey*, 27 N.C. App. 558, 560, 219 S.E.2d 646, 647 (1975), disc. review denied, 289 N.C. 140, 220 S.E.2d 798 (1976). However, "[t]he constitutional right to trial by jury, N.C. Const. Art. I, § 25, is not absolute; rather, it is premised upon a preliminary determination by the trial judge that there indeed exist genuine issues of fact and credibility which require submission to the jury." *Bank v. Burnette*, 297 N.C. 524, 537, 256 S.E.2d 388, 396 (1979). As both the United States Supreme Court stated in *Ex parte Wall* and this Court adopted in *In re Bonding Co.*, "it is a mistaken idea that due process of law requires a plenary suit and a trial by jury[] in all cases where property or personal rights are involved." *In re Bonding Co.*, 16 N.C. App. 272, 277, 192 S.E.2d 33, 36 (brackets omitted) (quoting *Ex parte Wall*, 107 U.S. 265, 289, 27 L. Ed. 552 (1883)), cert. denied and appeal dismissed, 282 N.C. 426, 192 S.E.2d 837 (1972).

Therefore, because "[t]he right to a jury trial accrues only when there is a genuine issue of fact to be

decided at trial,” State ex rel. Albright v. Arellano, 165 N.C. App. 609, 618, 599 S.E.2d 415, 421 (2004); we must resolve Sullivan’s other argument raised in his appeal, whether the trial court erred in granting TOG Properties’ motion for summary judgment. Specifically, Sullivan argues that there remains the genuine issue of material fact that requires determination by a jury: whether Day had the apparent authority as an agent of TOG Properties to transfer TOG Properties’ legal and equitable interests in any proceeds or claims related to the fire.

“The doctrine of summary judgment requires cautious application, ensuring that no litigant is unjustly deprived of his right to try disputed factual issues.” Leiber v. Arboretum Joint Venture, LLC, 208 N.C. App. 336, 344, 702 S.E.2d 805, 811 (2010) (citation omitted), disc. review denied, 365 N.C. 195, 711 S.E.2d 433 (2011). Citing Rule 56 of the North Carolina Rules of Civil Procedure, our Supreme Court explained summary judgment in Dalton v. Camp, stating that it is a device whereby judgment is rendered if the pleadings, depositions, interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law. The rule is designed to eliminate the necessity of a formal trial where only questions of law are involved and fatal weakness in the claim of a party is exposed. Dalton v. Camp, 353 N.C. 647, 650, 548 S.E.2d 704, 707 (2001) (citations omitted). Therefore, if “the trial court determines that only questions of law, not fact, are at issue,” a trial is not necessary and is to be eliminated, along with the attendant opportunity for the nonmoving party to present its facts to a jury. Loy v. Lorm

Corp., 52 N.C. App. 428, 437, 278 S.E.2d 897, 903-04 (1981). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party. Moreover, the party moving for summary judgment bears the burden of establishing the lack of any triable issue." Dalton, 353 N.C. at 651, 548 S.E.2d at 707 (citations omitted).

Therefore, we must determine whether the trial court could correctly assert as a matter of law that "Day did not have authority, actual or apparent, to act on behalf of TOG Properties when the Day letters were executed," namely, Day had no actual or apparent agency relationship with TOG Properties at the time he transferred TOG Properties' substantive rights to Sullivan. If no agency relationship existed at that time, then the purported transfer of rights was void. "Unless there is but one inference that can be drawn from the facts, whether an agency relationship exists is a question of fact for the jury. If only one inference can be drawn from the facts then it is a question of law for the trial court." Hylton v. Koontz, 138 N.C. App. 629, 635, 636, 532 S.E.2d 252, 257 (2000) (citing Hoffman v. Moore Regional Hospital, 114 N.C. App. 248, 250, 441 S.E.2d 567, 569, disc. review denied, 336 N.C. 605, 447 S.E.2d 391 (1994)), disc. review denied and dismissed, 353 N.C. 373, 546 S.E.2d 603-04 (2001).

"[A]n agent is one who acts for or in the place of another by authority from him. Two factors are essential in establishing an agency relationship: (1) the agent must be authorized to act for the principal; and (2) the principal must exercise control over the agent." Leiber, 208 N.C. App. at 344, 702 S.E.2d at

811 (citations, quotation marks, and brackets omitted). A principal will only be held liable to a third person for the actions of his or her agent “when the agent acts within the scope of his or her actual authority; when a contract, although unauthorized, has been ratified; or when the agent acts within the scope of his or her apparent authority, unless the third person has notice that the agent is exceeding actual authority.” *First Union Nat'l Bank v. Brown*, 166 N.C. App. 519, 527, 603 S.E.2d 808, 815 (2004) (citation omitted).

Furthermore, the doctrine of apparent authority may not be invoked by one who knows, or has good reason for knowing, the limits and extent of the agent's authority. In such case the rule is: Any apparent authority that might otherwise exist vanishes in the presence of the third person's knowledge, actual or constructive, of what the agent is, or what he is not, empowered to do for his principal. *Commercial Solvents v. Johnson*, 235 N.C. 237, 242, 69 S.E.2d 716, 720 (1952) (citation and quotation marks omitted).

Here, the uncontested evidence presented to the trial court in support of TOG Properties' summary judgment motion “indicated that Day's role as President of TOG Properties had been terminated on May 9, 2010”; thus, Day had no actual authority after that date. Additionally, no allegations were made that the establishment of a contract, or ratification of a contract, between TOG Properties and Sullivan is an issue. Therefore, our final determination is whether, as a matter of law, Day had the apparent authority to bind TOG Properties to the transfer to

Sullivan of its right to seek compensation for its damages caused by the April 2012 fire.

Sullivan presented no evidence beyond the assertions in his pleadings to oppose TOG Properties' motion for summary judgment. The exhibits and affidavits presented to the trial court in support of TOG Properties' motion showed that Sullivan knew, or had good reason for knowing, that Day had no authority to bind TOG Properties. First, the evidence tended to show that Sullivan had been served TOG Properties' bankruptcy petition in 2010 as a creditor of the company. The Statement of Financial Affairs served on Sullivan with the bankruptcy petition listed Day under the section "Former partners, officers, directors and shareholders" as an officer or director of TOG Properties "whose relationship with the corporation terminated within one year immediately preceding the commencement of [the bankruptcy] case." The date of Day's termination was listed as May 9, 2010. Second, the agreement purporting to cede any rights to any insurance claims resulting from the 2012 fire was introduced to the trial court in support of TOG Properties' motion. This agreement between Day and Sullivan, which they had sworn to, signed, and notarized in November and December of 2014, twice identified Day as a former member and registered agent of TOG Properties. Sullivan makes no attempt to explain what authority a former member or agent may reasonably possess that could bind his principal.

Because only one inference can be drawn from the facts presented to the trial court for summary judgment, whether an agency relationship existed between Day and TOG Properties is a question of law

for the court, and was correctly settled through summary judgment. No genuine issue of fact or credibility exists which would require submission of this question to the jury; therefore, Sullivan has no constitutional right to trial by jury.

Conclusion

The trial court did not err in ordering that, because no genuine issue of material fact existed, it could determine the rights, status, and legal relations of TOG Properties and Sullivan as a matter of law. Therefore, the order granting summary judgment to TOG Properties is affirmed.

AFFIRMED.

Judges DAVIS and ZACHARY concur.

No. 136A18

FIFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

DONALD SULLIVAN

V

ROBERT WAYNE PUGH AND KAREN LLOYD
PUGH, his legal wife

TOG PROPERTIES, LLC

V

KAREN PUGH

From N.C. Court of Appeals

(17-450)

From Pender

(14CVS124 15CVS348)

ORDER

Upon consideration of the notice of appeal from the North Carolina Court of Appeals, filed by the Plaintiff (Donald Sullivan) on the 7th of May 2018 in this matter pursuant to G.S. 7A-30, and the motion to dismiss the appeal for lack of substantial constitutional question filed by the Plaintiff (TOG Properties, LLC), the following order was entered and is hereby certified to the North Carolina Court of Appeals: The motion to dismiss the appeal is

“Allowed by the order of the Court in conference, this the 14th of August, 2018.”

**s/ Morgan, J.
For the Court**

WITNESS my hand and official seal of the Supreme Court of North Carolina, this the 24th day of August, 2018.

Amy L. Funderburk
Clerk, Supreme Court of North Carolina
s/ M.C. Hackney
Assistant Clerk, Supreme Court of North Carolina