IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN MARIANA ISLANDS

ADVANCE MEDICAL DESIGNS, INC., Plaintiff v. ADVANCE TEXTILE CORPORATION, Defendant	Civil Action No. 01-0014 ORDER DENYING PLAINTIFF'S MOTION TO STRIKE AND GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER came before the court on Thursday, February 21, 2002, for hearing of plaintiff's motion to strike the declarations of Tracy Anderson and Paul Zak[1] and plaintiff's motion for summary judgment. Plaintiff Advance

[1] No motion to strike the affidavit (deposition testimony) of Paul Zak was formally calendared, but the parties argued it and the court will rule on it.

Medical Designs, Inc. ("AMD") appeared by and through its attorneys, Eric S. Smith, Mark K. Williams, and John H. Watson (the latter by telephone); defendant Advance Textile Corporation ("ATC") appeared by and through its attorney, Richard W. Pierce.

THE COURT, having considered the submissions of the parties and the written and oral arguments of counsel, rules as follows:

Motion to Strike Anderson and Zak Affidavits

Plaintiff moved to strike the declaration of Tracy Anderson for failure to comply with Fed.R.Civ.P. 56(e). Subsection (e) requires that affidavits[2] made in support of or opposition to a motion for summary judgment be made on personal knowledge, that they set forth such facts as would be admissible in evidence, and that they show that affiant is competent to testify to the matters stated therein.

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[2] The court may permit, as here, a "declaration" opposing the motion for summary judgment to be in the form of deposition testimony. Fed.R.Civ.P. 56(e); Curnow v. Ridgecrest Police, 952 F.2d 321, 323 (9th Cir. 1991) (because witness had been sworn and oath transcribed, transcript was reliable as an affidavit).

Affidavits must be based on personal knowledge; an affidavit made on information and belief is insufficient. *See e.g.* Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc., 944 F.2d 1525, 1529 (9th Cir. 1991), *aff'd on other grounds*, 508 U.S. 49, 113 S.Ct. 1920 (1993) (court properly rejected affidavit that was based on information and belief and not on personal knowledge: "I believe that hotels were reluctant to invest...."). However, corporate officers are presumed to have personal knowledge of acts of their corporation. *See e.g.* Barthelemy v. Air Line Pilots Ass'n, 897 F.2d 999, 1018 (9th Cir. 1989). Personal knowledge does not require contemporaneous knowledge. Dalton v. Fed. Deposit Ins. Corp., 987 F.2d 1216, 1223 (5th Cir. 1993) (affidavit of corporate officer was not defective simply because he learned of transaction after it had occurred.)

Next, at the summary judgment stage, the focus of the court is not on the form of the evidence as it is presented in the affidavit, but whether at trial the matter stated in the affidavit would constitute admissible evidence. *See e.g.* Hughes v. United States, 953 F.2d 531, 543 (9th Cir. 1992); Curnow v. Ridgecrest Police, 952 F.2d 321 (9th Cir. 1991).

Here, defendant has submitted a portion of the deposition of Tracy

Anderson and a January 31, 2002, affidavit by him. The deposition transcript could be stricken because it contains nothing but unsubstantiated statements that "Charles Cottone took the money." This statement, standing alone as it does, provides no evidence of misfeasance, nonfeasance, or malfeasance by Charles Cottone. Surely, if by these statements Mr. Anderson claimed to have proof that the money obtained in return for the promissory note was taken by Charles Cottone for personal, rather than corporate, use, both Mr. Anderson and his attorney would have delved more deeply into the matter and brought that evidence to light. As it is, the record reflects only these unsubstantiated statement which, if they could have been substantiated, most certainly would have been. Similarly, Mr. Anderson's affidavit of January 31, 2002, offers nothing of which he has personal knowledge that is material or relevant to the issue of the promissory note. Rather, it contains many qualifiers such as "As far as I know," "I understand," "...but I am not sure of that," "The Corporate Resolution purportedly reflected...," "I had no personal knowledge," and, "I have no understanding." In other words, as to the substantive issues before the court---the validity of the promissory note--- Mr. Anderson offers nothing except speculation and conjecture. He provides nothing to challenge the

apparently straightforward events surrounding the signing of the promissory note by Charles Cottone as president of defendant ATC. Further, if Mr. Anderson's affidavit is otherwise accurate, his own contemporaneous actions and current motivation are called into question. He admits that, at Charles Cottone's request, he approached the senior Cottone, Joseph, to ask for the $250,000 loan at issue here. He states that he does not know if AMD gave a check to ATC for $250,000 but the record reflects that the check was drawn on AMD's account and deposited into ATC's account. And, he admits that, having secured a positive response from Joseph Cottone to the requested loan to the corporation, he, along with corporate secretary Christa Barnes, signed the corporate resolution authorizing Charles Cottone, acting on behalf of defendant ATC, to borrow $250,000 from AMD. Mr. Anderson claims that he signed the resolution without reading it and now declares that it was "false." Mr. Anderson's execution of his duties as a corporate officer are certainly called into question by these claims, but they do nothing to raise a genuine issue of material fact about the legitimacy of the promissory note signed by ATC.

Similarly, a review of Paul Zak's deposition shows that it contains statements made on information and belief or otherwise reflects his lack of

personal knowledge. His deposition fails to raise any genuine issue of material fact about the genesis of the promissory note.

Neither the Anderson nor Zak affidavits offer admissible statements made on personal knowledge on the issue of the promissory note. They do not raise a genuine issue of material fact sufficient to defeat plaintiff AMD's motion for summary judgment. However, having fully reviewed them, the court declines to strike them, finding that it is unnecessary to do so.

Summary Judgment Standard

Rule 56 of the Federal Rules of Civil Procedure states, in part, that judgment "shall be rendered forthwith 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 the moving party is entitled to judgment as a matter of law."

The party seeking summary judgment always bears the initial responsibility of informing the court of the basis for its motion and identifying those portions of the matters on record which it believes demonstrates the absence of a genuine issue of material fact. Celotex Corporation v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553 (1986). The court must view the evidence in

the light most favorable to the non-moving party; if direct evidence from both parties conflicts, summary judgment must be denied. Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp., 106 S.Ct. 1348, 1356 (1986). The non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* The non-moving party must set forth by affidavit or as otherwise provided in Rule 56 specific facts showing that there is a genuine issue of material fact for trial. Kaiser Cement Corp. v. Fischbach & Moore, Inc., 793 F.2d 1100, 1103-1104 (9th Cir.), *cert. denied*, 107 S.Ct. 435 (1986). All that is required from the non-moving party is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of truth at trial. First National Bank v. Cities Service Co., 391 U.S. 253, 88 S.Ct. 1575, 1592 (1968). There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party; if the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, 477 U.S. at 250-251.

Findings of Fact[3]

Plaintiff has moved for summary judgment on a promissory note. The court finds the following undisputed facts:

1. In October or November of 1994, defendant Advance Textile Corporation sought a loan to buttress its business, which had been suffering losses.

2. At the request of Charles Cottone, president of ATC, Mr. Tracy Anderson, then vice-president of ATC, approached Joseph Cottone, president of AMD, about obtaining a loan.[4]

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[3] The district court is not required to make findings of fact and conclusions of law on a motion for summary judgment, but such findings and conclusions are helpful to the reviewing court. *See e.g.* Underwager v. Channel 9 Australia, 69 F.3d 361, 366 n.4 (9th Cir. 1995) *citing* Gaines v. Houghton, 645 F.2d 761, 768 n.13 (9th Cir. 1981), *cert. denied* 454 U.S. 1145, 102 S.Ct. 1006 (1982). Of course, "findings of fact" on a summary judgment are not findings in the strict sense that the trial judge has weighed the evidence and resolved disputed factual issues; rather, they perform the narrow function of pinpointing for the reviewing court those facts which are undisputed and indicate the basis for summary judgment. All Hawaii Tours, Corp. v. Polynesian Cultural Center, 116 F.R.D. 645 (D.Haw. 1987), *rev'd on other grounds*, 855 F.2d 860 (9th Cir. 1988).

[4] Neither the handwritten notes of ATC's corporate secretary nor the subsequent typed official minutes of ATC's October 9, 1994, General Board

3. Joseph Cottone, as president of plaintiff AMD, agreed to make the loan to ATC, if the loan was supported by an ATC corporate resolution.

3. On November 22, 1994, defendant ATC passed a corporate resolution authorizing its president, Charles Cottone, to obtain a $250,000 loan from plaintiff AMD and to give security for the loan.

4. On November 22, 1994, ATC's president, Charles Cottone, signed, in his capacity as president of the corporation, a promissory note for $250,000 at nine percent interest per annum and payable to AMD.

5. Tracy Anderson, at that time vice-president, secretary, and treasurer[5] of defendant ATC, witnessed the signing of the promissory note by Charles Cottone.

6. Plaintiff AMD thereupon issued a check in the amount of $250,000 to defendant ATC.

7. The check was endorsed "Advance Tex Corp deposit only - 1073417" and deposited into defendant's Bank South account, No. 1073417.

Meeting support ATC's claim that ATC President Charles Cottone was told specifically that he had no authority to obtain a loan on behalf of ATC.

[5] And now chairman of the board of defendant ATC.

8. The check from plaintiff to defendant was paid and cleared plaintiff AMD's bank account on November 25, 1994.

9. Despite demand having been made upon it by plaintiff, defendant has failed and refused to pay any portion of the promissory note or accrued interest.

Conclusions of Law

1. The court has diversity jurisdiction. 28 U.S.C. § 1332.

2. In this diversity action, in which no federal issue has been raised, the court looks to the substantive law of the district in which is sits. Here, Title 5, Division 3, of the Northern Mariana Islands Code ("N.Mar.I. Code"[6]), Commercial Paper, provides a portion of the substantive law.

3. No genuine issue of material fact has been raised that the signature on the promissory note is not that of Charles Cottone, president of defendant ATC. Tracy Anderson, then vice-president, secretary, and treasurer of defendant ATC and currently the chairman of the board of defendant ATC, witnessed the signature of Charles Cottone. 5 N.Mar.I. Code § 3307.

4. No genuine issue of material fact has been raised to dispute plaintiff's

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[6] In this decision, the Commonwealth Code will be cited "___ N.Mar.I. Code § ___," as prescribed by "A Uniform System of Citation (16th ed.)."

assertion that the note or any part of it has never been paid.

5. No genuine issue of material fact has been raised to dispute plaintiff's assertion that the interest on the note, or any part of it, has never been paid.

6. The February, 1992, Amended and Restated Bylaws of defendant ATC grant the directors power to "exercise all of the powers that may be exercised or performed by the corporation," [Art. III, ¶ 3.1] including removal of officers of the corporation, [Art. V, ¶ 5.3. Further, "[a]ny officer designated by the Board...shall have such duties as shall be delegated to them by the Board[.]" [*Id.* at 5.4]

7. No genuine issue of material fact has been raised to refute the four corners of the promissory note or the corporate resolution that authorized Charles Cottone to execute the note on behalf of defendant ATC.

8. By virtue of the corporate resolution, Charles Cottone had actual authority, as designated to him by the directors in their resolution (pursuant to ¶ 5.4 of the corporation's bylaws), to sign the promissory note on behalf of defendant ATC and to obligate ATC to repay the note according to its terms.

9. In any event, defendant ATC, by its subsequent actions, ratified the act of Charles Cottone in entering into the promissory note and is now estopped

from denying the existence of or enforceability of the note.

> According to principles of equity and justice, where an agent borrows money for a corporation executing its note for the loan, and the corporation gets the benefit of the money by its application to the payment of its obligations, it is estopped to deny the agent's authority. Thus, the principal may be bound by the acts of its officers or agents, if it can be found that the corporation has clothed the officer or agent with apparent authority to borrow money in its behalf.

Fletcher Cyc. Corp. § 473 (Perm. Ed.)

> A corporation may expressly or impliedly ratify contracts made or other acts done by the president without authority. And if it accepts the benefit of the contract or act or acquiesces in such activity with knowledge, it impliedly ratifies it.

Fletcher Cyc. Corp. § 596 (Perm. Ed.)

> In the regular course of events, ratification should be had at a meeting duly called and held for that purpose; but this is not absolute, and it may as well be by other means, as, for instance, by acquiescence or recognition, on the part of the shareholders, or by their failure to act with full knowledge of the facts. Under these circumstances, ordinarily, ratification will be implied. In other words, ratification need not necessarily be express: As to wording, a resolution can be interpreted as being a ratification without necessarily containing the word "ratify" in its language. And, as to conduct, it may be deduced from [the] course of behavior of the directors, shareholders or other officers or agents. A contract made or other act done by an officer or officers of a corporation without authority may be ratified in any mode in which it might have been authorized.

Fletcher Cyc. Corp. § 767 (Perm. Ed.)

In conclusion, defendant ATC has raised no genuine issue of material fact that the promissory note is other than the straightforward business transaction it appears to be. To defeat the motion, defendant ATC has relied on the questionable acts of its own board, its own abysmal record keeping, speculation, and conjecture. Such arguments as have been raised are *post hoc* attempts to evade ATC's obligations under the terms of the promissory note and contradict the unequivocal record. Accordingly, plaintiff's motion for summary judgment is GRANTED.

In accordance with the terms of the promissory note, plaintiff is awarded attorney fees and costs. Plaintiff shall submit a detailed statement of attorney fees and costs by 3:30 p.m., Friday, March 1, 2002. Defendant shall have until 3:30 p.m., Friday, March 8, 2002, to file objections. The court will decide the matter without oral argument, unless it concludes oral argument is necessary.

Plaintiff is directed to prepare and submit to the court by 3:30 p.m., Friday, March 1, 2002, a form of judgment reflecting this ruling and containing the current amounts owed under the note and a figure by which the amount due will increase each day. Defendant shall have until 3:30 p.m., Friday, March 8, 2002, to present any objection to the form of the judgment. The court will

decide the matter without oral argument, unless it concludes oral argument is necessary. Entry of judgment will not be delayed pending the court's decision on attorney fees and costs.

IT IS SO ORDERED.

DATED this 23rd day of February, 2002.

ALEX R. MUNSON
Judge