

ATLANTIC SALMON A/S & Salmonor A/S

v.

Michael P. CURRAN

Appeals Court of Massachusetts, Suffolk
Decided May 5, 1992

These are the plaintiffs' appeals from a Superior Court judgment for the defendant. The issue presented is as to the personal liability of an agent who at the relevant times was acting on behalf of a partially disclosed or unidentified principal. . . .

The facts are not in dispute, and we draw most of them from the Superior Court judge's memorandum of decision after a jury-waived trial and from the parties' stipulation of facts. The defendant began doing business with the plaintiffs, Salmonor A/S (Salmonor) and Atlantic Salmon A/S (Atlantic), Norwegian corporations and exporters of salmon, in 1985 and 1987, respectively. At all times, the defendant dealt with the plaintiffs as a representative of "Boston International Seafood Exchange, Inc.," or "Boston Seafood Exchange, Inc." The salmon purchased by the defendant was sold to other wholesalers. Payment checks from the defendant to the plaintiffs were imprinted with the name "Boston International Seafood Exchange, Inc.," and signed by the defendant, using the designation "Treas.," intending thereby to convey the impression that he was treasurer. Wire transfers of payments were also made in the name of Boston International Seafood Exchange, Inc. The defendant gave the plaintiffs' representatives business cards which listed him as "marketing director" of "Boston International Seafood Exchange, Inc." Advertising placed by the defendant appeared in trade journals under both the names "Boston Seafood Exchange, Inc.," and "Boston International Seafood Exchange, Inc." (indicating in one instance as to the latter that it was "Est: 1982"). At the relevant times, no such Massachusetts or foreign corporation had been formed by the defendant or had existed.

On May 31, 1977, a Massachusetts corporation named "Marketing Designs, Inc.," was organized. It was created for the purpose of selling motor vehicles. As of 1983, the defendant was the president, treasurer, clerk, a director and the sole stockholder of that corporation. The extent of activity or solvency of the corporation is not shown on the record. On October 19, 1983, however, Marketing Designs, Inc., was dissolved, apparently for failure to make requisite corporate filings. See G.L. c. 156B, § 101. On December 4, 1987, a certificate was filed with the city clerk of Boston declaring that Marketing Designs, Inc. (then dissolved), was conducting business under the name of Boston Seafood Exchange (not with the designation "Inc." and not also under the name Boston International Seafood Exchange, Inc.). See G.L. c. 110, § 5.

Salmonor is owed \$101,759.65 and Atlantic \$153,788.50 for salmon sold to a business known as Boston International Seafood Exchange or Boston Seafood Exchange during 1988. Marketing Designs, Inc., was dissolved at the time the debt was incurred. In that year, advertising in a trade journal appeared in the name of "Boston Seafood Exchange, Inc.," and listed the plaintiffs as suppliers, and the defendant delivered to representatives of the plaintiffs his business card on which he was described as "marketing director" of "Boston International Seafood Exchange, Inc." On July 8, August 19 and 30, and September 9, 1988, the defendant made checks, imprinted with the name "Boston International Seafood Exchange, Inc.," to one or the other of the plaintiffs as payments for shipments of salmon.

The defendant never informed the plaintiffs of the existence of Marketing Designs, Inc., and the plaintiffs did not know of it until after the commencement of the present litigation on November 25, 1988. Marketing Designs, Inc., was revived for all purposes on December 12, 1988. . . .

In the course of his direct testimony, the defendant said: "We do business in seafood, and we're only in seafood. Boston Seafood Exchange is the name we use because it identifies us very closely with the industry and the products that we deal in. 'Marketing Designs, Inc.,' in the seafood business, would have absolutely no bearing or no recall or any factor at all. I picked the name Boston Seafood Exchange, Inc., because it defines where we are, who we deal with, the type of product we're into, and where our specialties are. The reason we have 'Inc.' on there is because also it seemed to me at the time-obviously it seemed to me at the time that it's incumbent upon me to tell people that I'm dealing with and to let them know that they're dealing with a corporation. So, we used 'Inc.' just to notify them; and I signed all my checks 'Treasurer' and so forth."

At trial and on appeal the defendant argues that he was acting as an agent of Marketing Designs, Inc., in 1988 when he incurred the debt which the plaintiffs seek to recover from him individually. It makes no difference that the plaintiffs thought they were dealing with corporate entities which did not exist, the defendant contends, because they were "aware" that they were transacting business with a corporate entity and not with the defendant individually. The judge essentially adopted the defendant's position. . . . The judge seems to have treated the case as if it were one involving the defendant as an agent for a partially disclosed principal. Then the analysis went astray.

"If the other party [to a transaction] has notice that the agent is or may be acting for a principal but has no notice of the principal's identity, the principal for whom the agent is acting is a partially disclosed principal." Restatement (Second) of Agency § 4(2) (1958). Here, the plaintiffs had notice that the defendant was purporting to act for a corporate principal or principals but had no notice of the identity of the principal as claimed by the defendant in this litigation. "Unless

otherwise agreed, a person purporting to make a contract with another for a partially disclosed principal is a party to the contract.” Id. at § 321.

It is the duty of the agent, if he would avoid personal liability on a contract entered into by him on behalf of his principal, to disclose not only that he is acting in a representative capacity, but also the identity of his principal. [string of citations omitted.]

The judge reasoned that since the defendant had filed a certificate with the city of Boston in December, 1987, that Marketing Designs, Inc., was doing business as Boston Seafood Exchange, the plaintiffs could have discerned “precisely with whom they were dealing by reference to public records before the 1988 credits were extended.” But the defendant had dealt with Salmonor, and probably Atlantic, before that date, continued to deal with both under the name Boston International Seafood Exchange, Inc., thereafter, and even proposed to the plaintiffs a corporate restructuring of that nonentity. In any event, it was not the plaintiffs' duty to seek out the identity of the defendant's principal; it was the defendant's obligation fully to reveal it. [string cite omitted.]

It is not sufficient that the plaintiffs may have had the means, through a search of the records of the Boston city clerk, to determine the identity of the defendant's principal. Actual knowledge is the test. . . . “The duty rests upon the agent, if he would avoid personal liability, to disclose his agency, and not upon others to discover it. It is not, therefore, enough that the other party has the means of ascertaining the name of the principal; the agent must either bring to him actual knowledge or, what is the same thing, that which to a reasonable man is equivalent to knowledge or the agent will be bound. There is no hardship to the agent in this rule, as he always has it in his power to relieve himself from personal liability by fully disclosing his principal and contracting only in the latter's name. If he does not do this, it may well be presumed that he intended to make himself personally responsible.” 1 Mechem on Agency § 1413 (2d ed. 1914).

* * *

The judgment is reversed, and new judgments are to be entered against the defendant for Atlantic in the amount of \$153,788.50 and for Salmonor in the amount of \$101,759.65, both with appropriate interest and costs.