

IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

USPG, INC.,)	Civil Action No. 98-0432
)	
Plaintiff,)	
)	
v.)	DECISION AND ORDER
)	DENYING MOTION AND
)	CROSS-MOTION FOR
LSG LUFTHANSA SERVICE)	SUMMARY JUDGMENT
SAIPAN INC., d/b/a LSG LUFTHANSA)	
SERVICE SKY CHEFS)	
)	
Defendant.)	
-----)	

I. INTRODUCTION

Plaintiff USPG, Inc. (“USPG”) brings this action to recover on a pineapple contract (“Contract”). Defendant LSG Lufthansa Service Saipan, Inc. (“LSG”) moves for summary judgment on the grounds that its resident manager did not have actual, apparent, or inherent authority to enter into the Contract with USPG. In addition, LSG argues that the Commonwealth Uniform Commercial Code (“UCC”) does not require enforcement of the Contract. USPG cross-moves for partial summary judgment. The court, having reviewed all briefs, declarations, exhibits, and having heard and considered the arguments of counsel now renders its written decision. Although there are factual disputes, the court views the facts in the light most favorable to USPG for purposes of LSG’s motion and views the facts in the light most favorable to LSG for purposes of USPG’s motion. [p. 2]

II. FACTS

USPG is an importer of produce and sea products into Saipan. LSG operates a flight service catering company in Saipan. USPG first transacted business with LSG in 1996 when Graham

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Cartner (“Cartner”) held the position of Resident Manager. Through Cartner, USPG entered a swordfish contract for a 3-4 month period totaling \$45,000.00. Cartner was the only person USPG dealt with at LSG. After this initial contract, USPG sold cod and/or shrimp prawns to LSG, each time dealing with Cartner or Martin Rainer (“Rainer”). In 1996, Rainer was an Executive Chef for LSG. However, he was the person who submitted the paperwork for USPG to be paid for the swordfish contract. USPG was paid.

In 1997, Rainer was elevated to the position of Resident Manager, reporting directly to the Regional Manager in Guam. (Def. Opp. Ex. E.) Although the employment contract states that Rainer was hired as Resident Manager, LSG had hired him as a General Manager/Resident Manager. Rainer identified himself to vendors on Saipan as the General Manager of LSG.

On May 12, 1997, Moniz on behalf of USPG and Rainer on behalf of LSG entered into the Contract requiring LSG to purchase a minimum amount of pineapple each month at a fixed price over a one year period. The Contract was entered as a result of Rainer’s discussions with the president of USPG, Frank Moniz (“Moniz”) about the poor quality of pineapple he was receiving from another source. Moniz had spoken with Del Monte in Hawaii but Del Monte was not initially interested in shipping to a small market such as Saipan because it did not believe USPG could demand enough pineapple to justify shipping expenses. When Moniz explained the situation to Rainer, Rainer agreed that LSG would guarantee its purchase of a minimum supply of pineapple each month.

The agreement was modified on July 23, 1997 at Rainer’s request. There were some changes made, including an extension of the term to two years. From the execution of the Contract until March 23, 1998, the Contract was performed by both sides. USPG delivered pineapple to LSG and gave invoices to LSG which were forwarded to Guam for review by LSG’s accounting department. Each invoice during this period was paid and signed by Michelle Ramos and/or Reinhard Guth, the Managing Director of LSG and LSG Guam. [p. 3]

Only one month before signing the Contract, Rainer had received a memo from his superior on Guam, directing him not to enter into any long term contracts. However, he did have the ability

to purchase on a daily basis without supervision.

III. ISSUES

1. Whether Rainer could have legally bound LSG in a two year contract.
2. Whether the Contract is enforceable under the Commonwealth Uniform Commercial Code, 5 CMC §2306.

IV. ANALYSIS

A. Standard

A motion for summary judgment may be granted only 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 the moving party is entitled to a judgment as a matter of law.” Com. R. Civ. P. 56(c). The Court’s role is issue finding, not issue determination. Rachel Concepcion v. American International Knitters, 2 CR 940 (1986). Further, the court will view the facts in a light most favorable to the nonmoving party. Cabrera v. Heirs of De Castro, 1 N.M.I. 172 (1990). Conclusory allegations or general denials are not enough to raise a genuine issue of material fact. Santos v. Santos, 4 N.M.I. 206 (1994); Estate of Mendiola v. Mendiola, 2 N.M.I. 233 (1991). Unless the material facts are undisputed, the existence of an agency relationship must be determined by a fact finder. Repeki v. MAC Homes (Saipan) Co., Inc., No. 90-002 (N.M.I. March 14, 1991).

B. Agency

There are three types of agency defined by the Restatement: actual, apparent, and inherent. Actual authority requires that the principal has manifested an intent that the agent perform a specific action. Restatement (Second) Agency (1958) § 7, cmt. (b). This manifestation may occur by direct instruction or by reasonable inference. Id.

Apparent authority requires that the words or conduct of the principal are communicated to a third party who on that basis relies on the agent. Restatement (Second) Agency (1958) § 27. “[A]pparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that

[p. 4] the principal consents to have the act done on his behalf by the person purporting to act for him.” Id. An agent cannot create apparent authority acting alone. Property Advisory Group, Inc. v. Bevona, 718 F.Supp. 209 (S.D.N.Y. 1989).

Inherent agency power has often been loosely referred to under the principle of apparent authority in court decisions although it is a separate type of agency. Restatement (Second) Agency (1958) § 8A, cmt. (b). Inherent agency power is derived “solely from the agency relation and exists for the protection of persons harmed by or dealing with a servant or other agent.” Restatement (Second) Agency (1958) § 8A. The risk of loss from an agent’s disobedience falls on the principal because agents are fiduciaries trusted and controlled by the principal who generally act to benefit the principal. Restatement (Second) Agency (1958) § 8A, cmt. (b)

By placing an agent in a position recognized in the business community as having certain authority, a principal may be estopped from denying that authority. Property Advisory Group, Inc. v. Bevona, 718 F.Supp. 209 (S.D.N.Y. 1989). The duty to make a reasonable inquiry as to an agent’s authority falls on the third party, unless it is found that the third party reasonably relied on the apparent authority of an agent and had no warning or cause to inquire. Id. “A general agent ... subjects his principal to liability for acts done on his account which usually accompany or are incidental to transactions which the agent is authorized to conduct if, although they are forbidden by the principal, the other party reasonably believes that the agent is authorized to do them and has no notice that he is not so authorized.” Restatement (Second) Agency (1958) § 161.

Here, there are myriad questions which are unanswered or on which the parties disagree. Whether LSG and the Saipan hotels can be said to comprise the same industry, sharing the same norms, is a factual question. Although there are documents attached which suggest other resident managers or general managers at Saipan hotels may have been authorized to bind their principals to contracts, there are no definitive documents which suggest this is an industry practice. In Saipan, LSG is the only airline catering business. However, this is a very small island and the commercial produce purchases are made not only by LSG but by many luxury hotels. Although LSG suggests that even a janitor could make tuna purchases at the bigger hotels, because those purchases are small

in comparison to those made by LSG, the question of whether LSG and the hotels of Saipan make [p. 5] up the same business community sharing the same norms remains.¹ There is a question of fact as to whether Rainer was actually the general manager or if he was holding himself out as a general manager. In addition, there is a question of fact whether the industry customs on Saipan allow a general manager or resident manager to contract for goods. Further, there are questions surrounding USPG's duty, if any, to make an inquiry under these circumstances. Because of these and other questions of fact which may only be resolved at trial, LSG's motion for summary judgment as well as USPG's partial motion for summary judgment are both denied on this issue.

C. Requirements Contract

LSG argues that because the Contract was a requirements contract, LSG had the right to terminate all purchases if in the interest of the company. LSG's argument is premised on the Contract being defined as a requirements contract under 5 CMC §2306 which provides:

(1) A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.

Good faith in this context "means honesty in fact in the conduct or transaction concerned." 5 CMC §1201 (19).

Where a local rule shares the language of its federal counterpart, federal law is considered authoritative in interpreting the local rule. Camacho v. J.C. Tenorio Enterprises, 3 CR 964 (D.N.M.I. App. 1989), *amended*, 3 CR 972. The Commonwealth's 5 CMC §2306 is a mirror image of the Uniform Commercial Code §2-306. As a result, absent local case law, this court turns to interpretations of the federal law.²

In a requirements contract, a buyer agrees to purchase its good faith requirements exclusively

¹ Even if the same norms are not shared, if it is true that a janitor could purchase tuna for a big hotel, then it could be that a Resident Manager could enter a tuna contract for an airline catering company.

² In addition, as an American Law Institute and National Conference of Commissioners on Uniform State Laws sponsored modernization and restatement of federal common law, the Uniform Commercial Code is similar to the Restatements which are authority in this jurisdiction.

from the seller. Alyeska Pipeline Service Co. v. O'Kelley, 645 P.2d 767 (1982). In a pure requirements contract, the buyer must exercise good faith and the seller assumes the risk of any [p. 6] variations, including a discontinuance of business. HML Corp. v. General Foods, Corp., 365 F.2d 77 (C.A.Pa.1966). However, where the parties have specifically set a minimum/maximum clause, requiring a minimum purchase, that term must be met. Tennessee Valley Authority v. Imperial Professional Coatings, 599 F.Supp. 436 (E.D.Tenn.1984).

The Contract is exclusive: LSG agrees to buy its total requirements of pineapple from USPG. There are unit prices set for the various types of pineapple products. Therefore, the Contract is a requirements contract. However, the Contract states minimum amounts that must be bought through September 29, 1997. After that point, the Contract allows the parties to either continue purchase of the same minimum amount or to renegotiate a different quantity which is mutually agreeable. There are issues of fact surrounding whether there was any attempt to renegotiate after September 29, 1997 or whether the contract continued in effect. Further, there are issues of whether complete refusal was warranted or whether LSG could have, in good faith, made lesser purchases. Accordingly, this court denies summary judgment against both parties on this issue.

V. CONCLUSION

LSG's motion for summary judgment is denied. USPG's cross motion for partial summary judgment is similarly denied. There are issues of fact surrounding whether Rainer had apparent or inherent authority to enter into the Contract on behalf of LSG. Further, if there is a finding that Rainer bound LSG to the Contract, there are factual issues surrounding the Contract itself which will need to be resolved at trial.

So ordered this 6 day of April, 1999.

/s/ Edward Manibusan
EDWARD MANIBUSAN, Presiding Judge