

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2010-FC-01308-SCT

***IN THE MATTER OF NORTHLAKE
DEVELOPMENT L.L.C.; KINWOOD CAPITAL
GROUP, L.L.C.; GEORGE KINIYALOCTS,
INDIVIDUALLY AND AS GENERAL PARTNER
OF KINIYALOCTS FAMILY PTRS. I, LTD***

v.

BANKPLUS

ATTORNEYS FOR BANKPLUS:	DANNY E. RUHL WILLIAM H. LEECH
ATTORNEYS FOR KINWOOD CAPITAL GROUP, L.L.C.	JAMES R. MOZINGO WILLIAM M. SIMPSON, II
NATURE OF THE CASE:	CIVIL - FEDERALLY CERTIFIED QUESTION
DISPOSITION:	CERTIFIED QUESTION ANSWERED - 05/05/2011
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

DICKINSON, PRESIDING JUSTICE, FOR THE COURT:

¶1. Michael Earwood, the minority member of Kinwood Capital Group, LLC,¹ secretly formed Northlake Development, LLC, with himself as sole owner. Earwood then signed a deed purporting to transfer a parcel of Kinwood's property to Northlake, which then granted a deed of trust on the property to secure a bank loan. Northlake later defaulted on the loan and filed bankruptcy, listing the property as an asset. Upon learning what Earwood had

¹ Kinwood is a member-managed, Mississippi limited-liability company. *See generally* Miss. Code Ann. §§ 79-29-101 to 79-29-1201 (Rev. 2009).

done, Kinwood’s majority member, George Kinyalocets, filed an objection in Northlake’s bankruptcy proceeding, arguing that Earwood had no authority to transfer Kinwood’s property, and Northlake’s deed was void. Because Earwood had neither actual nor apparent authority to transfer Kinwood’s property, and because Kinwood did not ratify the transaction, it was void and of no legal effect.

BACKGROUND FACTS AND PROCEEDINGS

¶2. After Kinyalocets and his attorney and business partner, Earwood, formed Kinwood to develop property, Earwood secretly formed Northlake Development, LLC, with himself as sole owner, managing member, and registered agent for service of process. Then, on July 12, 2000, Earwood signed a warranty deed as Kinwood’s “Managing Member,” conveying Kinwood’s property to Northlake.

¶3. Northlake applied to BankPlus for a loan, secured by the property. After obtaining a title certificate from Earwood’s two-person law firm, signed by Earwood’s law partner, BankPlus made the loan, taking as collateral a deed of trust on the property. Earwood put most and perhaps all of the BankPlus loan proceeds to his personal use.

¶4. When Northlake later filed for Chapter 11 bankruptcy protection, Earwood signed the petition, listing the property as a Northlake asset. Kinyalocets learned what Earwood had done, and contested the deed that purportedly transferred Kinwood’s property to Northlake. The learned bankruptcy judge—finding that Earwood never had the authority to convey the property from Kinwood to Northlake and that the Kinwood deed could not pass title of any

kind—entered judgment for Kinwood, declared the Kinwood deed and the BankPlus deed of trust null and void, and required both to be cancelled in the land records of Panola County.

¶5. BankPlus appealed to the district court, which affirmed. BankPlus then appealed to the United States Court of Appeals for the Fifth Circuit, arguing that the Northlake deed was not void, but rather was voidable; and that—because it had taken the deed of trust from Northlake in good faith and without notice that the Kinwood deed was unauthorized—its deed of trust was enforceable.

¶6. The Fifth Circuit, finding that the case “presents an important and determinative question of Mississippi limited liability company and property law for which there is no controlling Mississippi Supreme Court precedent . . . ,” certified the question to us.²

ANALYSIS

¶7. The precise question certified to us by the Fifth Circuit is:

When a minority member of a Mississippi limited liability company prepares and executes, on behalf of the LLC, a deed to substantially all of the LLC’s real estate, in favor of another LLC of which the same individual is the sole owner, without authority to do so under the first LLC’s operating agreement, is the transfer of real property pursuant to the deed: (i) voidable, such that it is subject to the intervening rights of a subsequent bonafide purchaser for value and without notice, or (ii) void *ab initio*, *i.e.*, a legal nullity?³

² *Kinwood Capital Group v. BankPlus (In re Northlake Dev., L.L.C.)*, 614 F.3d 140, 145 (5th Cir. 2010). *See also* M.R.A.P. 20.

³ *Kinwood*, 614 F.3d at 145.

¶8. It is undisputed in the facts presented to us—and implicit in the question certified to us by the Fifth Circuit—that Earwood did not have actual authority to transfer the property.

Kinwood’s Operating Agreement includes the following limitation:

All management decisions shall be by a vote of the Members owning a majority of the Membership Interests. Notwithstanding any provision in this Agreement to the contrary, the affirmative vote of Members holding at least Seventy-five percent (75%) of all Membership Interests shall be required to approve the sale, exchange, or other disposition of all, or substantially all, of the Company’s assets (other than in the ordinary course of the Company’s business) which is to occur as part of a single Transaction or plan.

Because Earwood had no actual authority to transfer Kinwood’s property, we now turn to the question of apparent authority.

¶9. Although the Mississippi Limited Liability Company Act⁴ does not specifically address the issue presented, it does inform our analysis with the following provision, which creates an agency relationship between a member-managed LLC and its members:

[E]very member is an agent of the limited liability company for the purpose of conducting its business and affairs, and the act of any member, including, but not limited to, the execution in the name of the limited liability company of any instrument for apparently carrying on in the usual way the business or affairs of the limited liability company of which he is a member, binds the limited liability company, unless the member so acting has, in fact, no authority to act for the limited liability company in the particular matter and the person with whom he is dealing has knowledge of the fact that the member has no such authority.⁵

⁴ Miss. Code Ann. §§ 79-29-101 to 79-29-1204 (Rev. 2009). Because the LLCs in this case all were formed before January 1, 2011, they are not subject to the provisions of the Revised Mississippi Limited Liability Company Act. *See* Miss. Code Ann. § 79-29-1301 (Supp. 2010). We therefore consider the provisions of the unrevised Act.

⁵ Miss. Code Ann. § 79-29-303(1) (Rev. 2009).

¶10. Under this statute, Earwood was an agent of Kinwood for the purpose of conducting “in the usual way” Kinwood’s business and affairs. Generally, an agent cannot bind the principal to a contract unless the principal clothes the agent with authority, whether actual or apparent.⁶ The bankruptcy court found that Earwood lacked Kinwood’s actual authority to enter into the transaction with Northlake; that Earwood knew he had no authority to enter into the transaction; and that Kinyalocets remained unaware of the unauthorized act until the commencement of bankruptcy proceedings.

¶11. Earwood (the sole owner of the grantee, Northlake) certainly knew he had no authority to convey Kinwood’s property to Northlake. And because Earwood’s knowledge of his own wrongdoing was imputed to Northlake, it took the property with knowledge that Earwood had no authority to sign the deed. Because the doctrine of apparent authority is unavailable to one who knows an agent lacks actual authority,⁷ we must conclude that Earwood did not have apparent authority to transfer the property to Northlake.

¶12. The certified question essentially asks us whether the unauthorized conveyance was voidable; that is to say, was it an effective transfer of title unless and until Kinwood repudiated it? If—as BankPlus argues—it was voidable, then the BankPlus deed of trust

⁶ *Christian Methodist Episcopal Church v. S & S Constr. Co.*, 615 So. 2d 568, 572 (Miss. 1993) (citing *Andrew Jackson Life Ins. Co. v. Williams*, 566 So. 2d 1172, 1180 (Miss. 1990)).

⁷ *Mladineo v. Schmidt*, 52 So. 3rd 1154, 1167 (Miss. 2010) (“Apparent authority exists when a reasonably prudent person, having knowledge of the nature and usages of the business involved, would be justified in supposing, based on the character of the duties entrusted to the agent, that the agent has the power he is assumed to have.”).

survives. The Fifth Circuit graciously did not confine our “reply to the precise form or scope of the question certified.”⁸

¶13. It is settled law in Mississippi that, absent some form of legal authority, an agent is powerless to affect the legal relationship between his principal and others.⁹ If an agent purports to act for his principal but is without any legal authority to do so, his action generally¹⁰ has no legal effect on his principal.¹¹ Nevertheless, our law allows a principal to ratify the agent’s unauthorized acts and, upon doing so, becomes bound. We find the following explanations from the Restatement (Third) of Agency to be illustrative:

Ratification has an immediate effect on legal relations between the principal and agent, the principal and the third party, and the agent and the third party. Ratification recasts those legal relations as they would have been had the agent acted with actual authority. Legal consequences thus “relate back” to the time the agent acted. Ratification creates claims *not otherwise present*, giving the principal and the third party enforceable rights against each other . . .¹²

⁸ *Kinwood*, 614 F.3d at 145.

⁹ *Patriot Commercial Leasing Co. v. Jerry Enis Motors, Inc.*, 928 So. 2d 856, 865 (Miss. 2006) (citing 2 C.J.S. *Agency* §§ 95, 96); *Johnson v. Blasdale*, 9 Miss. (1 S. & M.) 17 (1843) (“The act of an agent who exceeds his authority, is binding upon his principal to the extent of his authority, but is void for the residue.”). See also *Restatement (Third) of Agency* § 1.01 cmt. c (2005) (“Only interactions that are within the scope of an agency relationship affect the principal’s legal position.”).

¹⁰ The notable exception—inapplicable here—is where, despite the absence of an agency relationship, a “principal” may be estopped from denying agency. *Ala. Great S. R.R. Co. v. McVay*, 381 So. 2d 607, 612 (Miss. 1980) (citing *Restatement (Second) of Agency* § 8B (1958)). See also *Restatement (Third) of Agency* § 2.05 (2005).

¹¹ He may, however, be liable to the other contracting party for breach of contract, breach of warranty of authority, or some other cause of action against the agent himself.

¹² *Restatement (Third) of Agency* § 4.02 cmt. b. (2005) (emphasis added). See also *Barnes, Broom, Dallas & McLeod, PLLC v. Estate of Cappaert*, 991 So. 2d 1209, 1212 (Miss. 2008) (citing

¶14. Ratification does not arise by operation of law; rather, “[a] person ratifies an act by (a) *manifesting assent* that the act shall affect that person’s legal relations, or (b) conduct that justifies a *reasonable assumption* that the person so consents.”¹³ It is true that, under some circumstances, a principal’s *inaction* can result in ratification, but only where the principal has notice that others will infer from his silence that he intends to manifest his assent to the act.¹⁴ That is certainly not the case here.

¶15. So where no actual or apparent authority exists to transfer a principal’s property, we decline to characterize the deed as voidable. Rather, it is void unless and until later ratified. Ratification is a principal’s after-the-fact, conscious decision to be bound by an agent’s unauthorized act, and it is that decision that can trigger the principal’s liability to third parties. Where the agent has no actual or apparent authority, a principal has no need to repudiate an agent’s unauthorized act in order to “put things back” the way they were. Absent ratification—and prior to ratification—nothing changes.

CONCLUSION

¶16. Earwood was without authority (actual or apparent) to convey the property to Northlake. The conveyance therefore had no effect on Kinwood’s interest in the property. Once Kinwood learned of the purported conveyance, it could have ratified it—but didn’t.

Autry v. State, 698 So. 2d 84, 87 (Miss. 1997)).

¹³ *Restatement (Third) of Agency* § 4.01(2) (2005) (emphasis added). See also *Estate of Cappaert*, 991 So. 2d at 1212 (“Ratification may be established through affirmative acts or inaction.”).

¹⁴ *Restatement (Third) of Agency* § 4.01 cmt. f (2005).

Kinwood's rights in the property are therefore unaffected by the actions of Earwood, Northlake, or any other subsequent party.

¶17. **CERTIFIED QUESTION ANSWERED.**

**WALLER, C.J., CARLSON, P.J., RANDOLPH, LAMAR, KITCHENS,
CHANDLER, PIERCE AND KING, JJ., CONCUR.**