



N.M. Military Inst. v. NMMI Alumni Ass'n

2019-NMCA-008 (2018) | Cited 0 times | New Mexico Court of Appeals | October 22, 2018

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2019-NMCA-008

Filing Date: October 22, 2018

Docket No. A-1-CA-35621

NEW MEXICO MILITARY INSTITUTE,

Plaintiff-Appellee, v.

NMMI ALUMNI ASSOCIATION, INC., a New Mexico non-profit corporation,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF CHAVES COUNTY Jane Shuler Gray, District Judge

Hinkle Shanor, LLP Richard E. Olson Parker B. Folse Roswell, NM

for Appellee

Keleher & McLeod, P.A. Jeffrey A. Dahl Michael G. Smith Albuquerque, NM

for Appellant

OPINION

KIEHNE, Judge.

{1} The New Mexico Military Institute (NMMI) sued the New Mexico Military Institute Alumni Association, Inc. (the Association), claiming that the Association breached its contractual obligation to maintain a proper financial accounting system and also alleging that the Association was NMMI . NMMI asked that the Association be made to turn over donations it received while acting as NMMI trial, the district court found that the Association had not breached its contractual



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obligations to NMMI, but it also found that the contract between the Association and NMMI was terminable at will, that the Association was NMMI and that NMMI had legally agent. Based upon its latter findings, the district court imposed a constructive trust over

donations that the Association received while acting as NMMI

{2} The Association appeals, claiming that: (1) NMMI lacked standing to bring its terminable at will should be reversed because NMMI did not raise that theory until after

was not supported by substantial evidence; (4) imposition of a constructive trust was improper; and (5) requiring the Association to turn over donations that it received to NMMI We hold that NMMI had standing, we affirm the di

NMMI had a right to terminate its agency relationship with the Association regardless of the existence of the contract between them, we do not reach the questions of whether the contract was terminable at will or whether NMMI appropriately terminated the contract.

BACKGROUND

{3} NMMI is a state-funded school that provides students with up to four years of high school and two years of junior college instruction. The Association is a non-profit

interest and welfare of [NMMI]. . .; to afford a permanent means of contact between [NMMI] and its alumni; to create, establish and maintain scholarships and student loan funds; and to collect and administer trust funds and endowments for the use and benefit of [NMMI]; and to do generally any and all things which may be deemed advisable, necessary or desirable in the interest of the [NMMI], its students [t]o

promote the interest and welfare of the [NMMI,] [] lifelong connections between its Alumni and [NMMI,] conjunction with the New Mexico Military Institute Foundation (the NMMI Foundation),

for deserving cadets to attend [NMMI.]

{4} The Association was incorporated in 1964 and was originally staffed by NMMI employees. In 1993 the Association and NMMI entered into a Memorandum of Agreement (MOA), and the staffers handling alumni communication and coordination left the employment of NMMI and became employees of the Association. The NMMI continued to provide office space and utilities to the Association free of charge. The Association staff also used NMMI phone lines and email servers, and used @nmmi.edu email addresses.

{5} The Association and NMMI entered into a series of agreements between 1993 and 2013. The first



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was the 1993 MOA referenced above. In 2001 the Association and NMMI entered into a new MOA (the 2001 MOA). They entered into a third MOA in 2012 (the 2012 MOA). The 2001 MOA contained a number of affirmative covenants requiring the Association to do a number of things unless excused in writing by NMMI. These ; maintaining the composition of the membership of its board of directors in accordance with its bylaws; employing an executive secretary selected by its board of directors; and retaining advisory and other professional services as deemed necessary to perform its primary function of supporting NMMI; serving as the primary repository of records relating to NMMI alumni; providing NMMI publications to alumni, cadets, and patrons; maintaining a database with continued updates of all alumni to be used by NMMI for fundraising programs; and receiving donations and disbursing those funds in conformity with any conditions imposed by the donors and in accordance with NMMI rules and regulations governing financial aid to cadets.

{6} The 2012 MOA contained the same affirmative covenants. The 2012 MOA also contained language stating that NMMI s articles and provided to NMMI for consideration and comment. All three MOAs contained provisions

obligating the Association to manage, document and track its financial activity and provide financial information to NMMI. The 1993 and 2001 MOAs contained language stating that the Association was not NMMI contain this language and did not say anything about whether an agency relationship existed between the parties.

{7} NMMI, the Association, and the NMMI Foundation, a non-profit foundation that provides primarily financial support to NMMI, provided financial support to the Association, and holds scholarship funds for students of NMMI, also entered into an outlined the duties of each party relating to fundraising. This agreement required that the

Association supply an annual budget to the Alliance Committee, a group made up of representatives from the NMMI Foundation, NMMI, and the Association for approval.

{8} The Association held funds given to it by donors for the purpose of providing scholarships to NMMI students. Some of these funds had donor-imposed restrictions. The scholarship committee, which consisted of representatives from NMMI, the Association, and the NMMI Foundation, met each February to award scholarships from those funds. Students seeking scholarships would contact NMMI and if a scholarship was awarded to a student using the Association funds, NMMI would bill the Association at the end of the academic year.

{9} In July 2009, NMMI hired a new president and superintendent, Major General Jerry Grizzle. General Grizzle reviewed the agreements between NMMI and the Association that were then in force, including the 2001 MOA and the Third Amended Alliance Agreement. General Grizzle believed that the 2001 MOA was outdated and Beginning in 2010, General Grizzle had discussions



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with successive board presidents of the Association about his concerns. provisions governing financial accounting and management of its finances. These efforts resulted in the parties signing the 2012 MOA.

{10} The Association, however, still did not provide any audited financial statements to NMMI, and it appeared to General Grizzle that the Association was not likely to file a timely, audited tax return. Thus, on February 21, 2013, NMMI letter to the Association stating that it intended to terminate the 2012 MOA because the

Association had not maintained an adequate financial accounting system and had not provided NMMI with a copy of its annual audit, and asking it to cure these problems within thirty days. The Association did not respond to this letter. In April 2013, NMMI sent a final notice to the Association that it was terminating the relationship between NMMI and the Association. On this same date, NMMI removed the Association from its offices on NMMI property.

{11} NMMI brought suit against the Association in June 2013 claiming that the Association breached its contractual obligation to maintain an adequate financial accounting system, and that the Association was in possession of funds that it received on behalf of NMMI while acting as NMMI
strict court to: freeze the NMMI receiver; order the Association to account for funds it received while an agent of NMMI;

and order the Association to transfer all funds received for the benefit of NMMI or its cadets to an appropriate custodian.

{12} The district court held a one-week bench trial. Most of the evidence and argument tried the issue of whether the Association was NMMI court issued an initial set of findings of fact and conclusions of law, finding that the

Association acted as NMMI and that NMMI had improperly terminated the 2012 MOA. The district court then issued

custody, and stating that because the Association was NMMI convey these funds to NMMI or the NMMI Foundation if NMMI so directed. After post-

trial motions filed by both parties, the district court issued supplemental findings of fact and conclusions of law, reiterating that the Association had acted as NMMI and stating that , as the principal, [could] as its agent for any reason. The district court also found that the 2012 MOA was

terminable at will. The court issued an amended judgment reiterating its agency finding and the creation of a constructive trust over funds in NMMI The Association appeals from the district co



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DISCUSSION

A. NMMI had standing to sue the Association {13} (1) they are directly injured as a result of the action they seek to challenge[,] (2) there is a causal relationship between the injury and the challenged conduct[,] and (3) the injury is likely to be redressed by a favorable decision. *ACLU of N.M. v. City of Albuquerque*, 2008- NMSC-045, ¶ 1, 144 N.M. 471, 188 P.3d 1222. Whether a party has standing presents a question of law that we review de novo. *Id.* ¶ 6.

{14} Here NMMI alleged in its complaint that the Association acted as its agent, that the Association on the condition, both express and implied, that those funds directly benefit NMMI NMMI and the Association had been terminated, the Association should not be allowed to retain control over funds that were intended to benefit NMMI. These claims allege an injury to NMMI in the form of loss of access to and control over funds intended to support its students and programs.

{15} NMMI further alleged that it had demanded the return of the funds, but that the Association had not responded to the demand, and apparently could not or would not act on the demand because its board had split into two factions with contrary aims. These allegations were sufficient to allege a causal connection between NMMI

funds to NMMI, despite its obligation to do so as NMMI See, e.g., *Moser v. Bertram*, 1993-NMSC- stands in a fiduciary relationship with his or her principal, a position of great trust and confidence commanding the utmost good 8.01 (Am. Law Inst. 2006) benefit in all matters connected with the agency relationship. . Finally, a favorable decision would redress NMMI ed injury by giving it control over funds that the Association had raised on NMMI

{16} The Association claims, however, that NMMI failed to prove that it suffered any injury because the district court rejected NMMI The Association acknowledges NMMI

must return property that it can no longer rightfully possess after the termination of the agency relationship[,] NMMI lacks standing because: (1) NMMI failed to prove that it suffered any injury; (2) NMMI suggest that the Association was not the proper party to hold and administer the funds

MOA . . . suggest[s] that [NMMI] is the proper holds that an agent must disgorge its own property to a principal absent any breach of

{17} These NMMI needed to demonstrate that the Association committed some breach of duty, or caused some harm, terminate the agency relationship. But as we will ex claim, NMMI reason or no reason. The Association was therefore obligated to turn over to NMMI all donations that it had collected on NMMI NMMI sufficiently demonstrated that it had standing by alleging and proving that the



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Association was its agent, that the agency relationship had been terminated, and that nevertheless the Association would not or could not turn over to NMMI the donations that it had collected on NMMI NMMI had standing to pursue its claims against the Association. See *Am. ty. & Mun. Employees, Council 18 v. Bd. of Cty. rs*, 2016-NMSC-017, ¶ 32, 373 P.3d 989 (holding that injury-in-fact requirement to obtain standing is satisfied where the plaintiff [it] is (internal quotation marks and citation omitted)).

B. NMMI substantial evidence

{18} The Association next claims that substantial evidence does not exist to support the NMMI evidence that NMMI exercised the degree of control over the Association required to support the existence of an agency relationship. We disagree.

{19} On appeal, we will not disturb a finding of agency if [it is] supported by substantial evidence. *Gallegos v. Citizens Ins. Agency*, 1989-NMSC-055, ¶ 17, 108 State ex rel. *King v. B & B Inv. Grp.*,

Inc., 2014-NMSC-024, ¶ 12, 329 P.3d 658 (internal quotation marks and citation

court resolves all disputes of facts in favor of the successful party and indulges all reasonable inferences in support of the prevailing par v. *City of Las Cruces*, 1997-NMCA-044, ¶ 12, 123 N.M. 329, 940 P.2d 177.

{20} *Hansler v. Bass*, 1987-NMCA-106, ¶ 28, 106 N.M. 382, 743 P.2d 1031. Whether an

circumstances of the case, together with the conduct and communications between the *Brown v. Cooley*, 1952-NMSC-083, ¶ 8, 56 N.M. 630, 247 P.2d 868. The existence of an agency relationship does not depend on the name that the parties use to describe their relationship. See *Chevron Oil Co. v. Sutton*, 1973-NMSC-111, ¶ 4, 85 N.M. the manner in which the parties designate a relationship is not controlling, and if an act done by one person on behalf of another is in its essential nature one of agency, the one is the agent of the other,

{21} Here, the Association does not dispute that it acted on NMMI that NMMI did not exercise sufficient control over the Association to render the

co *Shaver v. Bell*, 1964-NMSC-255, ¶ 16, 74 N.M. 700, 397 P.2d 723. The principal, however, need not rson may be an agent although the principal lacks the right to control the full range of the § 1.01 cmt. c (*Am. Law Inst.* 2006).

{22} In New Mexico, our case law has not required a particularly invasive level of control to support a finding that a principal-agent relationship exists. For example, in *Shaver*, a plaintiff who was injured after slipping in a puddle of gasoline at a service station sued both the actual operators of the station



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(Bass and Hendrix) and the man who had leased the station and sold gasoline to them (Bell) for negligence. Bell argued that Bass and Hendrix were not his agents because he could not control their operation of the gas station, and he obtained summary judgment on that basis. Shaver, 1964-NMSC-255, ¶ 1. Our Supreme Court reversed, holding that a dispute of fact existed about whether it day-to-day provided advertising for the station and paid its utilities; (3) Hendrix and Bass agreed to

purchase gasoline sold by Bell; (4) the station every week or two; and (5) gasoline should be sold, as well as ways to increase the business of the station, [although]

Id. ¶¶ 3, 25-26. Similarly, in Chevron Oil, our Supreme Court held that an issue of fact existed about whether Chevron, who had leased a gas station to a man named Sharp, but did not control his day-to-day operations, was in a principal-agent relationship where Chevron products, to remain open for certain hours, and to meet minimum standards of cleanliness

and order, and where Chevron provided Sharp with gasoline, advertising, and uniforms, and allowed his customers to pay with Chevron credit cards. 1973-NMSC-111, ¶ 7. And in Gallegos, our Supreme Court held that an insurance agency was in a principal-agent relationship with an insurance salesman where the salesman had access to the insurance licited business for the insurance agency, and received price information from the insurance agency to relay to his customers. 1989-NMSC-055, ¶ 18.

{23} NMMI exercised sufficient control over the Association to place them in a principal- agent relationship. First, there was abundant evidence to support the existence of a close relationship between NMMI and the Association, and that the donations it solicited were for the benefit of NMMI [t]he Association, as an affiliated entity, has provided support to NMMI by raising funds on behalf of NMMI that were intended to benefit NMMI and its cadets[,] [t]he Association solicited donations on behalf of NMMI ; [o]n behalf of NMMI, the Association created and established endowments, including those for scholarships, intended to benefit o promote and help fund NMMI various NMMI programs and cadet activities[,] endowments at NMMI -laws, and the the interest and welfare of NMMI and collecting and administering trust funds and

endowments for the use and benefit of NMMI. The 2001 and 2012 MOAs specified that the Association would serve as the primary repository of records relating to alumni for NMMI NMMI students.

{24} There was also substantial evidence of NMMI with NMMI ; [u]ntil

NMMI up until the 2012 MOA, all previous MOAs stated that the

Association was not an agent of NMMI; and Association to undertake several commitments[,]



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adequate financial accounting system and submission to annual audits. Any changes to

NMMI approval. The excused by [NMMI] -exempt

organization, employing an executive secretary, organizing its staff and retaining advisory and other professionals services as it deemed necessary. indicate a level of control on the part of NMMI, as they outline the basic structure and organization that the Association was to have and make clear where the Association had authority to exercise its own professional discretion.

{25} The 2012 MOA also required the Association to provide NMMI publications to alumni, provide and maintain a database with continued updates of all alumni, and to receive and disburse scholarship funds in conformity with all conditions imposed by the donors and in accordance with NMMI rules governing financial aid to cadets. Students at NMMI had to apply for Association-administered scholarships through NMMI financial aid office, and the Association provided the scholarship funds for students to

NMMI.

{26} This evidence established that NMMI exercised at least as much, if not more, control over the Association as did the principals in Shaver, Chevron Oil, and Gallegos. To be sure, the Association pointed to contrary evidence, such as the testimony of its past president, John Phinzy, and its former executive secretary, David Romero, that NMMI NMMI s, which statements in the 1993 and 2001 MOAs that explicitly disclaimed a principal-agent

relationship between NMMI and the Association. But on substantial evidence review, Sandoval v. Baker Hughes

Oilfield Operations, Inc., 2009-NMCA-095, ¶ 41, 146 N.M. 853, 215 P.3d 791 (internal quotation marks and citation omitted). Having concluded that the evidence was sufficient NMMI affirm that finding.

C. NMMI had the power to terminate its agency relationship with the Association, regardless of whether the 2012 MOA was terminable only for

{27} The Association vigorously argues that NMMI could only terminate the 2012 MOA for cause, and given that the district court found that the Association did not violate the 2012 MOA, NMMI relationship or justify the imposition of a constructive trust requiring that it transfer the

scholarship funds in its possession to NMMI. The Association also argues that the district -trial finding that the 2012 MOA was terminable at will cannot justify the order requiring it to turn over its scholarship funds to NMMI, and should be reversed, because NMMI did not raise the



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terminable-at-will theory until after trial concluded. supported by the evidence, that could not justify the transfer of funds to [NMMI] The

In response, NMMI argues that

because the Association was its agent, it therefore could end its agency relationship regardless of whether the 2012 MOA was terminable only for cause, and even if the Association complied with all of its obligations to NMMI. Whether NMMI as principal could terminate its agency relationship with the Association without cause presents a question of law that we review de novo. See *Bank of N.Y. Mellon v. Lopes*, 2014-NMCA- 097, ¶ .

{28} Although the parties have not cited any New Mexico cases that have directly addressed the issue, the overwhelming, if not unanimous, weight of authority is that a principal has the power to terminate an agency relationship at any time and for any reason, even if the principal and agent have signed a contract providing that their relationship is irrevocable or may be terminated only for cause. The Restatement (Second) of Agency § 118 (Am. Law Inst. principal or the agent manifests to the other dissent to its continuance[,]) principal or agent who terminates the relationship in violation of such a contract may still

be subject to liability to the other party for breach of contract. Restatement (Second) of Agency § 118 ty[,]) Restatement (Second) of Agency § 138 (Am. Law. Inst.

1958), but that does not apply here.

{29} The Restatement (Third) of Agency § 3.10 (Am. Law Inst. 2006) similarly states authority terminates . . . Comment b

ext actual authority shall be irrevocable or shall not be revoked except under specified circumstances[,]) Comment b principal[,]) Restatement (Third) of Agency § 3.10 cmt.

b. The principal may, however, still be liable for breach of contract if it has wrongfully available to the agent). *Id.*

{30} Case law from other jurisdictions confirms application of these general principles, and the Association has not cited any authority to the contrary. See, e.g., *Guarantee Fund of Republic of Finland v. Hyatt Corp.*, 95 F.3d 291, 300 (3d Cir. 1996) (stating that agency relationship is ordinarily terminable even if the parties agreed the relationship could not be terminated); *Woolley v. Embassy Suites, Inc.*, 278 Cal. Rptr. 719, 724 (Ct.) It is a cardinal principle of agency law that a principal who *Ireland v. Wynkoop*, 539 P.2d 1349, 1362 (Colo. App. Ct. 1975) (reversing portion of injunction that purported to prevent princip has the power to terminate an agency relationship at any time, even in breach of a



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contract).

{31} Because the district court found that the Association was NMMI finding that we have already held was supported by substantial evidence), it follows that

NMMI finding that the Association did not breach the 2012 MOA. While we are sympathetic

NMMI, mismanage any of its funds, or give NMMI any cause to terminate their relationship, the law is clear that NMMI ne Association further argues that allowing NMMI to terminate their relationship without

cause violates New Mexico law requiring the enforcement of contracts, because the 2012 MOA only allows termination for cause. But as we have stated, the law allows a principal If the Association believed that NMMI breached the 2012 MOA by terminating the relationship, the Association could have asserted a breach of contract counterclaim in the district court, but it did not do so.

{32} Because NMMI had the power to terminate its agency relationship with the Association, it follows that the district court properly imposed a constructive trust requiring the Association to turn over funds it solicited on NMMI NMMI The imposition of a constructive trust is an equitable remedy . . . within

the broad discretion of the district court. In re Estate of Duran, 2003-NMSC-008, ¶ 35, 133 N.M. 553, 66 P.3d 326. A constructive trust will be imposed to prevent unjust enrichment that would result if the person having the property were permitted to retain it. Id. ¶ 34 (internal quotation marks and citation omitted).

{33} As an agent, the Association owed fiduciary duties to its principal, NMMI. Hydro Res. Corp. v. Gray, 2007-NMSC-061, ¶ 40, 143 N.M. 142, 173 P.3d 749 (stating that fiduciary relationship, whereby the agent is required to act only in the

respect NMMI NMMI See Restatement (Third) of Agency § 8.12 (Am. Law Inst. 2006) (stating that an agent has a to received or paid . Once NMMI terminated the

NMMI. See Restatement (Third) of Agency § 8.05 cmt. b (Am. Law Inst. 2006) who continues to possess property of a principal has a duty to return it and to comply

with . . . management and record-keeping rules[.] for the district court to allow the Association to retain those funds in the face of NMMI demand for their return. The district court therefore acted within its discretion by

imposing the constructive trust.



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merit

{34} the intent of donors who made testamentary gifts to the Association to be administered by the Association. We hold that this claim is meritless.

{35} based on its finding that the Association was NMMI

NMMI, as principal, was entitled to terminate the agency relationship and require the Association, as its agent, to turn over all funds that it received while acting as NMMI agent. The Association claims that it is nevertheless entitled to keep the funds that it received and solicited on NMMI Association should be in charge of administering and distributing those funds. In support of this claim, the Association cites *In re Cable Family Trust*, 2010-NMSC-017, 148 N.M. 127, 231 P.3d 108 and *In re Estate of Seymour*, 1979-NMSC-069, 93 N.M. 328, 600 P.2d and Association, relying on *Schwarzkopf v. American Heart Association*, 541 So. 2d 1348

(Fla. Dist. Ct. App. 1989) and *National City Bank of Michigan/Illinois v. Northern Illinois University*, 818 N.E.2d 453 (Ill. App. Ct. at there is a {36} actual ruling or demonstrate that it was wrong. We have no quarrel with the principle that

courts should attempt to give effect to the intent of donors or testators with respect to the Cable and Seymour for that general proposition. But the district court found that the funds at issue here were donated to the Association in its capacity as an agent for NMMI, and that NMMI was therefore entitled to demand that they be turned over to it. The Association has cited no authority for the proposition that where an agent receives or solicits funds on behalf of its principal, it is entitled to keep those funds, even in the face of a demand from its principal for their return, merely because the donor intended that the agent be the one to administer the funds. Accordingly, the Association has failed to demonstrate that the district court erred. See *In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 orted by cited authority, counsel after diligent search, was unable to find any supporting authority.

{37} Similarly, we also have no reason to dispute the principle that a court may not y of distributing the funds that it received while acting as NMMI

CONCLUSION

{38}

{39} IT IS SO ORDERED.



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_____ EMIL J. KIEHNE, Judge

WE CONCUR:

_____ J. MILES HANISEE, Judge

_____ JULIE J. VARGAS, Judge

