

ENTERED 12-9-10

11-0074

IN THE CIRCUIT COURT OF BOONE COUNTY, WEST VIRGINIA

ALL MED, L.L.C.,

Plaintiff,

v.

Civil Action No.: 08-C-197
(Honorable William S. Thompson)

RANDOLPH ENGINEERING CO., INC.,
and DONALD R. HAYS,

Defendant.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING RANDOLPH
ENGINEERING COMPANY'S MOTION FOR SUMMARY JUDGMENT**

After hearing argument of counsel, the court does make the following findings of fact and conclusions of law:

1. Plaintiff All Med, L.L.C. ("plaintiff" or "All Med") filed its complaint in the Circuit Court of Boone County against Donald R. Hayes ("Mr. Hayes") and Randolph Engineering on October 15, 2008, asserting causes of action for negligence and breach of contract based on Mr. Hayes alleged negligence in completing an elevation certificate.
2. Randolph Engineering is a professional consulting engineering firm located in Scott Depot, West Virginia formed in 1976, with Roger Randolph as president of the company.
3. Donald Hayes has worked for Randolph Engineering as a professional land surveyor from approximately 1978 to the present. Mr. Hayes currently heads Randolph Engineering's survey department.

4. Mr. Hayes works a flexible forty-hour work week for Randolph Engineering. Randolph Engineering does not require its employees to keep strict hours. All of Randolph Engineering's employees, including Mr. Hayes, have their own keys to the office.

5. Randolph Engineering is not in the business of providing elevation surveys, though it does provide such only in conjunction with other work for clients. Randolph Engineering got out of the business of providing stand-alone elevation certificates for flood insurance sometime in the 1990s because it was "cost prohibitive." Randolph Engineering was not performing any elevation surveys in the fall of 2006 when Mr. Hayes did the work for plaintiff that is the subject of this lawsuit.

6. Mr. Hayes takes on surveying work independent of his work for Randolph Engineering approximately ten to fifteen times a year. Mr. Hayes does not use Randolph Engineering's equipment for his independent surveying work. Randolph Engineering has never billed for any work that Mr. Hayes performed independently.

7. Mr. Hayes' independent work has included performing elevation surveys. Mr. Hayes performed the independent elevation surveys, on his own time, outside the forty hours per week he works for Randolph Engineering.

8. Sometime around September of 2006, Mark Saber, one of the owners of plaintiff All Med L.L.C., contacted Randolph Engineering to examine a piece of property he had purchased at 2340 23rd Street, Nitro West Virginia (the "Nitro property"). This was the first time that Mr. Saber had met Mr. Hayes.

9. On April 3, 2007, Randolph Engineering sent an invoice on company letterhead for \$1,683.00 to Mark Saber, part-owner of plaintiff All Med, for professional engineering services relating to the Nitro property. This invoice is stamped "PAID" on May 18, 2007 by

Check No. 1530. Mr. Saber signed Check No. 1530, dated May 17, 2007, on the account of BLADE CREEK DEVELOPMENT LLC payable to "Randolph Engineering Co., Inc." in the amount of \$1683.00. The check is stamped "RECEIVED" on May 18, 2007 by Randolph Engineering Co., Inc. Mr. Saber testified that his check was for the work Randolph Engineering did for him on the Nitro property.

10. Approximately two weeks after Hayes began the work on Mr. Saber's Nitro property, in about October, 2006, Mr. Saber requested that Mr. Hayes explore an elevation survey for a property at the corner of 3rd Street and County Route 86/8 in Danville, West Virginia, and requested that Mr. Hayes look at this property for that purpose.

11. Mr. Hayes made two trips to the Danville property, working a total of approximately ten to fifteen hours on the elevation survey and certificates. Mr. Hayes used his own personal surveying equipment on the Danville property. Mr. Hayes does not have a company vehicle and, to Mr. Randolph's knowledge, did not drive a company vehicle to the Danville property.

12. On each certificate that resulted from the elevation survey, Hayes listed his title as "LAND SURVEYOR," and did not write any information in the space on each certificate for "Company Name," instead leaving the company name blank. In the space on each certificate for "Address," Mr. Hayes listed his home address in Hurricane, West Virginia.

13. Mr. Hayes gave plaintiff a handwritten invoice for his work at the Danville property. This handwritten invoice listed Mr. Hayes personal address and had no reference to Randolph Engineering.

14. Randolph Engineering never issued an invoice for any of the work on the Danville property. Randolph Engineering was not paid any monies for this project.

15. Twenty days after Mr. Hayes completed the elevation certificates for the Danville property, Mr. Saber wrote and signed Check No. 1127, dated November 1, 2006, on the account of ALL MED MGMT CO LLC payable to "Donald R. Hayes" in the amount of \$680.00.

16. Mr. Saber recognizes his writing on the check, but he does not remember writing the check. He does not know what work the \$680.00 check he wrote to Mr. Hayes represents. Mr. Saber cannot remember writing a check for any of the work Mr. Hayes did and cannot put together what happened that caused him to write a check for any of the projects Mr. Hayes performed.

17. Except for any elevation certificates, all of Mr. Hayes' other work at the Nitro property was for Randolph Engineering. All of Randolph Engineering's work on the Nitro property was invoiced to plaintiff on April 3, 2007, and paid in full with a check written to "Randolph Engineering Co., Inc." in the amount of \$1683.00 and signed by Mr. Saber on May 17, 2007.

18. Mr. Saber never spoke with anyone at Randolph Engineering headquarters about the Danville property project, other than maybe a secretary.

19. The above referenced checks are not the only checks that Mr. Saber on behalf of All Med. he has written to your Mr. Hayes or Randolph Engineering. On August 7, 2006, Randolph Engineering sent an invoice on company letterhead to Mark Saber's ex-father-in-law, Buck Flynn, or \$285.00 for professional engineering services relating to a subdivision. Mr. Saber signed a check, dated October 3, 2006. on the account of plaintiff All Med, payable to "Randolph Engineering Co" in the amount of \$285.00 for a joint venture in which Mr. Saber was going to participate with Mr. Flynn.

20. Sometime after he completed the Danville work, Mr. Hayes realized he had made a 100-foot "typo error" in recording the 100-year flood elevation on the elevation certificates he completed for the Danville property. In the space for "Base Flood Elevation" on each elevation certificate for Buildings Nos. 1 through 5, Mr. Hayes recorded "593" feet, rather than "693" feet, an error which plaintiff alleges caused the elevation certificates to incorrectly reflect that the Danville property was outside the 100-year flood plain.

21. After Mr. Hayes realized his typographical error, Mr. Hayes went to talk to Mr. Randolph about the issue, "more as friends than anything else." This conversation was the first time Mr. Randolph learned about Mr. Hayes' work for the plaintiff on the Danville property.

22. Later, in July of 2008, Mr. Saber sent a demand letter addressed to "Mr. Donald R. Hayes, Randolph Engineering, 4414 Teays Valley Road, Scott Depot, WV 25560." Mr. Saber signed the demand letter, which was written to Donald Hayes, as opposed to Randolph Engineering's president or principal officers.

23. Plaintiff seeks to hold Randolph Engineering liable for Mr. Hayes' alleged conduct under the theory that Mr. Hayes "is an agent of defendant Randolph Engineering Co., Inc."

24. The undisputed facts of his case, however, demonstrate that Mr. Hayes was not acting as an agent or employee for Randolph Engineering when he performed the elevation surveys and prepared elevation certificates.

25. The West Virginia Supreme Court of Appeals has stated that "agency is a question of law for the court where the material facts from which it is to be inferred are not in dispute and only one reasonable conclusion can be drawn therefrom." Laslo v. Griffith, 102 S.E.2d 894, 900 (W.Va. 1958).

26. “The law indulges no presumption that an agency exists; on the contrary a person is legally presumed to be acting for himself and not as the agent of another person; and the burden of proving an agency rests upon him who alleges the existence of the agency.” Syl. Pt. 1, John W. Lohr Funeral Home, Inc. v. Hess & Eisenhardt Co., 166 S.E.2d 141, 142 (1969).

27. Of the four general factors the court should consider when assessing whether an agency relationship exists, “the power of control is determinative.” Timberline Four Seasons Resort Management Co., Inc. v. Herlan, 679 S.E.2d 329, 334 (W.Va. 2009)(per curiam)(quoting Syl. Pt. 5, Paxton v. Crabtree, 400 S.E.2d 245 (1990)).

28. Plaintiff has not met its burden to prove that Mr. Hayes acted as an agent or employee of Randolph Engineering because the undisputed facts establish that Randolph Engineering had no power to control Mr. Hayes’ conduct or activities on the subject property. Randolph Engineering had no power to control Mr. Hayes’ work on the subject property because Randolph Engineering had no involvement with that work and did not even know about it until well after Mr. Hayes completed it.

29. Furthermore, because Randolph Engineering lacked any knowledge of Mr. Hayes’ work on the subject property, it did not select Mr. Hayes for the project or have the power to dismiss him from it, which are two additional factors for the Court to consider under Timberline.

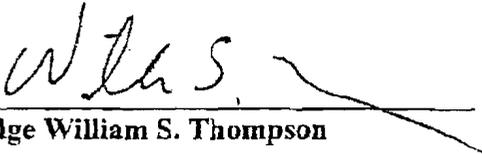
30. The remaining Timberline factor examines which party provided “payment and compensation” to a person who is allegedly acting as an agent. Randolph Engineering did not compensate Mr. Hayes for this independent work. Randolph Engineering did not request or receive any payment for this work. The undisputed facts of this case establish that Mr. Hayes’ work on the subject property was for his own benefit and not on behalf of Randolph

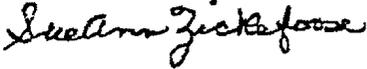
Engineering's business. Because Mr. Hayes had a personal financial interest in his work on the subject property for plaintiff, he was not acting as an agent or employee of Randolph Engineering.

31. For the above reasons the plaintiff has not produced sufficient evidence that would permit a jury to find that Mr. Hayes acted as Randolph Engineering's agent when he performed elevation surveys and completed elevation certificates on the subject property, and Randolph Engineering is entitled to summary judgment on plaintiff's claims, as a matter of law.

ACCORDINGLY, this Court does hereby find that Randolph Engineering Co. Inc. is entitled to be dismissed from this lawsuit with prejudice, and this Court does ORDER such dismissal, with each party to bear its own costs. The remainder of the case shall continue toward trial on the schedule previously ordered by the court. All remaining parties are directed to contact the Judge's office to set a scheduling conference.

Entered the 9th day of December, 2010.


Judge William S. Thompson

A COPY ATTEST

CIRCUIT COURT