When does a property management company validly represent the real estate owner ?

TANJA SCHMIDT

In this decision, the Federal Court had to decide whether a property management company had validly represented a real estate company in ordering renovation work. Among other circumstances, the Federal Court considered the knowledge of the real estate company's sole shareholder to be relevant in recognizing an apparent internal power of attorney in favor of the property management company.

Judgment of the Federal Supreme Court of 25 july 2024
Case Reference : 4A_207/2023

Facts

B. SA (the "Company") is a real estate company wholly owned by C. (the "Sole Shareholder"). The Company owned a building ("the Building") that had been fully managed by F. SA ("the Manager") since 2001. In early 2019, following a decision of the Company, the Manager mandated A. Sàrl ("the General Contractor") to do some repair work on the electrical installations of the Building in the underground car park. On the 20th of March 2019, the General Contractor drew up an estimate of the costs, amounting to CHF 29'583.55. The Manager orally accepted this estimate, and the repairs started in May 2019.

In July 2019, E. bought from the Sole Shareholder all the shares of the Company and became its sole administrator. However, he never visited the Building and was not informed at any point that construction work was happening on it.

The General Contractor finished the repair work in December 2019 and sent three invoices to the Company for a total amount of CHF 41'684. The Company did not dispute the invoices, but did not pay any of them.

After the Court of first instance ruled in favor of the General Contractor and ordered the establishment of a building contractor's lien on the Building, the Cantonal court dismissed the General Contractor's claim on the grounds that the Company had not been validly represented by the Manager. According to the court, there were no internal powers of representation granted by the Company to the Manager (Art. 32 para. 1 SCO), nor was the General Contractor allowed to infer powers of representation from the Manager's behavior (Art. 33 para. 3 CO).

The Manager appealed to the Federal Supreme court.

Issue

The Federal Supreme Court had to determine whether the Manager, acting as agent, validly concluded the contract with the General Contractor in a binding manner for the Company.

Decision

By interpretation of the parties' intent, the Federal Supreme Court ruled that the Company was bound by the Manager's acts, acting as a representative (Art. 32 para. 1 SCO), and therefore upheld the appeal.

More specifically, the Federal Supreme Court held that the Company had tacitly granted the Manager internal powers to conclude the contract and supervise the electrical work in the underground car park. These powers arose from an internal apparent power of attorney (*Anscheinsvollmacht; procuration apparente*), since the Company should have known that the electrical work had been ordered by the Manager, which could have believed in good faith that it was authorized to act.

To conclude that an internal apparent power of attorney existed, the Federal Supreme Court considered as relevant that the decision to renovate the underground car park was taken by the Company, which had clearly been informed that work was necessary to bring the car park up to standard. This decision had necessarily been communicated to the Manager, which had contacted the General Contractor at that time to obtain a quote for electrical work.

In addition, the fact that the Sole Shareholder lived in the building at the time of the renovation work was also relevant, since he could not have been unaware of the work being carried out in the underground car park. On this point, the Federal Supreme Court made it clear that the issue here was not whether the Company was bound to a third party by an

act of management of the Sole Shareholder, but what the Company knew or should have known, given that knowledge of the Sole Shareholder was clearly attributable to it. In doing so, it rejected the cantonal court's view, which held that the knowledge of the Sole Shareholder was irrelevant, since he did not have the status of an organ and did not validly represent the Company (Art. 718 para. 1 SCO).

Taking all these circumstances into account, the Federal Supreme Court ruled that the Manager could understand, according to the rules of good faith, that it was authorized to award the electrical work to the General Contractor who had been entrusted with all the building's electrical work for nearly twenty years. Furthermore, there was no indication that the internal powers of the General Contractor had been revoked or restricted. In particular, the sale of the share capital from C. to E. during the renovation work and the lack of knowledge of the new shareholder (i.e. E.) and sole director did not alter the scope of the powers conferred to the Manager.

Key takeaway

This decision provides a concrete example of the circumstances to be taken into account when inferring apparent internal power of attorney in favor of a representative. It highlights namely the importance that should be attached to the decisions taken by the principal and to the principal's specific knowledge, even if through a sole shareholder.

Comments

The decision is interesting for two main reasons.

First, the Federal Supreme Court recalls its case law on the granting of a tacit internal power of attorney (Art. 32 para. 1 CO), which can arise either from tolerance or from appearance:

- There is an internal power of attorney by tolerance (*Duldungsvollmacht*) when the principal knows that a person has acted on its behalf vis-à-vis a third party without having been authorized to do so, but has not objected to this unsolicited act of representation.
- There is an apparent internal power of attorney (*Anscheinsvollmacht*) when, on the one hand, the principal is unaware that a person has acted as its representative vis-à-vis a third party, but should have been aware of this if it had exercised the care that could be expected in the circumstances. On the other hand, there is such power of attorney when the representative could, in accordance with the rules of good faith, interpret the principal's behavior as granting powers, as decided in the case under review.

Second, the case provides an opportunity for the Federal Supreme Court to rule on whether the Sole Shareholder's knowledge can be attributed to the Company. While the cantonal court held irrelevant that the Sole Shareholder lived in the Building, since the Sole Shareholder did not validly represent the Company (Art. 718 SCO), the Federal Supreme Court held that knowledge of the Sole Shareholder was clearly attributable to the Company in order to retain an apparent internal power of attorney.

By doing so, the Federal Supreme Court followed the prevailing legal opinion according to which the knowledge of the represented party should be taken into account if it can be assumed that it consented to the act of representation. Under this view, if the principal knows or should have known that the representative with general power of attorney is about to conclude a specific act of representation, the principal should, if he or she does not consent to it, oppose the act of representation by revoking the powers of the representative.

Other sources presenting the case

Oliver Dreyer, ius.focus 2024 n° 246.

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A party acting as a representative once, may not be a representative twice.

In the absence of a validly conferred power of attorney, the principal shall only be bound if the third party can rely on its own legitimate representation of the situation.