

No. 1-10-2582

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JOSEPH FERRELL and JF BREWING, INC.,)	Appeal from the
)	Circuit Court of
Plaintiffs-Appellees,)	Cook County.
)	
v.)	No. 08 M1 102506
)	
PAULMARK LAND ACQUISITION COMPANY, LLC,)	Honorable
)	Anthony L. Burrell,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court properly granted summary judgment in favor of the plaintiffs where the defendant has failed to raise a genuine issue of material fact regarding whether the plaintiffs were entitled to repayment of two loans totaling \$14,000, plus interest.
- ¶ 2 This appeal arises from an October 30, 2009 order entered by the circuit court of Cook County, which granted summary judgment in favor of the plaintiffs, Joseph Ferrell (Ferrell) and JF Brewing, Inc. (JFB). On appeal, the defendant, PaulMark Land Acquisition Company, LLC (PaulMark), argues that genuine factual disputes existed to preclude an entry of summary judgment in favor of Ferrell and JFB. For the following reasons, we affirm the judgment of the circuit court

of Cook County.

¶ 3

BACKGROUND

¶ 4 In 2004, PaulMark, a "member-managed"¹ limited liability company, was formed by Paul Wojcicki (Wojcicki) and Mark Kocol (Kocol) as part of a development project to establish a brewery restaurant business with its affiliate, Beverly Brewing Company, LLC (BBC). In 2005, PaulMark purchased a commercial lot located at 10720 South Western Avenue in Chicago, Illinois (the property), with the intention of erecting a building and leasing it to BBC to conduct brewery operations.

¶ 5 PaulMark executed a "first amended operating agreement" (operating agreement), effective May 31, 2005, which governed its internal operating procedures, such as the management of the company, the maintenance of capital accounts, capital contributions, membership classes, and member loans. Paragraph 6.1 of the operating agreement expressly provided that the Chief Executive Officer (CEO) of PaulMark had "full and complete discretion in the management and control of the day-to-day business and affairs of [PaulMark] and the authority to make all decisions affecting [PaulMark's] business and affairs," that "any action taken by the CEO *** in accordance with the provisions of [the operating agreement] shall constitute the act of and serve to bind [PaulMark]," and that "[p]ersons dealing with [PaulMark] shall be entitled to rely conclusively on

¹A "member-managed" limited liability company is defined under the Limited Liability Company Act as "a limited liability company other than a manger-managed company," and, except as otherwise stated by the Act, as a limited liability company in which "each member has equal rights in the management and conduct of the company's business." 805 ILCS 180/1-15, 180/15-1(a) (West 2008).

the power and authority of the CEO *** as set forth in [the operating agreement]."

¶ 6 Prior to April 2007, however, PaulMark had exhausted substantially all of its working capital. As a result, Wojcicki, Kocol, and other members of PaulMark periodically made loans to PaulMark to cover its normal operating expenses, including real estate taxes, mortgage interest and other charges associated with the property. Also, prior to April 2007, Wojcicki, Kocol, and other members of PaulMark attempted to secure financing to fund the construction of the brewery restaurant, and began efforts to secure new investors to become members of PaulMark and BBC.

¶ 7 In April 2007, Ferrell expressed interest in becoming a member of PaulMark and BBC. Over the course of several months, Ferrell and Michael Hurley (Hurley), then CEO of PaulMark,² engaged in a series of discussions concerning the terms and conditions under which Ferrell or a corporate entity owned by Ferrell would invest in and be admitted as a member of PaulMark and BBC. During these discussions, Ferrell also requested that changes be made to the operating agreement, as a result of which further discussions concerning possible changes to the operating agreement occurred.

¶ 8 In May 2007, PaulMark was in need of approximately \$22,000 to pay its normal operating expenses. In an email dated May 19, 2007 from Hurley to Wojcicki, Kocol, Timothy McArdle (McArdle)³ and Ferrell, Hurley recommended that he and Ferrell, who was not yet a member of PaulMark or BBC, each make a \$11,000 loan to PaulMark in order to help offset its operating costs.

¶ 9 On May 22, 2007, Ferrell formed corporate entity JFB, serving as its sole shareholder,

²Hurley was also an officer of Green Square, Inc., which was a member of PaulMark and BBC during all relevant times.

³McArdle was also one of PaulMark's member lenders.

director and officer. Thereafter, on May 30, 2007, Hurley engaged in a conversation with Ferrell about the terms of any loans made to PaulMark. Based on this conversation, on May 31, 2007, JFB issued a check in the amount of \$11,000 to PaulMark, which Hurley accepted and endorsed on behalf of PaulMark. The memo line of the check designated the funds for "member loan for May 2007."

¶ 10 Over the next several months, until September 2007, the parties continued negotiations over the proposed changes to the operating agreement. In September 2007, PaulMark was again in need of funds for its normal operating expenses. Subsequently, on September 4, 2007, JFB issued another check in the amount of \$3,000 to PaulMark, which Hurley again accepted and endorsed on behalf of PaulMark. The memo line of the second check read "loans for Aug 07."

¶ 11 The parties never reached an agreement regarding the proposed changes to the operating agreement, and thus, neither Ferrell nor JFB ever became a member of PaulMark or BBC. On approximately September 25, 2007, Ferrell notified Hurley that he was no longer interested in becoming an investing member of PaulMark or BBC. Thereafter, Ferrell, acting on behalf of JFB, presented two promissory notes to Hurley for the two loans totaling \$14,000 which were made to PaulMark, and requested that the promissory notes be signed and that the loans be repaid.

¶ 12 On October 1, 2007, before Hurley was able to sign the promissory notes, he was removed as CEO of PaulMark. Subsequently, no representative of PaulMark ever signed the promissory notes, nor did PaulMark repay the \$14,000 loan amount to JFB.

¶ 13 In January 2008, Ferrell and JFB filed the instant cause of action against PaulMark to recover the \$14,000 loan amount, plus interest. The complaint alleged that JFB issued these two loans to PaulMark as a result of representations from Hurley, as CEO of PaulMark, that the loans would bear

interest at the rate provided in the operating agreement, that they would be repaid promptly if JFB was not admitted as a member of PaulMark, and that, upon request, PaulMark would sign a promissory note evidencing the loans.

¶ 14 On June 2, 2009, Ferrell and JFB filed a motion for summary judgment. On October 30, 2009, the trial court granted the motion for summary judgment. On July 23, 2010, the trial court denied PaulMark's motion to reconsider summary judgment.

¶ 15 On August 23, 2010, PaulMark filed a notice of appeal before this court.

¶ 16 ANALYSIS

¶ 17 The sole issue on appeal before this court is whether the trial court erred in granting Ferrell and JFB's motion for summary judgment, which we review *de novo*. See *Hahn v. Union Pacific Railroad Co.*, 352 Ill. App. 3d 922, 929, 816 N.E.2d 834, 840 (2004).

¶ 18 PaulMark argues⁴ that the trial court's entry of summary judgment was in error because Ferrell was not entitled to a repayment of the loans he did not make; JFB was not entitled to repayment of the loans under terms which were discussed between Ferrell and Hurley prior to JFB's inception; a jury must decide whether Hurley had authority to accept loans from JFB on behalf of PaulMark; the loans had not yet become due for PaulMark; and PaulMark should not be liable for any interest incurred on the loans.

¶ 19 Summary judgment is proper where "the pleadings, depositions, and admissions on file,

⁴On September 30, 2011, this court, on its own motion, found that Ferrell and JFB had failed to file a brief within the time prescribed by Supreme Court Rule 343(a); thus, this case is taken for consideration on the record and on PaulMark's brief only.

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2008). "In considering a motion for summary judgment, the court must view the record in the light most favorable to the nonmoving party." *Pielet v. Pielet*, 474 Ill. App. 3d 407, 419, 942 N.E.2d 606, 622 (2010). "The purpose of summary judgment is not to try a question of fact, but to determine whether one exists" that would preclude the entry of judgment as a matter of law. *Land v. Board of Education of the City of Chicago*, 202 Ill. 2d 414, 421, 432, 781 N.E.2d 249, 254, 260 (2002). "Thus, although the nonmoving party is not required to prove his case in response to a motion for summary judgment, he must present a factual basis that would arguably entitle him to judgment." *Id.* at 432, 781 N.E.2d at 260.

¶ 20 In the instant case, it is undisputed that JFB made two loans to PaulMark in 2007 totaling \$14,000, which were used for the benefit of PaulMark. It is further undisputed by the parties that the loan terms were negotiated between Ferrell and Hurley, who was CEO of PaulMark at the time of negotiation. The parties also do not dispute that neither Ferrell nor JFB ever became members of PaulMark and BBC.

¶ 21 PaulMark makes a number of arguments on appeal to show that the trial court improperly entered summary judgment. However, we begin by noting that several of PaulMark's contentions are bereft of any citations to legal authority, in direct violation of Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008), which requires parties on appeal to support their arguments with proper legal citations. "The appellate court is not a depository in which the appellant may dump the burden of argument and research," and our supreme court rules "are not merely suggestions, but are

necessary for the proper and efficient administration of the courts." *Walters v. Rodriguez*, 2011 IL App (1st) 103488, ¶ 5. Although a party's noncompliance with Rule 341 risks forfeiture of the issues on appeal, a reviewing court, notwithstanding the deficiencies, may consider the issues in the interest of finding a just result because Rule 341 is an admonition to the parties and not a limitation on the court's jurisdiction. *Brown v. Brown*, 62 Ill. App. 3d 328, 332-33, 379 N.E.2d 634, 637 (1978). Thus, we examine each of PaulMark's arguments in turn.

¶ 22 First, PaulMark argues, without reference to any legal authority, that Ferrell was not entitled to repayment of the loans where he did not personally lend PaulMark \$14,000. PaulMark does not make any argument on appeal relating to the issue of standing. We reject this contention as primarily one of form over substance, which must fail under the facts of the instant case. Based on our review of the record, the uncontroverted facts show that Ferrell was the sole shareholder, director and officer of JFB at the time the two loans were made by JFB to PaulMark in 2007. Thus, PaulMark has not raised a genuine issue of material fact regarding Ferrell's authority to act on behalf of JFB, including issuing and delivering the loan checks on JFB's behalf and instigating the instant cause of action with JFB to recover the amount owed by PaulMark. See generally *Harrison v. Addington*, 2011 IL App (3d) 100810, ¶ 52 (a corporate officer acts on behalf of the corporation).

¶ 23 Second, PaulMark argues, again without legal support, that JFB was not entitled to repayment of the loans because it had yet to be formed at the time Ferrell purportedly discussed the loan terms with Hurley. Rather, it maintains that the evidence shows that "JFB understood and agreed" to a different repayment scheme, whereby, in the event loan repayments occurred, the balance of the member lender who had lent the most money to PaulMark would be paid down first "until even with

the next highest loan amount." Viewing the record in a light most favorable to PaulMark, we find that no genuine issues of material fact existed to warrant vacating the trial court's summary judgment order on this basis. The record shows that paragraph 13 of PaulMark's verified answer to the complaint expressly admitted that, in April 2007, representatives of PaulMark and Ferrell engaged in a series of discussions concerning the terms and conditions under which "Ferrell *and/or a corporation wholly owned by Ferrell* would invest in and be admitted as a member of PaulMark and BBC." (Emphases added.) According to Ferrell's affidavit and Hurley's discovery deposition, their conversation about the loan terms occurred *after* JFB was formed. Further, it is undisputed that both loans were made to PaulMark subsequent to the incorporation of JFB, and that PaulMark accepted and endorsed those funds from JFB for its own benefit. Hurley's deposition also shows that he had informed Ferrell that loans to PaulMark would be treated as "member loan[s]" under the terms of the operating agreement, with the exception that the loans would be "repaid right away" if Ferrell or JFB did not become a member of PaulMark and BBC. Thus, no genuine issues of material fact have been raised that the loan repayment terms between Ferrell and Hurley would not apply to JFB.

¶ 24 PaulMark references certain emails from Hurley to Ferrell and other members of PaulMark and BBC, as evidence that JFB "understood and agreed" to a repayment schedule different from the loan terms negotiated by Ferrell and Hurley. However, based on our review of the record, we find that these documents make no mention whatsoever of what the loan repayment terms would be should Ferrell or JFB never become members of PaulMark and BBC. Therefore, we find that PaulMark has not raised a genuine issue of material fact regarding the loan repayment terms, as described by Hurley, in the event, as here, that neither Ferrell nor JFB became members of PaulMark

and BBC.

¶ 25 Next, PaulMark argues that a question of fact existed as to whether Hurley had authority to solicit and accept loans from JFB on behalf of PaulMark, contending that, under the operating agreement, Hurley was required to obtain the approval and authorization from a majority of PaulMark's lending members before entering into any loan agreement with Ferrell or JFB.

¶ 26 In granting Ferrell and JFB's motion for summary judgment, the trial court found that Hurley had both express and apparent authority to negotiate the loan terms and to enter into the two loan transactions with JFB, that he had informed other members of PaulMark of the loans, that there was no objection by those members, and that JFB's loan checks were accepted and endorsed for PaulMark's benefit. We agree.

¶ 27 Section 13-5(a) of the Limited Liability Company Act (the Act) provides in pertinent part as follows:

"[Section] 13-5. Agency of members and managers.

(a) Subject to subsections (b) and (c):

(1) [e]ach member is an agent of the limited liability company for the purpose of its business, and an act of a member, including the signing of an instrument in the company's name, for apparently carrying on, in the ordinary course, the company's business or business of the kind carried on by the company *binds the company, unless the member had no authority to act for the company in the particular matter and the person with whom the member was dealing*

knew or had notice that the member lacked authority." (Emphasis added.) 805 ILCS 180/13-5(a)(1) (West 2008).

¶ 28 Article 6.1 of PaulMark's operating agreement expressly vested power in two officers—the CEO and Chief Operating Officer (COO)—to manage the day-to-day business and affairs of PaulMark. Article 6.1 states in relevant part:

"[t]he CEO shall manage the day-to-day affairs of [PaulMark] and carry out the directions of the Board of Members, subject to the terms of this [a]greement. *** [T]he Board hereby delegates to the [o]fficers full and complete discretion in the management and control of the day-to-day business and affairs of [PaulMark] and the authority to make all decisions affecting [PaulMark's] business and affairs, and, except as otherwise provided herein, *any action taken by the CEO and/or the COO (in his capacity as such) in accordance with the provisions of this [a]greement shall constitute the act of and serve to bind [PaulMark]. Persons dealing with [PaulMark] shall be entitled to rely conclusively on the power and authority of the CEO and the COO as set forth in this [a]greement.*" (Emphasis added.)

¶ 29 In the case at bar, it is undisputed that Hurley was the CEO of PaulMark at the time he solicited and accepted JFB's loans to PaulMark. It is likewise uncontradicted in the pleadings, depositions, admissions on file and affidavits in the record that JFB's May 2007 and September 2007 loans to PaulMark were used to help pay its normal operating expenses. Under the plain language

of Article 6.1 of the operating agreement and section 13-5(a) of the Act, Hurley was vested with the power to manage and control PaulMark's day-to-day business and affairs, and thus, had the express authority to make decisions affecting PaulMark's business and affairs—including the power to request and accept loans from JFB to help offset its day-to-day operating expenses. See *C.A.M. Affiliates, Inc. v. First American Title Insurance Co.*, 306 Ill. App. 3d 1015, 1021, 715 N.E.2d 778, 783 (1999) ("[a]n agent has express authority when the principal explicitly grants the agent the authority to perform a particular act"). Moreover, under the provisions of Article 6.1 of the operating agreement, Ferrell and JFB, as "persons dealing with [PaulMark]," were entitled to rely conclusively on the power and authority granted to Hurley under the operating agreement.

¶ 30 Nonetheless, PaulMark asserts that the provisions under Article 5.7(b) of the operating agreement triggered to negate Hurley's authority to unilaterally solicit and accept JFB's loans on behalf of PaulMark. Article 5.7(b) provides that whenever PaulMark's existing member loans have an outstanding balance of \$100,000 or greater in the aggregate, any decisions relating to the company shall be made solely upon the approval of member lenders who hold a majority interest in PaulMark's outstanding member loans. PaulMark further argues that Hurley never sought to obtain the approval of the member lenders prior to soliciting and accepting loans from JFB, and that Ferrell knew or should have known that Article 5.7(b) of the operating agreement placed limits on Hurley's authority to act unilaterally. We reject this contention and find that no genuine issue of material fact existed to defeat summary judgment on this basis.

¶ 31 We find that PaulMark has not created a genuine issue of material fact that the provisions of Article 5.7(b) were triggered at the time Hurley discussed the loan terms with Ferrell and accepted

the loans from JFB in May 2007. Although email correspondences from Hurley to Ferrell, which were attached to pleadings in the record on appeal, show that Ferrell was given a copy of the operating agreement as early as April 2007, no document evidencing PaulMark's total member loan contributions was sent to Ferrell and member lenders Wojcicki, Kocol and McArdle until June 15, 2007. There is nothing in the record to show that PaulMark's outstanding member loan balance amounted to \$100,000 or greater in the aggregate prior to June 2007. Thus, the evidence does not support the claim that Article 5.7(b) applied, or that Ferrell knew or should have known that the provisions of Article 5.7(b) was in effect, at the time Hurley negotiated the loan terms with him or accepted JFB's \$11,000 loan in May 2007.

¶ 32 Even assuming that Article 5.7(b) was applicable at the time Hurley negotiated the loan terms and solicited and accepted JFB's loans, the record reveals, as the trial court correctly concluded, that Hurley had informed PaulMark's member lenders of the loans, and that, despite this knowledge, those member lenders voiced no objections to Hurley's soliciting and accepting JFB's loans for PaulMark's benefit. Hurley testified in his deposition that he had informed PaulMark's member lenders of his request of Ferrell for a \$11,000 loan, that there was "general agreement" among the members, and that they were "all aware of the loans and [they] all approved them." Although paragraph 9 of Wojcicki's affidavit in the record stated that Wojcicki "expressed disapproval" upon learning of JFB's May 2007 loan to PaulMark, such statement, even when viewed in a light most favorable to PaulMark, did not raise a genuine issue of material fact because it failed to set forth with particularity the circumstances under which Wojcicki purportedly disapproved JFB's May 2007 loan—such as whether he communicated his disapproval to anyone, or when and how such purported

disapproval was conveyed to Hurley and other member lenders. See Ill. S. Ct. R. 191 (eff. July 1, 2002) ("[a]ffidavits in support of and in opposition to a motion for summary judgment under section 2-1005 of the Code of Civil Procedure *** shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based"). Indeed, it is worth mentioning that despite Wojcicki's purported disapproval of the May 2007 loan, he, along with Hurley and other member lenders, proceeded to accept a second loan from JFB to PaulMark in September 2007. Thus, the record does not contain evidence from which a jury could reasonably conclude that Hurley failed to obtain the member lenders' approval prior to his solicitation and acceptance of JFB's loans.

¶ 33 Nevertheless, even if Hurley lacked actual or express authority to solicit and accept JFB's loans, he had the apparent authority to act on PaulMark's behalf. Apparent authority is cognizable "when a principal, through words or conduct, creates the reasonable impression in a third party that his agent is authorized to perform a certain act on his behalf." *Gambino v. Boulevard Mortgage Corp.*, 398 Ill. App. 3d 21, 56, 922 N.E.2d 380, 413 (2009). "To prove the existence of apparent authority, a party must establish that: (1) the principal consented to or knowingly acquiesced in the agent's exercise of authority; (2) the third party, based upon his knowledge of the facts, possessed a good-faith belief that the agent possessed such authority; and (3) the third party relied to his detriment on the agent's apparent authority." *Id.* In the situation at hand, the evidence is uncontradicted that Ferrell was aware at all relevant times that Hurley was the CEO of PaulMark. The evidence shows that all 2007 email correspondences to Ferrell pertaining to discussions of his potential membership and PaulMark's financial needs stemmed solely from Hurley. Hurley's May 19, 2007 email to Ferrell, in which he requested an \$11,000 loan from Ferrell, was also sent to

member lenders Wojcicki, Kocol and McArdle. There is no evidence that any one of these member lenders, who held a majority interest in PaulMark's outstanding member loans, as defined by Article 5.7(b) of the operating agreement, ever notified Ferrell that Hurley lacked the authority to solicit and accept JFB's loans. Based upon the member lenders' acquiescence, Ferrell and JFB could reasonably conclude, and rely to their detriment, that Hurley was an agent of PaulMark who possessed the authority to solicit and accept loans on its behalf. Thus, no genuine issues of material fact have been raised regarding whether Hurley had the apparent authority to act on behalf of PaulMark. Therefore, Hurley's actions served to bind PaulMark.

¶ 34 Notwithstanding the evidence in the record, PaulMark asserts, without reference to any legal authority, that Hurley was not acting on behalf of PaulMark when he and Ferrell agreed that the loans at issue would be repaid "right away" in the event that Ferrell or JFB did not become members, because PaulMark had no money to repay those loans. We reject this contention and find that the question of whether PaulMark had sufficient funds to repay JFB's loans was irrelevant and failed to create a question of fact to defeat summary judgment. Likewise, we reject the notion that JFB made the two loans to PaulMark with the understanding that repayment would occur only if BBC became operational and generated revenue. As discussed, the documents referenced by PaulMark in an attempt to show that JFB "understood and agreed" to a loan repayment schedule different from the loan terms agreed to by Ferrell and Hurley make no mention at all of what the loan repayment terms would be should Ferrell and JFB never become members of PaulMark and BBC. Thus, no genuine issues of material fact were raised regarding the loan repayment terms where neither Ferrell nor JFB became members of PaulMark and BBC.

¶ 35 Finally, PaulMark argues that it was not obligated to pay interest on JFB's loans because there was neither an oral nor written agreement between Hurley and Ferrell regarding this subject.

¶ 36 In his deposition, Hurley did not recall agreeing to pay interest on JFB's loans upon repayment, as a result of his discussion with Ferrell about the loan terms in May 2007. However, as discussed, Hurley's deposition testimony shows that he had informed Ferrell that JFB's loans would be treated as "member loans" under the terms of the operating agreement, with the exception that the loans would be "repaid right away" if Ferrell or JFB did not become a member of PaulMark and BBC. There is nothing in the record to raise a genuine issue of material fact regarding the treatment of JFB's loans as member loans, as described by Hurley. Thus, because JFB's loans were treated as member loans, they must necessarily bear interest at the rate provided in PaulMark's operating agreement for member loans—at the "simple rate per annum equal to the [p]rime [r]ate plus one percent (1%), but not to exceed ten percent (10%)." Accordingly, we find that the trial court properly granted summary judgment in favor of Ferrell and JFB.

¶ 37 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 38 Affirmed.