Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-171

NOVEMBER TERM, 2002

General Truck & Equipment, Inc.	}	APPEALED FROM:
v.	}	Windham Superior Court
Ralph A. Wright	}	DOCKET NO. 281-6-01 Wmcv
	}	Trial Judge: Richard W. Norton

In the above-entitled cause, the Clerk will enter:

Defendant appeals the superior court' s judgment in favor of plaintiff for rental fees and equipment damage in connection with the rental of an excavator owned by plaintiff. The court determined that defendant was the principal involved in the rental of the excavator, and thus was liable for the rental fees and damage to the machine. We affirm.

During July 2000, defendant was involved in the logging and marketing of property he owned in West Chesterfield, New Hampshire. At that time, he enlisted the services of Dana Foote, who lived near the property. On July 25, 2000, Foote rented an excavator from Carl Kelton, Sr., the owner of plaintiff General Truck & Equipment, Inc., a business located in Westminster, Vermont. Kelton testified at trial that he rented the excavator to Foote only because Foote told him that he was acting on behalf of defendant, whom Kelton had known for many years. The next day, Scott Alexander arrived at plaintiff' s premises to transport the excavator to the West Chesterfield property. The machine was operated on defendant' s property over the following two weeks first by Alexander and later by Leonard McLam. During that period, the excavator was damaged on at least two occasions, once while Alexander was operating it, and once while McLam was operating it. Alexander dropped off the excavator in a damaged condition at plaintiff' s premises on August 11, 2000. Plaintiff billed defendant for the rental fees and damage to the equipment, but defendant ignored the bills, and plaintiff filed suit in June 2001.

On November 30, 2001, plaintiff filed a motion for summary judgment. On January 18, 2002, the superior court notified the parties that a hearing on the motion was set for February 14. The notice indicated in capital letters: " IF THE MOTION FOR SUMMARY JUDGMENT IS DENIED AT THE HEARING THEN THE COURT WILL PROCEED WITH THE HEARING ON THE MERITS." On February 7, plaintiff filed with the court, in support of its motion for summary judgment, an affidavit from Foote stating, in part, that he had placed defendant in contact with plaintiff regarding the rental of the excavator for use on defendant' s property, and that defendant was in charge of the logging operation on his property. At the beginning of the hearing on February 14, the court denied plaintiff' s motion for summary judgment because defendant had filed an affidavit denying that he had ever had a contract with Foote or plaintiff. The hearing then proceeded on the merits of the complaint. Plaintiff called defendant, Kelton, McLam, and Kelton' s son as witnesses. Defendant represented himself and testified in his defense. Following the close of evidence, the court made findings on the record and concluded that defendant was liable for plaintiff' s claimed damages because

he was the principal involved in the rental of the excavator, and Foote had acted as his agent or partner in renting the equipment.

On appeal, defendant argues that the trial court erred by allowing plaintiff to establish an agency relationship between himself and Foote solely on the basis of hearsay testimony and an out-of-court affidavit signed by the purported agent. He states that on the day of trial he expected to participate in a brief discussion about plaintiff' s summary judgment motion and was totally unprepared to proceed on the merits of the case. He further claims that he did not understand either the significance of Foote' s absence from the proceeding or the need to object to several of the hearsay statements made by plaintiff' s witnesses concerning what Foote had allegedly said. In his view, the court should have required Foote' s presence at the hearing to ensure that he would be able to cross-examine Foote.

We reject defendant' s claim that his pro se status entitled him to the trial court' s affirmative assistance in defending against plaintiff' s suit. Cf. Olde & Co., Inc. v. Boudreau, 150 Vt. 321, 322 (1988) (trial court was not responsible for adducing facts to support pro se defendant' s case). While this Court will not allow a party to take unconscionable advantage of a pro se litigant, that " does not mean that pro se litigants are not bound by the ordinary rules of civil procedure." Vahlteich v. Knott, 139 Vt. 588, 590-91 (1981); see Richardson v. Persons, 116 Vt. 413, 414 (1951) (pro se litigant " must be given the same consideration as any other, no more and no less"). Here, defendant was forewarned by written notice that a hearing on the merits would take place on February 14 if plaintiff' s motion for summary judgment was denied. At the hearing, defendant neither complained nor objected when the court denied plaintiff' s motion for summary judgment and proceeded with the merits of the case. Defendant did not indicate that he was not prepared for trial. At one point, he asked the court if he could challenge Foote' s credibility. The court explained that Foote' s affidavit had been submitted as part of plaintiff' s motion for summary judgment and was not admissible at the merits hearing unless Foote testified. Yet, defendant did not ask for a continuance to obtain the testimony of Foote or any other witness. Nor did he make any objections to testimony on the basis of hearsay. Upon review of the record, we conclude that there was no unconscionable advantage taken of defendant.

Although some hearsay statements were made at trial without objection from defendant, there was also considerable nonhearsay evidence to support the court' s conclusion that Foote had acted as defendant' s agent or partner in arranging the rental of the excavator for use on defendant' s property. Indeed, defendant himself acknowledged that (1) he had had previous dealings with Foote; (2) he told Foote that he needed the excavator for the logging operation on his property; (3) he paid Alexander to bring the excavator to Westminster and operate it on his West Chesterfield property; (4) he witnessed the excavator being damaged while Alexander was operating it on his property; (5) he had McLam operate the excavator following a dispute between him and Alexander over payment for services rendered; (6) he paid McLam and his brother for work done on the property; (7) he saw Alexander return the excavator to Westminster after the job was done; and (8) he paid Alexander in cash for doing so in a parking lot near plaintiff' s premises. As for compensation to Foote, defendant testified that he had paid Foote a " finder' s fee" in connection with the West Chesterfield property, but that Foote did not receive any money directly as a result of the logging operation for which the equipment was used.

For his part, Kelton testified that he would not have rented the excavator, but for Foote' s assurance that it was being rented by defendant, whom he had known for a number of years. He also testified that he saw defendant drive into and quickly away from his premises on the day Alexander returned the machine. McLam testified that defendant was in control of the logging operation, and that he answered to defendant, who directed him regarding operation of the excavator. He also testified that defendant paid him for his work, albeit only after he took legal action.

The court found this evidence overwhelming in determining that defendant had been the principal party responsible for renting the excavator. We agree that plaintiff met its burden in this regard. See Westinghouse Elec. Supply Co. v. B.L. Allen, Inc., 138 Vt. 84, 94 (1980) (" The burden of proving agency lies with the party asserting it."). " An agency relationship results when one party consents to another party acting as its agent." Kimco Leasing Co. v. Lake Hortonia Props., 161 Vt. 425, 429 (1993). Although agency cannot be shown merely through out-of-court declarations of the agent, Nadeau Lumber, Inc. v. Johnson, 138 Vt. 556, 558 (1980), " [t]he existence of an agency relationship . . . may be demonstrated from the circumstances of the particular situation or the conduct of the parties," Bills v. Wardsboro Sch. Dist., 150 Vt. 541, 544 (1988). " Formality is not essential to the creation of the relationship, which can arise by verbal agreement or be implied from the circumstances, and can arise from a single transaction." Id. Whether an agency relationship exists is a question of fact to be decided by the trier of fact after weighing the evidence and considering the

credibility of the witnesses. See Estate of Sawyer v. Crowell, 151 Vt. 287, 292 (1989); Bills, 150 Vt. at 544. The evidence summarized above was more than sufficient for the court to conclude that defendant was the principal with respect to the rental of the excavator, and that Foote was acting on defendant' s behalf either as his agent or his jointly liable partner.

Our resolution of defendant' s first argument necessarily disposes of his argument that he is not liable for damages to equipment rented by Foote because Foote was an independent contractor hired by him. For the reasons stated above, we uphold the court' s determination that defendant was liable because Foote acted as defendant' s agent in renting the excavator. See Bills, 150 Vt. at 544 (" The existence of an agency relationship does not depend on the label the parties give it, but may be demonstrated from the circumstances of the particular situation or the conduct of the parties.").

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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John A. Dooley, Associate Justice

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James L. Morse, Associate Justice