

**IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION**

CARL O. WUESTEHUBE,

CASE NO. 14CVF-07-7589

APPELLANTS,

JUDGE HORTON

VS.

OHIO REAL ESTATE COMMISSION,

APPELLEE.

DECISION AND ENTRY

AFFIRMING THE ADJUDICATION ORDER OF JULY 15, 2014

HORTON, J.

The matter before the Court is the administrative appeal filed by Carl Wuestehube (Appellant) on July 22, 2014. Appellant named the Ohio Real Estate Commission. (Appellee). For the reasons that follow, this Court **AFFIRMS** the Appellee's Adjudication Order of July 15, 2014.

I. FACTS:

A) Procedural History:

The Appellant filed a Notice of Appeal with this Court on July 22, 2014. The Appellant is an individual who is not an attorney nor does he hold a real estate license in the State of Ohio. Appellant contested the findings of the Appellee. Appellee filed a Motion to Dismiss the appeal asserting that it was a nullity having been filed by a non-lawyer. This Court granted the motion as to the corporation but not as to the individual.

The Appellant titled his Notice of Appeal – "Special Appearance". Appellant claimed that the Order of July 15, 2014 was not supported by reliable, probative, and substantial evidence

and is not in accordance with law. However the Appellant also asserted that there was no personal jurisdiction.

The parties have briefed the issues.

B) FACTS ESTABLISHED AT ADMINISTRATIVE LEVEL:

The Certified Record shows that the Appellant was served with notice of the administrative action that was proposed to be taken against him. As such he was given the opportunity to utilize the administrative process to defend himself against the claims. However, the Appellant did not actively participate in the administrative process.

The Appellant did submit a letter to the Appellee during the investigative process. It was dated August 3, 2013. It was signed by the Appellant and in that letter he acknowledged receipt of the Appellee's complaint. (Cr.R. at page 127) That letter confirmed the Appellant's belief that he was not providing any 'Real Estate Service from me or my company'. No further action was taken by the Appellant until he filed this administrative appeal on July 22, 2014.

On May 1, 2014 the Appellee went forward and conducted a hearing. At the beginning of the hearing, the Hearing Officer acknowledged the fact that the Appellant had not requested the hearing nor did the Appellant seek the opportunity to present evidence. However, the Certified Record showed that the Appellant was given the option to request a hearing. The hearing then commenced and Investigator Bryan Reardon testified.

Mr. Reardon testified as follows at page 18 of the hearing transcript:

11 | **A. Mr. Wuestehube has had some previous**
12 | **interaction with the Division. Mr. Khucklace**
13 | **(phonetic), my investigative supervisor, followed up**
14 | **on Tri Star Realty and Mr. Carl Wuesethube, and we**

15 | found that he was continuing actions of unlicensed
16 | activity within the state of Ohio. Therefore, a case
17 | was opened, shortly after, for unlicensed activity on
18 | both entities.

Mr. Reardon was asked to explain the Appellee's position on flat fee brokering in Ohio. He read the Appellee's position on that matter into the record during the hearing. (Hr. Tr. p. 24, 6 – 9) It was the position of the Appellee that a “broker offering a flat fee listing is engaging in activity for which a license is required and therefore must comply with all provisions of the license law”.

Mr. Reardon was then asked to go – property by property – to establish the violations assessed to the Appellant. He complied with that request and established the violations that were summarized in his spreadsheet marked as Exhibit S. The listing agreements established by the testimony of Mr. Reardon indicated that a flat fee was paid. (Hr. Tr. p 30, l., 15 – 22) That evidence was produced over and over again at the hearing.

The Hearing Officer reviewed the testimony and evidence and he issued his Findings of Fact and Conclusions of Law. That document was served upon the Appellant. The matter went before the Appellee's Board and the Appellee's Board issued a fine of \$1,000 per established occurrence.

The Decision and fines where contained in the Adjudication Order of July 15, 2014. Appellant filed his Brief on October 20, 2014. The Appellee filed its Brief on November 3, 2014. No reply was received on or before November 10, 2014. This matter is ready for review.

II. STANDARD OF REVIEW

The Appellant has asserted that the Adjudication Order issued by the Appellee was not supported by reliable, probative, and substantial evidence and was in error of

law. Revised Code §119.12 and the multitude of cases addressing that section govern this Court's review of an order of an administrative agency, such as the Appellee. An often cited case is that of *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St. 2d 108, 407 N.E.2d 1265. The *Conrad* decision states that in an administrative appeal filed pursuant to R.C. §119.12, the trial court must review the agency's order to determine whether it is supported by reliable, probative and substantial evidence and is in accordance with law.

The Court states at pages 111 and 112 that:

In undertaking this hybrid form of review, the Court of Common Pleas must give due deference to the administrative resolution of evidentiary conflicts. For example, when the evidence before the court consists of conflicting testimony of approximately equal weight, the court should defer to the determination of the administrative body, which, as the fact-finder, had the opportunity to observe the demeanor of the witnesses and weigh their credibility. The findings of the agency are not conclusive. Where the court, in its appraisal of the evidence, determines that there exist legally significant reasons for discrediting certain evidence relied upon by the administrative body, the court may reverse, vacate or modify the administrative order. Where it appears that the administrative determination rests upon inferences improperly drawn from the evidence adduced, the court may reverse the administrative order.

The *Conrad* case has been cited with approval numerous times. (See, also *City of Hamilton v. State Employment Relations Bd.*(1994), 70 Ohio St. 3d 210, 638 N.E.2d 522; *Ohio Historical Soc. v. State Emp. Relations Bd.* (1993), 66 Ohio St. 3d 466, 471, 613 N.E.2d 591)

Although a review of applicable law is *de novo*, the reviewing court should defer to the agency's factual findings. (See, *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 614 N.E.2d 748. Rehearing denied by: *Pons v. State Medical Bd.* (1993), 67 Ohio St. 3d 1439, 617 N.E.2d 688. See, also *VFW Post 8586 v. Ohio Liquor Control Comm.* (1998), 83 Ohio St.3d 79, 82, 697 N.E.2d 655) The basis for such due deference is the agency's expertise in interpretation of the technical and ethical requirements of a

profession provided by its administrative body. (See, *Joudah v. Ohio Dept. of Human Serv.* (1994), 94 Ohio App. 3d 614, 617, fn.2, 641 N.E.2d 288)

As indicated, the Appellant has now claimed that the Adjudication Order of the Appellee was not supported by the evidence. The quantum and quality of evidence to support the order must be evidence that is reliable, probative, and substantial. The case of *Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St. 3d 570, 589 N.E.2d 1303 is often cited for its explanation of the terms reliable, probative, and substantial in a Chapter 119 application. Justice Wright applied the following definitions.

- (1) "Reliable" evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true.
- (2) "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue.
- (3) "Substantial" evidence is evidence with some weight; it must have importance and value.

Hence, the standard for an R.C. §119.12 appeal is well defined in the law. From within this legal framework this Court will now review the arguments of the parties.

III. ANALYSIS

A) R.C. §119.12 Review:

The Appellant asserted that there was no evidence to support the Appellee's Adjudication Order. In his Brief, the Appellant – for the first time – presented arguments and alleged evidence to show his ultra limited role in facilitating the internet placement of the listings in question. The Appellant asserted that his arguments established that he was not acting in a way that could be viewed as a broker by the Appellee.

The Appellee asserted that the evidence at the hearing established its findings and fines. Furthermore, the Appellee noted that it was too late for the Appellant to bring forth evidence at this time. The Appellee argued that the Appellant could have attempted to establish his

arguments during the administrative process. Appellant's failure to do so led to his failure to exhaust the administrative remedies. Furthermore, the Appellee asserted that R.C. §119.12 gave the Appellant the opportunity to request the opportunity to submit additional evidence, but the Appellant failed to move for that relief. Finally, the Appellee asserted even if the Appellant would have ask for the right to supplement the record, the nature of the evidence Appellant advanced was in fact known to him at the time of the administrative hearing. Hence, the Appellant would not have been able to satisfy his burden to get his evidence before this Court.

After a review of the hearing transcript, this Court can only come to the conclusion that the Adjudication Order was in fact supported by the reliable, probative, and substantial evidence. The undisputed testimony at the administrative hearing established that the Appellant engaged in multiple flat fee listing agreements with Ohioans while the Appellant did not have a license in this state. The Appellant attempted to try and explain his conduct in his Brief, but that evidence is not admissible on appeal.

The Hearing Officer's findings of fact and conclusions of law support the Board's decision. The Hearing Officer listen to the evidence produced and reviewed the documents in support. The Hearing Officer concluded that there was a number of violations of R.C. §4735.02 violation. As such, pursuant to R.C. §119.12 the Adjudication Order should be affirmed.

B) Lack of Personal Jurisdiction:

The other issue asserted by the Appellant was the Appellee's authority to regulate his activities. The Appellant asserted that the agency – and by extension – this Court lacked personal jurisdiction to regulate the Appellant's conduct.

The question of jurisdiction is a legal one. Please note the following from *In re Blue Flame Energy Corp.*, 2006-Ohio-6892 (10th Dist.) at ¶13:

Whether a forum can claim jurisdiction over an individual is a question of law, which this court reviews under the de novo standard. *Joffe v. Cable Tech, Inc.*, 163 Ohio App.3d 479, 2005-Ohio-4930, 839 N.E.2d 67, at ¶ 10. See, also, *AmCare, Inc. v. Ohio Dept. of Job & Family Servs.*, 161 Ohio App.3d 350, 2005-Ohio-2714, 830 N.E.2d 406, at ¶ 10 (appellate review of an administrative decision presenting a question of law is de novo). The party who asserts the existence of personal jurisdiction has the burden of establishing that jurisdiction once the opposing party challenges it. *Klug v. Trivison* (2000), 137 Ohio App.3d 838, 842, 739 N.E.2d 1243.

Normally jurisdiction over a nonresident calls for a two step process. Please note the following case law:

In deciding whether Ohio has jurisdiction over nonresident defendants, a court must engage in a two-step analysis. *U.S. Sprint Communications Co. Ltd. Partnership v. Mr. K's Foods, Inc.* (1994), 68 Ohio St.3d 181, 183, 624 N.E.2d 1048; *Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc.* (1990), 53 Ohio St.3d 73, 75, 559 N.E.2d 477. The court must first determine whether Ohio's long-arm statute, R.C. 2307.382, and the applicable Rule of Civil Procedure, Civ.R. 4.3(A), confer jurisdiction. *U.S. Sprint Communications* at 184, 624 N.E.2d 1048; *Kentucky Oaks Mall Co.* at 75, 559 N.E.2d 477. Second, the court must determine whether granting jurisdiction would deprive the nonresident of due process of law under the Fourteenth Amendment to the United States Constitution. *Id.*

But this is an administrative appeal:

In the case at bar, we need not engage in the first step of the analysis because neither the long-arm statute nor the Rules of Civil Procedure apply to regulatory actions. The long-arm statute designates when "[a] court may exercise personal jurisdiction over a person * * * as to a cause of action." (Emphasis added.) R.C. 2307.382(A). As this matter neither originated in a court nor through a cause of action, the long-arm statute, by its very terms, is inapplicable. The Rules of Civil Procedure also apply to courts, not adjudicatory proceedings before administrative agencies. *Kathmandu, Inc. v. Bowland* (Sept. 28, 1999), Franklin App. No. 99AP-36, 2000 WL 192554 ("The proceeding before the commission was administrative in nature and, therefore, the civil rules are not applicable"); *Vaughn v. State Med. Bd.* (Aug. 6, 1991), Franklin App. No. 90AP-1160, 1991 WL 150950 ("[T]he Civil Rules are not binding in adjudicatory proceedings before administrative agencies"). Accordingly, we must focus upon whether the Division's exercise of jurisdiction over appellees infringed upon their right to due process.

The Due Process Clause protects an individual from being subject to the binding judgments of a forum in which he has not established any meaningful contacts, ties, or relations. *Burger King Corp. v. Rudzewicz* (1985), 471 U.S. 462, 471-472,

105 S.Ct. 2174, 85 L.Ed.2d 528, quoting *Internatl. Shoe Co. v. Washington* (1945), 326 U.S. 310, 319, 66 S.Ct. 154, 90 L.Ed. 95. Due process is satisfied if a forum has either specific or general jurisdiction over a nonresident defendant. *Helicopteros Nacionales de Colombia, S.A. v. Hall* (1984), 466 U.S. 408, 414-415, 104 S.Ct. 1868, 80 L.Ed.2d 404, fns. 8 and 9. Specific jurisdiction turns upon the relationship between the defendant, forum, and litigation, and exists only when the litigation at hand arises out of or relates to a defendant's "minimum contacts" with the forum. *Burger King* at 472, 105 S.Ct. 2174, 85 L.Ed.2d 528. General jurisdiction, on the other hand, is based upon "continuous and systematic" contacts with the forum that are unrelated to the underlying litigation. *Helicopteros* at 415, 104 S.Ct. 1868, 80 L.Ed.2d 404, fn. 9.

Regardless of these classifications, jurisdiction is proper only when a party "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Burger King* at 475, 105 S.Ct. 2174, 85 L.Ed.2d 528, quoting *Hanson v. Denckla* (1958), 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283. The "purposeful availment" requirement—the constitutional touchstone of personal jurisdiction—ensures that a party will only be hauled into a jurisdiction where it has either deliberately engaged in significant activities or created continuing obligations between itself and residents of the state. *Burger King*, 471 U.S. at 475-476, 105 S.Ct. 2174, 85 L.Ed.2d 528. *Id.* at ¶¶14 – 17. *Id.* at ¶¶ 15 – 17.

The Appellee asserted that the Appellant purposely availed himself of this forum. To establish that assertion, the Appellee showed how the Appellant directly communicated with the individual Ohio property owners/sellers via email. (Cr. Tr. at 147, 162, 200-205, 250-255, 303-204, etc.) The Appellee further established that the Appellant conducted business and entered into numerous contracts with Ohio sells.

The three criteria for personal jurisdiction is as follows:

- 1) The respondent must purposely avail itself of the privilege of acting in the forum state or causing a consequence in the forum state;
- 2) The litigation must arise from the respondent's activities in the forum state; and
- 3) The respondent must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable. *In re Blue Flame Energy Corp.*, 2006 Ohio 6892 (10th Dist.) ¶18.

From a review of the evidence adduced during the administrative process, this Court holds that the three criteria for personal jurisdiction has been met. Hence, the Appellee and this Court have jurisdiction over the Appellant.

IV. DECISION

This Court **AFFIRMS** the Appellee's Adjudication Order of July 15, 2014.

THIS IS A FINAL AND APPEALABLE ORDER

Judge Timothy Horton

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Franklin County Court of Common Pleas

Date: 01-29-2015
Case Title: CARL O WUESTEHUBE ET AL -VS- OHIO REAL ESTATE
COMMISSION
Case Number: 14CV007589
Type: DECISION/ENTRY

It Is So Ordered.

A blue circular seal of the Franklin County Court of Common Pleas, Ohio, is centered on the page. The seal features a sunburst in the center and the text "FRANKLIN COUNTY OHIO" around the perimeter. A banner at the bottom of the seal reads "ALL THINGS ARE POSSIBLE". Overlaid on the seal is a handwritten signature in black ink, which appears to be "Timothy S. Horton".

/s/ Judge Timothy S. Horton

Court Disposition

Case Number: 14CV007589

Case Style: CARL O WUESTEHUBE ET AL -VS- OHIO REAL
ESTATE COMMISSION

Case Terminated: 10 - Magistrate

Final Appealable Order: Yes