

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

LARRY KATZ,	:	
	:	
APPELLANT,	:	CASE NO. 17 CVF 1487
	:	
vs.	:	JUDGE KIMBERLY COCROFT
	:	
OHIO REAL ESTATE	:	
COMMISSION, OHIO DEPARTMENT	:	
OF COMMERCE, DIVISION OF	:	
REAL ESTATE & PROFESSIONAL	:	
LICENSING	:	
	:	
APPELLEE.	:	

DECISION AND ENTRY

Cocroft, J.

This case involves the R.C. 119.12 administrative appeal filed by Appellant, Larry Katz, from an Ohio State Real Estate Commission (“Commission”) Adjudication Order dated January 25, 2017. The Commission adopted in part, and rejected in part as provided in Exhibit A, the findings of fact and conclusions of law of the Hearing Examiner, Richard Brown. The Commission concluded, in relevant part:

Larry Katz is found to have violated Revised Code 4735.18 as set forth in Schedule A of the Notification of Formal Hearing. The penalty imposed is as follows:

- Count 1 Revocation of the license of the Respondent
- Count 2 Revocation of the license of the Respondent

January 25, 2017 Adjudication Order.

Exhibit A of the January 25, 2017 Adjudication Order, provides as follows:

The Commission rejects the conclusion in the first paragraph of page 13 and rejects the conclusion of the last paragraph of page 14. The Commission finds that the conduct of the Respondent constitutes a violation of R.C. 4735.18(A)(6) as it incorporates RC 4735.02 for the following reasons:

Respondent operated without the supervision or guidance of a broker and therefore he was acting like a broker.

There was no oversight from the brokers which allowed Respondent to do whatever the Respondent wanted to do.

Respondent advertised as Best Rentals not in the name of the brokerage (Ebner)

Evidence shows there were property management services provided by Best Rentals between April of 2012 through 2014.

The trust account was held in the name of Best Realty but required to be held by the brokerage firm. The trust account was completely away from the brokerage.

Exhibit A of the January 25, 2017 Adjudication Order.

On February 9, 2017, Appellant filed a Notice of Appeal. On March 20, 2017, the Court granted Appellant's unopposed motion to stay.

STANDARD OF REVIEW

R.C. § 119.12 sets forth the standard of review a common pleas court must follow when reviewing an administrative appeal. R.C. 119.12 provides, in pertinent part:

The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative and substantial evidence and is in accordance with law.

In *Our Place* the Ohio Supreme Court provided the following definition of reliable, probative and substantial evidence as:

(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.

Our Place, Inc. v. Ohio Liquor Comm., 63 Ohio St.3d 570, 571, (1992).

Once the common pleas court has determined that the administrative agency's order is

supported by reliable, probative and substantial evidence, the court must then determine whether the order is in accordance with law. See R.C. § 119.12. The reviewing court cannot substitute its judgment for the agency’s decision where there is some evidence supporting the decision. See *Harris v. Lewis*, 69 Ohio St. 2d 577, 579, (1982); see also *University of Cincinnati v. Conrad*, 63 Ohio St. 2d 108 (1980).

APPELLANT’S ASSIGNMENTS OF ERROR

Appellant sets forth the following legal issues and errors in his brief:

- B. THE ADJUDICATION ORDER IS INVALID AND NOT IN ACCORDANCE WITH THE LAW.
- C. THE COMMISSION’S DECISION THAT KATZ VIOLATED R. C. CHAPTER 4735 IS CONTRARY TO LAW AND IS NOT SUPPORTED BY RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE.
 - 1. Charge 1-Acting Like a Broker Without a Broker’s License.
 - a. The Substance of Charge 1 is Inconsistent with Ohio Law and Not Supported by the Evidence in the Record.
 - b. Charge 1 is Procedurally Improper Under Ohio Law.
 - 2. Charge 2-Failure to Collect Deposits, Payments and/or Management Fees in the Name of and/or With the Consent of the Broker.
- D. THE COMMISSION’S DECISION AND ADJUDICATION ORDER VIOLATE KATZ’S RIGHT TO DUE PROCESS.

LAW AND ARGUMENT

A. Appellant’s Jurisdictional Challenge.

Appellant argues that pursuant to R.C. 4735.32(A)(1), the Division’s investigation did not commence within three years of the alleged violations and thus, is time barred. Appellant asserts that the Adjudication Order is invalid per se and must be reversed. R.C. 4735.32(A)(1) provides, in pertinent part, that:

The Ohio real estate commission or the superintendent of real estate may commence, at any time within three years from the date on which an alleged violation of a provision of this or another chapter of the Revised Code occurred, any investigation that relates to the conduct of a licensed real estate broker, real estate salesperson, foreign real estate dealer, or foreign real estate salesperson, that is authorized pursuant to section 1349.11, 4735.051, 4735.052, or 4735.18, or any other section of the Revised Code, and that is for purposes of determining whether a licensee, unlicensed person, or unlicensed entity has violated a provision of this or another chapter of the Revised Code and whether, as a consequence, a licensee's license should be suspended or revoked, or other disciplinary action taken, as provided in this or another chapter of the Revised Code. If such an investigation is not commenced within the three-year period, it shall be barred, and neither the commission nor the superintendent shall suspend or revoke the license of any licensee, or take other disciplinary action against any licensee, unlicensed person, or unlicensed entity because of the alleged violation of a provision of this or another chapter of the Revised Code that could have been the subject of the barred investigation.

The Ohio General Assembly intended the time frames set forth in R.C. 4735.32 to be jurisdictional in nature. *Boggs v. Ohio Real Estate Comm.*, 2009-Ohio-6325; see also *Wightman v. Ohio Real Estate Comm.*, 2011-Ohio-1816. The record demonstrates that on or about April 9, 2015, the Division sent correspondence to Appellant advising him that pursuant to R.C. 4735.051, he was the subject of a complaint filed with the Division on March 25, 2015. The Division's Schedule A alleges that Appellant's statutory violations occurred between April 2012 and June 2014, although the Division's correspondence references a transaction date of "02/19/08," the initial effective date of the property management agreement (PMA) entered into between Denise Ramos-Laboy and Appellant's company, Best Rentals, LLC.

R.C. 4735.32(A)(2) provides as follows:

[f]or purposes of division (A)(1) of this section, if an investigation that is authorized by section 4735.051 of the Revised Code is involved, it shall be considered to be commenced as of the date on which a person files a complaint with the division of real estate.

The record is undisputed that the complaint in the underlying case was filed by Ms. Ramos-Laboy on March 25, 2015. R. 529. Thus, the date of the commencement of the Division's

investigation was March 25, 2015, pursuant to R.C. R.C. 4735.32(A)(2). This Court concludes as a matter of law that the investigation occurred within the three year statutory time period.

Upon review, this Court concludes as a matter of law that Appellee had jurisdiction, and adjudicated Appellant's case within the statutory time frames. R.C. 4735.051; R.C. 4735.32. Accordingly, Appellant's jurisdictional challenge is not well-taken, and this legal argument is hereby **OVERRULED**.

B. Appellant's Due Process Claim.

Appellant argues that Appellee violated his due process rights. In asserting that the Commission violated his due process rights, Appellant has not identified in his brief, specifically, what article/section of the United States and/or Ohio Constitutions were violated. Thus, this Court will address these arguments in a general sense, as set forth by Appellant. Appellant's Brief, pgs. 13-15.

The record substantiates that Appellant was apprised of the charges against him. The June 17, 2016 Notification of Formal Hearing, Schedule A, provides, in pertinent part:

You, Larry Katz, a licensed real estate salesperson (License # 2004019192), did the following between approximately April of 2012 and approximately June of 2014 with respect to the property located at 4127 Jonquil Street, Columbus, Ohio (subject property):

1. You acted like an Ohio real estate broker without an Ohio real estate broker's license when you failed to perform property management services for the subject property through Ebner Real Estate Mgt., Inc., the brokerage you were licensed with at the time you provided the property management services. This conduct constitutes a violation of Ohio Revised Code Section 4735.18(A)(6), misconduct, as that section incorporates Ohio Revised Code Section 4635.02 which provides that no person shall act as a real estate broker without first being licensed under Chapter 4735.
2. During the course of your managing the subject property, you failed to collect deposits, payments and/or management fees in the name of and/or with the consent of the licensed real estate broker with whom you were licensed at that time. This conduct constitutes a violation of Ohio Revised Code Section 4735.18(A)(6), misconduct, as that section incorporates Ohio Revised Code

Section 4735.21 which provides that no real estate salesperson shall collect any money in connection with any real estate whether as a commission, deposit, payment, rental, or otherwise, except in the name of and with the consent of the licensed real estate broker with whom they are licensed.

Under Ohio law, a statute enacted by the General Assembly enjoys a strong presumption of constitutionality. *Coldwell Banker Residential Real Estate Services, Inc. v. Bishop*, 26 Ohio App. 3d 149 (1985). Real estate licensees, like attorneys and physicians, are subject to government regulation. The state has a valid interest in promoting character, honesty, and intellectual competence of real estate licensees. The General Assembly established the Ohio Real Estate Commission, and it is comprised of experts with the responsibility of regulating the industry and adopting canons of ethics. R.C. 4735.03. Like other professionals, a person holding a real estate license is held to a higher standard of competency and fairness than is a lay member of the public in the market place.

Thus, obtaining and maintaining a real estate license in Ohio is a privilege, not a right. *Kiko v. Ohio Dept. of Commerce*, 48 Ohio St.3d 74 (1990). It is well established that the state has a valid interest in licensing and maintaining the licenses of realtors who are not involved in criminal behavior; and promoting the character, honesty and intellectual competence of persons holding real estate licensees.

R.C. 4735.18(A) provides that a sanction shall be imposed for any statutory violation. A reviewing court may not modify a sanction authorized by statute. The available sanctions that the Commission shall impose are set forth in R.C. 4735.051(I):

The commission may impose the following sanctions upon a licensee for a violation of section 4735.18 of the Revised Code:

- (1) Revoke a license issued under Chapter 4735. of the Revised Code;
- (2) Suspend a license for a term set by the commission;
- (3) Impose a fine, not exceeding two thousand five hundred dollars per violation;
- (4) Issue a public reprimand;

(5) Require the completion of additional continuing education course work. Any continuing education course work imposed pursuant to this section shall not count toward the continuing education requirements set forth in section 4735.14 of the Revised Code. All fines imposed pursuant to division (I)(3) of this section shall be credited to the real estate recovery fund, which is created in the state treasury under section 4735.12 of the Revised Code.

As stated, there is a strong presumption of constitutionality that cloaks legislative acts. Moreover, any assertion of a legislative act's incompatibility with a constitutional provision must be established beyond a reasonable doubt before the legislation is deemed as unconstitutional. See *Pack v. Cleveland*, 1 Ohio St. 3d 129, 134 (1982); see also *State ex rel Rear Door Bookstore v. Tenth Dist. Court of Appeals*, 63 Ohio St. 3d 354 (1992).

The phrase "due process" expresses the requirement of "fundamental fairness." In defining the process necessary to ensure "fundamental fairness," the United States Supreme Court has recognized that the clause does not require that the procedures used to guard against an erroneous deprivation be so comprehensive as to preclude any possibility of error, and in addition, the Supreme Court has emphasized that the marginal gains from affording an additional procedural safeguard may be outweighed by the societal cost of providing such a safeguard. Thus, an Appellant must make a showing of "identifiable prejudice." See *Ghassan Haj-Hamed v. State Medical Board*, 2007 Ohio App. LEXIS 2335.

Upon review, the record demonstrates that once Appellant was placed on notice, he was given an opportunity to request a hearing. The record reflects that Appellant had an opportunity to be heard at a September 2, 2016 hearing. The record reflects that Appellant was represented by counsel at the September 2, 2016 hearing, and that counsel actively participated in the examination of witnesses. The record demonstrates that Defendant submitted several exhibits. Clearly, there is no issue regarding procedural due process because the record demonstrates that Appellant had notice, an opportunity to be heard, and was represented by counsel at all stages of this litigation.

Moreover, the record demonstrates that Appellee, as a matter of law, complied with the jurisdictional time frame set forth in R.C. 4735.32.

Substantive due process is a principle that allows courts to protect rights deemed fundamental from government interference. Thus, substantive due process aims to protect individuals against policy enactments that exceed the limits of governmental authority. Appellant seems to be asserting that he has a fundamental right to an Ohio real estate license, but has not provided any legal authority to support his argument. However, case law demonstrates that obtaining and maintaining a real estate license in Ohio is a privilege, not a right, and clearly not a fundamental right. *Kiko*, supra.

The summary set forth in the October 24, 2016 Findings of Fact and Conclusions of Law of Richard Brown, the Administrative Hearing Examiner, provide as follows, in relevant part:

The evidence in this matter demonstrates by a preponderance that Respondent’s conduct violated 4735.18(A)(6), misconduct, as that section incorporates R.C. 4735.21, as charged in paragraph 2 of Schedule A of the Notification of Formal Hearing to Respondent.

October 24, 2016 Findings of Fact and Conclusions of Law, Summary.

Appellant asserts that the Commission’s actions in rejecting the “findings” of the hearing examiner violate his right to due process. However, the record demonstrates that the Commission did not reject the “findings” of the hearing examiner, but rather the Commission rejected the “*conclusion* in the first paragraph of page 13” and rejected the “*conclusion* of the last paragraph of page 14.” The conclusions rejected by the Commission are set forth in the following paragraphs:

Respondent’s second procedural argument was that the Division is limited to the penalty or sanction set forth in R.C. 4735.052 when claiming a violation of R.C. 4735.02 by a licensee. This argument is moot, however, as the undersigned Hearing Examiner concludes that Respondent did *not* violate R.C. 4735.02 as alleged in paragraph 1 of the Division’s Schedule A, so Respondent’s procedural argument pertaining to that allegation

is moot given the substantive failure of the Division’s claim, as set forth below.

Consequently, Respondent did *not* act as an unlicensed real estate broker as alleged in paragraph 1 of the Division’s Schedule A; instead, when he conducted his property management activities, he was acting as a “real estate person,” pursuant to R.C. 4735.01(C), for which he was, at all times relevant in this matter, licensed. Respondent did not violate R.C. 4735.02, and therefore, his actions did not constitute misconduct under R.C. 4735.18(A)(6).

In arguing his position, Appellant provided the Commission with a settlement agreement in the case of another license holder who, according to Appellant, had the “*exact same charges*” and received a 14-day suspension from the Commission.

Clearly, Appellant’s argument is not a due process argument, but appears to be grounded as an equal protection argument. However, Appellant does not cite to the 14th amendment or set forth an equal protection argument in his brief. Thus, in comparing another license holder’s situation with his, Appellant appears to be asserting that he was treated differently.

Appellant has tangentially asserted an equal protection argument, but fails to identify his protected class. Appellant seems to assert that he was denied “due process” (equal protection), under the law since he was treated differently from other alleged “similarly situated” license holders. Assumably, the “class” that Appellant defines as “similarly situated” appear to be persons who have violated Ohio law and hold real estate licenses in the state of Ohio. Appellant has not provided any case law or other legal authority to support his contention that this is a protected class of individuals who are afforded 14th amendment protection.

A thorough review of the record demonstrates that Appellant was not denied “due process” and/or equal protection under the law. The 14th amendment equal protection clause requires the states to give similarly situated persons or classes of people similar treatment under the law. Equal protection does not require that all persons be dealt with identically, but it does

require that any distinction made have some relevance to the purpose for which the classification is made. *Baxstrom v. Herold* 383 U.S. 107, 111 (1966). Equal protection means that legislation that discriminates must have a rational basis for doing so. If the legislation affects a fundamental right or involves a suspect classification, then the Court would be required to apply a strict scrutiny test.

Under the facts *sub judice*, Appellant has not asserted a fundamental right nor has he asserted that he belongs to a suspect class requiring a strict scrutiny analysis or an intermediate level of scrutiny. Therefore the rational basis analysis would apply. When the rational basis analysis is applied, great deference is paid to the state, with the only requirement being that the state show that the differential treatment is rationally related to some legitimate state interest. See *Conley v. Shearer*, 64 Ohio St. 3d 284, 289 (1992).

Under the facts before the Court, it is clear that the state has a legitimate interest in protecting the public from licensed realtors who violate state law. Additionally, the Commission only grants licenses to persons who, in its discretion, are qualified, have met all the statutory requirements for such licensure, and adhere to all regulations and state laws. Thus, Appellant's assertion lacks any basis in fact demonstrating that the Board intentionally discriminated against him because of his membership in a particular class. *Meyers v. Columbus Civil Serv. Comm.*, 2008-Ohio-3521.

Even if Appellant appeared to be similarly situated to other individuals/entities whose cases previously came before the Commission, the Commission is under no obligation to treat all individuals/entities the same. The facts and circumstances of each case must be considered individually. In respect to each case, the Commission determines the facts, weighs the credibility of each witness independently, judges the integrity of that person, considers the

evidence, and makes a decision on that basis.

Appellant also asserts that the Commission's January 25, 2017 Adjudication Order constitutes an abuse of power and violates his due process rights. Appellant asserts in his brief the following:

Beyond the incomprehensible grounds for the rejection of the hearing officer's findings, the Commission further exploited Katz's due process rights by its refusal to consider its own recent and directly on point precedent.

Appellant does not support this argument with any case law that establishes that the Commission is statutorily mandated to follow the "precedent" of its own prior decisions, which clearly is a misstatement of the law. Moreover, Appellant does not support his contention by citing to any Ohio Supreme Court case holding, Tenth District Court of Appeals case holding, or any other Ohio appellate court holding. As previously stated, the facts and circumstances of each case must be considered individually. In respect to each case, the Commission determines the facts, weighs the credibility of each witness independently, judges the integrity of that person, considers the evidence, and makes a decision on that basis.

This Court is not persuaded by Appellant's vague constitutional arguments asserting violations of procedural and/or substantive due process. Thus, these assignments of error are not well-taken and are hereby **OVERRULED**.

C. There is reliable, probative and substantial evidence supporting the Ohio Real Estate Commission 's January 25, 2017 Adjudication Order.

This Court concludes as a matter of law that there is reliable, probative and substantial evidence to support that Appellant's conduct violated R.C. 4735.02 and R.C. 4735.21. (September 2, 2016 Transcript): Tr. 25, 26, 30, 31, 38, 51 95, 98, 102. The record demonstrates that the Commission is the ultimate decision maker and complied with R.C. 119.09. January 25, 2017 Adjudication Order, Exhibit A.

A common pleas court’s review of an administrative order in an R.C. 119.12 appeal involves some deference to the trier-of-facts’ determinations. The common pleas court should normally defer to the determination of the administrative agency as to the weight to be given the evidence and the credibility of the witnesses. Accordingly, this Court concludes as a matter of law that Appellant’s arguments addressing the issue as to whether the January 25, 2017 Adjudication Order is supported by reliable, probative and substantial evidence are not well-taken and are hereby **OVERRULED**.

Accordingly, Appellant’s legal arguments and assignments of error are not well-taken and are hereby **OVERRULED**. This Court concludes as a matter of law that the January 25, 2017 Adjudication Order of the Department of Commerce, Division of Real Estate & Professional Licensing is supported by reliable, probative and substantial evidence. Moreover, this Court concludes that the January 25, 2017 Adjudication Order is in accordance with law and thus, is hereby **AFFIRMED**.

Rule 58(B) of the Ohio Rules of Civil Procedure provides the following:

(B) Notice of filing. When the court signs a judgment, the court shall endorse thereon a direction to the clerk to serve upon all parties not in default for failure to appear notice of the judgment and its date of entry upon the journal. Within three days of entering the judgment on the journal, the clerk shall serve the parties in a manner prescribed by Civ. R. 5(B) and note the service in the appearance docket. Upon serving the notice and notation of the service in the appearance docket, the service is complete. The failure of the clerk to serve notice does not affect the validity of the judgment or the running of the time for appeal except as provided in App. R. 4(A).

THE COURT FINDS THAT THERE IS NO JUST REASON FOR DELAY. THIS IS A FINAL APPEALABLE ORDER. Pursuant to Civil Rule 58, the Clerk of Court shall

serve notice upon all parties of this judgment and its date of entry. The Order of Stay issued by this Court on March 20, 2017 is hereby lifted.

IT IS SO ORDERED.

Copies to all parties registered for e-filing

Franklin County Court of Common Pleas

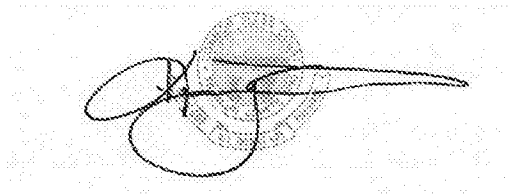
Date: 06-29-2017

Case Title: LARRY KATZ -VS- OHIO REAL ESTATE COMMISSION

Case Number: 17CV001487

Type: ENTRY

It Is So Ordered.

A handwritten signature in black ink, appearing to read 'K. Cocroft', is written over a circular embossed seal. The seal is partially obscured by the signature and has a textured, dotted appearance.

/s/ Judge Kimberly Cocroft

Court Disposition

Case Number: 17CV001487

Case Style: LARRY KATZ -VS- OHIO REAL ESTATE COMMISSION

Case Terminated: 10 - Magistrate

Final Appealable Order: Yes