

NO. 09-103233-AS

IN THE SUPREME COURT OF THE STATE OF KANSAS

STEWART TITLE OF THE MIDWEST, INC.
d/b/a STEWART TITLE OF KANSAS CITY,
Plaintiff,

v.

REECE & NICHOLS REALTORS, INC.,
Defendant/Appellee,

And

PATRICK E. MCGRATH,
Defendant/Appellant.

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS
HONORABLE JAMES F. VANO
DISTRICT COURT CASE NO.: 07CV05103

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REPLY TO RAN’S ARGUMENTS AND AUTHORITIES

I. REPLY TO RAN’S ARGUMENT THAT IT IS STATUTORILY PROHIBITED FROM PAYING A COMMISSION TO MCGRATH.

A. The parties agree that the standard of review is de novo.

B. Reply to RAN’s interpretation of KREBSLA as it applies to RAN. (RAN’s brief, p. 5).

RAN alleges that K.S.A. 58-3062 operates to statutorily prohibit it from participating in a commission payment to McGrath. This is “the heart of RAN’s argument.” RAN’s brief, p. 7. The plain language of KREBSLA, however, does not support RAN’s position. Nor do the individual statutory sub-sections (58-3062(a)(10) and 58-3062(c)(1)), the sole statutory authority relied upon by RAN, support its interpretation of the Act.

K.S.A. 58-3034 through 58-3076 is known as the real estate brokers’ and salespersons’ license act” (KREBSLA). K.S.A. 58-3035 provides the definitions for terms of art that are used by the Act. K.S.A. 58-3037 provides exemptions to KREBSLA, specifying that “the provisions of this Act shall not apply to: . . . services rendered by an attorney licensed to practice in this state in performing such attorney’s professional duties as an attorney.”

K.S.A. 58-3062(a)(10) provides that RAN shall not: “pay a commission or compensation to any person, not licensed under this Act, for performing any activity for which a license is required under this Act.” (Emphasis added). Here, the activities that McGrath engaged in were not activities for which a real estate license was required under the Act because “the provisions of this Act [do] not apply to

services rendered by an attorney licensed to practice in this state in performing such attorney's professional duties as an attorney." K.S.A. 58-3037(c). The legislature is generally presumed to intend its enactments to be read literally. *Jenkins v. City of Topeka*, 958 F.Supp. 556, *rev'd*, 136 F.3d 1274 (D. Kan. 1997). The legislative intent is unmistakable; KREBSLA does not apply to attorneys performing their professional duties.

RAN concedes that McGrath is exempt under the Act but claims that RAN would be subject to penalty for honoring that exception. K.S.A. 58-3062(a)(10), however, unambiguously states that payment of a commission or compensation is only prohibited when payment relates to conduct for which a license is required under the Act. McGrath is specifically exempt under the Act. Any reading of the statute which would require McGrath to be a real estate agent is nonsensical. "The legislature is presumed to intend that statutes be given reasonable construction so as to avoid unreasonable or absurd results." *Topkins v. Bise*, 259 Kan. 39, 910 P.2d 185 (1996).

Next, RAN argues that K.S.A. 58-3062(c)(1) bars RAN from participating in a commission payment to McGrath. RAN's argument here similarly misinterprets the statute and ignores the clear language of the Act. K.S.A. 58-3062(c)(1) provides that RAN shall not "pay a commission or compensation to any person for performing the services of an associate broker or salesperson unless such person is licensed under this Act and employed by or associated with the broker." (Emphasis added). Associate broker and salesperson are specifically defined: "'Associate broker' means an individual who has a broker's license and" K.S.A. 58-3035(c).

“‘Salesperson’ means an individual, other than an associate broker, who is employed by a broker . . .” K.S.A. 58-3035(p).

Neither RAN nor McGrath argue that McGrath was acting as an associate broker or a salesperson within the meaning of KREBSLA. By definition, McGrath simply is not an associate broker or a salesperson. Moreover, the stipulated facts before this Court are that McGrath was not acting as an associate broker or a salesperson, but rather was acting as an attorney for Lausier.

In cases involving statutory construction, courts are required to consider and construe together all parts of a statute in *pari materia*. *In re: Adoption of G.L.V.*, 286 Kan. 1034, Syl. ¶ 4, 190 P.3d 245, 246 (2008). “The purpose of the real estate brokers’ license act is to protect the public from the fraud, misrepresentation, and imposition of dishonest and incompetent persons.” *Thomas v. Jarvis*, 213 Kan. 671, 675, 518 P.2d 532, 537 (1974). Here, there are no allegations or even concerns of fraud, misrepresentation or incompetency. Indeed, the stipulated facts in this case are that “McGrath and Lausier [McGrath’s client and the purchaser of the real estate] had an attorney-client relationship and . . . Lausier is, and has always been, extremely satisfied with the services McGrath provided with respect to this real estate transaction.” (ROA, Vol. II, p. 270). Further, the regulations and rules specifically applicable to Kansas attorneys are sufficient to protect the public from fraud, misrepresentation, and the imposition of dishonest or incompetent attorneys. In searching for a reason why the legislature did not require ‘attorneys at law’ to also secure a real estate license, the opinion of Chief Judge Cardozo is particularly insightful. See McGrath’s Brief, p. 21.

If the legislature had intended to prohibit RAN from participating in a commission payment to an attorney exempt under the Act, then, the legislature could have so provided, in any number of different ways: (e.g., “*notwithstanding any provisions or exemptions to this Act, no attorney shall participate in a commission arrangement with any entity licensed under this act.*”); or (“*under no circumstances, irrespective of the exceptions to this Act, shall any licensee participate in a commission payment to any person or entity that is not licensed under this Act.*”); or (“*notwithstanding the exemptions to this Act, no licensed real estate broker or agent subject to this act shall participate in a commission payment with any person or entity not licensed under this act; it shall be unlawful for any entity licensed under this act to participate in any commission payment to any entity that is exempt from this act.*”). The simple fact that no such language appears in K.S.A. 58-3037(c), or elsewhere, demonstrates that the legislature specifically contemplated and intended that attorneys could receive commissions.

The fact that attorneys are entitled to receive commission compensation in connection with the sale of residential property is further evidenced by the negative implication of K.S.A. 58-3037(b). K.S.A. 58-3037(b) immediately precedes K.S.A. 58-3037(c) and explicitly provides that those who are authorized to perform KREBSLA related acts by sole reason of a power of attorney are not able to receive a commission. K.S.A. 58-3037(b) states that the Act shall not apply to: “any person who directly performs any of the acts within the scope of this Act with reference to property that such person is authorized to transfer in any way by power of attorney from the owner, provided that such person receives no commission or other

compensation, direct or indirect for performing any such act.” *Id.* (Emphasis added). The fact that the legislature did not include this type of language in K.S.A. 58-3037(c) directly demonstrates the legislature’s intent that attorneys may receive commission or other compensation for participating in a commission based real estate transaction. The well recognized rules of statutory construction support the negative inference to be drawn from the absence of K.S.A. 58-3037(b)’s prohibitory language. “In construing a statute, the maxim *expressio unius est exclusio alterius*, the mention or inclusion of one thing necessarily implies the exclusion of another” is certainly applicable here. *Degollado v. Gallegos*, 260 Kan. 169, Syl. ¶ 5, 917 P.2d 823, 824 (1996).

Furthermore, “the right to compensation is unaffected by licensing statutes which are inapplicable to persons or transactions involved. Consideration must be given to the express statutory exemptions.” 12 *C.J.S. Brokers* § 193, at 112. “The statute requiring licensing of real estate brokers must be construed with regard to the evil which it is intended to suppress and, as a criminal offense, must be strictly construed so as not to extend it to activities and transactions not intended by the legislature to be included.” *Furr v. Fonville Morisey Realty, Inc.*, 503 S.E.2d 401 (N.C. App. 1998).

Finally, K.S.A. 58-3062 concludes with subsection (g) which provides: “Nothing in this Act shall be construed to grant any person a private right of action for damages or to eliminate any right of action pursuant to other statues or common law.” (Emphasis added). The legislature specifically stated that K.S.A. 58-3062 (the section RAN solely relies upon) shall not be construed to eliminate any right of action

pursuant to other statutes or the common law. RAN's proffered interpretation would directly eliminate many rights. RAN's reading would eliminate the common law right to make and enforce contracts, the freedom to select a lawyer as a buyer's agent, and the statutory right to have a free and competitive market (K.S.A. 50-101).

Given the explicit language of the KREBSLA and the established rules of statutory construction, the Act cannot be reasonably interpreted to bar RAN from participating in a commission payment to McGrath.

C. Reply to RAN's interpretation of KREBSLA as it applies to McGrath (RAN's brief, p. 6).

RAN concedes that McGrath is exempt under KREBSLA but argues that RAN is not exempt and therefore cannot participate in a commission payment to an exempt entity (McGrath). As discussed immediately above, though RAN is regulated by K.S.A. 58-3034, *et seq.*, the Act itself does not prohibit RAN from participating in a commission payment to McGrath. Furthermore, under the stipulated facts, RAN would not have been making payment to McGrath. Originally, payment was to be made by Stewart Title, the escrow agent. See stipulated facts, ¶ 4; ROA Vol. II, p. 268. Therefore, RAN would not have been participating in payment to McGrath. Even now, RAN cannot be viewed as paying a commission to McGrath since payment will be made to McGrath solely by the clerk of the district court with the funds that have been paid into court.

D. Reply to RAN's argument that the payment of a commission by a non-exempt entity to an exempt entity is statutorily prohibited (RAN's brief, p. 7).

The “heart” of RAN’s argument is that KREBSLA expressly prohibits RAN from paying a commission to entities not licensed under KREBSLA. The only statutory prohibitions that RAN relies upon are K.S.A. 58-3062(a)(10) and 58-3062(c)(1), discussed above. There is nothing whatsoever in these two subsections that prohibits payment to McGrath. McGrath was not performing any activity for which a license was required under the Act (K.S.A. 58-3062(a)(10)). Nor was McGrath performing the services of an associate broker or salesperson as defined by the Act (K.S.A. 58-3062(c)(1)).

E. Reply to RAN’s argument that the payment of a commission to a non-licensee subjects RAN to statutory penalties (RAN’s brief, p. 7).

RAN argues that participating in a commission payment to McGrath would be a willful violation of KREBSLA and would subject RAN to imprisonment or fines or both. This argument is circular. It presupposes that a commission to McGrath, under the law of this state, would be a violation of KREBSLA. Because participation in a commission payment to McGrath does not violate KREBSLA, RAN’s concern that it would be subject to imprisonment and penalties is untenable.

Moreover, the rules of statutory construction well-known by this Court provide that a judicial interpretation of legislative statutes should avoid interpretations that result in unjust, absurd or unreasonable consequences. “The legislature is presumed to intend that statutes be given reasonable construction so as to avoid unreasonable or absurd results.” *Topkins v. Bise*, 259 Kan. 39, 910 P.2d 185 (1996). General rules of statutory construction require that this Court interpret the statute at issue to be in harmony with other statutes and legislative enactments. Here, RAN’s

proffered interpretation would be inconsistent with other Kansas statutes and RAN's proffered interpretation would be void as against public policy. ("To make or enter into any obligation or agreement of any kind [that shall bind RAN not to participate in a commission payment] so as to preclude free and unrestricted competition . . . [is] hereby declared to be against public policy, unlawful and void." See K.S.A. 50-101; McGrath's Brief at 13).

F. Reply to RAN's position that McGrath misapplies *Lambertz v. Builders, Inc.*, 183 Kan. 602, 331 P.2d 559 (1958) (RAN's brief, p. 8).

First, RAN points out that *Lambertz* is a case from the late 1950's. Presumably, RAN's intended inference is that *Lambertz* is no longer good law. Noteworthy, the law at the time, G.S. 1949, 67-1002, *et seq.* is extremely similar to the present law. Despite the different statutory number scheme, G.S. 1949, 67-1002, *et seq.* was the predecessor statute to the current law, K.S.A. 58-3034, *et seq.*

G.S. 1949, 67-1019 provided essentially that any person engaged in the real estate sales business had to be licensed in order to be compensated. K.S.A. 58-3038(a) provides substantially the same restrictions. G.S. 1949, 67-1002 defined "real estate broker," "real estate salesman," etc. and the definitions are extremely similar to the present definitions found in K.S.A. 58-3035. *Lambertz* is still good law and is on point.

Second, RAN attempts to distinguish *Lambertz* factually by emphasizing that *Lambertz* was a Kansas Supreme Court decision made under the "then applicable" law, citing G.S. 1949, 67-1003, *et seq.* The "then applicable" law in *Lambertz* is substantially identical to the current law, K.S.A. 58-3034, *et seq.* Third, RAN

attempts to suggest that *Lambertz* is factually distinguishable in that the real estate commission at issue there was between an employer (Builders, Inc.) and its employee (Lambertz).

In *Lambertz*, the jury found in favor of plaintiff and on appeal, the defendants contended that Lambertz's commission recovery was barred under G.S. 1949, 67-1019 because he was not a licensed real estate salesman. This Court held that Lambertz was not required to be a licensed real estate broker or salesman in order to receive a commission payment because the services performed by Lambertz fell clearly within the exceptions of G.S. 1949, 67-1003. G.S. 1949, 67-1003 was the predecessor statute to the present K.S.A. 58-3037.

In *Lambertz*, this Court held that the statutory exemption in effect exempted plaintiff from the requirement of being a licensed real estate broker or salesman in order to maintain an action for commission compensation. *Lambertz* found that Builders, Inc. was not bound by the statutory prohibition (G.S. 1949, 67-1019) against payment to a non-licensed real estate agent. Likewise, this Court should find that the current statutory prohibition in the Act (K.S.A. 58-3036) does not bar RAN from participating in a commission payment to McGrath.

G. Reply to RAN's argument that KREBSLA does not violate public policy (RAN's brief, p. 10).

McGrath does not contend that KREBSLA violates public policy, as RAN argues in its brief at page 10. McGrath contends that RAN's position on appeal is untenable because RAN's interpretation and application of the statute (K.S.A. 58-3062) would violate public policy. RAN's interpretation would bar attorneys from

participating in the commission-based compensation that is universally present in the real estate market and would therefore unreasonably restrain competition in the real estate industry, resulting in violations of Section 1 of the Sherman Act, 15 U.S.C. 1 and Kansas Anti-trust laws, K.S.A. 50-101, *et seq.* In the language of K.S.A. 50-101, RAN's interpretation would be "declared to be against public policy, unlawful and void."

Next, RAN argues that the Anti-trust Division of the Department of Justice's claims against the National Association of Realtors were mere "allegations." In *The United States of America, Plaintiff, v. The National Association of Realtors, Defendant*, Case No. 05C5140 (U.S. District Court for the Northern District of Illinois) the United States brought suit against the National Association of Realtors (NAR) to stop NAR from violating anti-trust laws. NAR had adopted policies which contained rules that obstructed brokers' abilities to use the Internet to reduce fees to consumers.

On September 8, 2005, NAR repealed its Internet policies and replaced them with different policies. NAR had hoped that this change would forestall the United States from challenging NAR's policies. However, NAR's new policies continued to be anti-competitive. See The United States' Competitive Impact Statement filed in that action, attached as Exhibit 1. The United States prevailed in *U.S. v. NAR* and the federal court ruled that the National Association of Realtors shall not adopt, maintain, or enforce any rule, or enter into any agreement that directly or indirectly prohibits, restricts or impedes free competition in the real estate industry. See Final Judgment,

attached as Exhibit 2. Exhibits 1 and 2 provide insight into the predatory and anti-competitive practices ever present in the real estate industry.

McGrath does not suggest that anyone licensed in one profession is necessarily competent to practice in another profession, as suggested in RAN's brief at page 11. Indeed, McGrath agrees that being a licensed Kansas attorney does not authorize one to engage in all activities of a real estate broker or salesperson. The issue now on appeal does not involve the "skill set" of "marketing residential real property." The discreet legal issue raised in this appeal does not extend to the circumstances as claimed by RAN (i.e., a law license qualifies an attorney to engage in all aspects of residential real estate sales; that a law license qualifies an attorney to engage in the practice of medicine; etc.). RAN's brief at p. 11.

BRRETA is not implicated in this appeal as RAN argues in its brief at page 11. Consumers are not governed by BRRETA as RAN alleges in its brief. A Kansas home purchaser should have the freedom to choose in deciding who best serves his or her interests. BRRETA authorizes a dual agency role for a real estate salesperson. That is, a real estate salesperson can represent the seller and at the same time represent the buyer of the same property.

Many Kansas home buyers may see BRRETA's dual agency as a irreconcilable conflict of interest and thus home buyers should be free to choose an attorney that will represent only the home buyer's interest. Kansas Rules of Professional Conduct generally prohibit an attorney from representing both sides of an adverse action (KRPC 1.7).

Finally, RAN argues, without citation to any authority, that attorneys are not generally prepared to meet the standard of competency necessary to be involved in the purchase of a residential home. Kansas Rules of Professional Conduct, however, require that attorneys only provide competent services (KRPC 1.1).

II. REPLY TO RAN’S ARGUMENT THAT THE ATTORNEY EXEMPTION SET FORTH IN K.S.A. 58-3037(c) DOES NOT APPLY.

A. The parties agree that the standard of review is de novo.

B. Reply to RAN’s position regarding the Kansas Attorney General Opinion(s). (RAN’s brief, p. 13).

The Attorney General’s Formal Opinion (Opinion No. 94-6) reasoned that a licensed attorney was not required to be a licensed real estate broker or salesperson where the attorney was retained by a corporation whose principal business was the acquisition of property rights. The Attorney General’s Formal Opinion concluded that “negotiating and contracting” falls squarely within the practice of law whether in relation to divorce settlements, plea negotiations or an interest in real estate. Accordingly, the Attorney General opined, that such attorney’s services are professional duties which fall within the exception created by K.S.A. 58-3037(c). The factual situation as referenced in the Attorney General’s Formal Opinion is functionally identical to the stipulated facts now before this Court (“McGrath acted as agent for Lausier and rendered legal professional duties and services as an attorney to Lausier (said legal professional duties and services included negotiating and contracting for the purchase and construction of Lausier’s new home; as well as the rendition of professional services requiring the knowledge and application of legal

principles and technique to serve the interests of Lausier at Lausier's request.”)) (ROA Vol. II, p. 269).

The “broad” versus “narrow” interpretation as referenced in the 1994 Attorney General's Formal Opinion refers to statutes that are broadly interpreted, meaning that the attorney exemption is not limited to the performance of an attorney's professional duties. The narrow interpretation refers to the limitation imposed upon the attorney exemption, limiting it to performing activities that are within the attorney's professional duties as an attorney; e.g., negotiating and contracting real estate sales. Here, negotiating and contracting Lausier's real estate purchase are part of the stipulated facts before this Court. See McGrath's Brief, p. 4; ROA Vol. II, p. 269. The Kansas Supreme Court has clearly stated what constitutes an attorney's professional duties as an attorney. See McGrath's Brief, p. 15.

The 1986 Formal Opinion of the Kansas Attorney General (Opinion No. 86-111) is of interest because the Attorney General notes that: “Protecting the public's interest is the underlying purpose of the Act. (Citation omitted). We believe that this purpose would not be furthered by its application to auctioneers who conduct tax foreclosure sales.” Here, the rationale is the same. Protecting the public's interest, the underlying purpose of the Act, is not furthered by RAN's proffered interpretation of the statute. RAN does not respond to this Formal Opinion of the Attorney General (Opinion No. 86-111).

RAN attempts to cloud the Formal Opinions of the Attorney General with reference to the fact that the Kansas Real Estate Commission (KREC) was a party below. By statutory requirements, the KREC is represented in all legal proceedings

by the Kansas Attorney General's office. At the district court level, the Attorney General's office was acting as a legal advocate for the KREC, not stating a Formal Opinion of the Attorney General's office. After the KREC was dismissed from this action, the KREC nonetheless moved the district court to file an amicus curiae brief supporting RAN's position.

The KREC consists only of real estate industry insiders. See Exhibit 3. There is no one on the KREC that is a direct, unbiased advocate for the consumer. Indeed, consumer advocacy is not part of the KREC's own mission statement, which reads as follows: "To protect the public interest, which embraces both the interests of the regulated real estate licensees and of the consumers who use their services and products." (Emphasis added). See www.kansas.gov/krec, attached as Exhibit 4.

In the amicus curiae brief, the young lawyer from the Attorney General's office, arguing as an advocate on behalf of the KREC, boldly stated that "an attorney that claims a commission for his or her dealings in a real estate transaction necessarily asserts that he or she has performed the services of a broker or salesperson not incidental to the practice of law." See RAN's brief, p. 15. This bold statement lacks any foundation, is conclusory and is directly contrary to the stipulated facts before the district court and the stipulated facts before this Court.

Telling of RAN's inability to support its position, RAN fails to respond to *Atlantic Richfield v. Sybert*, 456 A.2d 20 (Md. 1983); *Sharpe-Wiggins, Ltd. v. Fourmiks Developers, Inc.*, 1975 WL 15360 (1975 Pa. Com. Pl.); *Kribbs v. Jackson*, 129 A.2d 490 (Pa. 1957); *Furr v. Fonville Morisey Realty, Inc.*, 503 S.E.2d 401 (N.C. App. 1998); *Queen of Angels Hospital v. Younger*, 66 Cal.App.3d 359 (1977);

Calvert v. K. Hovnanian, 607 A.2d 156 (N.J. 1992); *Weinblatt v. Parkway-St. Johns Place Corporation*, 241 N.Y.S. 721 (1930); and to *Corpus Juris Secundum*, 12 C.J.S. Brokers § 193. See McGrath’s Brief, pp. 17-21. These authorities are persuasive and support the proposition that McGrath is entitled to receive a commission payment under the law of this state. The persuasive reasoning from other jurisdictions stands independently in support of McGrath’s position. In addition, as a principle of statutory construction, a statute adopted by Kansas from another state carries with it the construction placed on it by the courts of that state. *Benton v. Union Pac. R. Co.*, 430 F.Supp. 1380 (D. Kan. 1977).

C. Reply to RAN’s argument that McGrath could have been paid by Lausier for the performance of legal services. (RAN’s brief, p. 15).

RAN’s argument that payment from a third party to an attorney in the form of a commission would undermine the attorney-client relationship is unfounded. Indeed, a substantial amount of attorney compensation comes from third-party payments. For example, parents often pay for attorney fees for their children; insurance carriers (third parties) typically pay attorney fees for their insureds. See *The Business and Ethics of Liability Insurers*, 28 *U. Mem. L. Rev.* 57 (1997).

D. Reply to RAN’s statement, “Get a Real Estate License.” (RAN’s brief, p. 16).

This is a circular argument. The argument presupposes that McGrath must have a real estate license in order to receive a commission payment. “The law does not require the performance of a futile or useless act.” *Anderson v. Dugger*, 130 Kan. 153, 156, 285 P. 546, 549 (1930).

WHEREFORE, McGrath prays that this Court enter its Order reversing the district court's Journal Entry of Judgment in favor of RAN and directing the district court to enter judgment in favor of McGrath with the further direction that the funds now held on deposit with the clerk of the district court be paid to McGrath forthwith.

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Certificate of Mailing

I hereby certify that 2 copies of the above and foregoing Reply Brief of Appellant were mailed, via U.S. Mail, First Class postage prepaid, on this 10th day of February, 2010, to:

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/s/ Patrick E. McGrath
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