

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-001905-MR

ARETTA L. WEST

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE THOMAS O. CASTLEN, JUDGE
ACTION NO. 00-CI-00449

KENTUCKY REAL ESTATE COMMISSION
AND DANIEL A. CLARK, JR.

APPELLEES

OPINION

REVERSING AND REMANDING

** ** *

BEFORE: DYCHE, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE. This is an appeal from an order of the Daviess Circuit Court affirming an order of the Kentucky Real Estate Commission ("KREC") disciplining appellant for failing to fully disclose to a client information about a property transaction in which she had an interest and ordering her to pay restitution therefor. From our review of the record and the applicable law, we adjudge that the KREC's finding of a violation of the

disclosure statute (KRS 324.160(1)(e) and (q)) was not supported by substantial evidence. Hence, we reverse and remand.

Appellant, Aretta West, is a licensed real estate broker and auctioneer in Owensboro. On April 11, 1998, West entered into a real estate listing agreement with her cousin, Herman Bowlds, for the sale of a piece of property he owned in Hardinsburg. This was a six-month listing set to expire on October 11, 1998, with a stated commission of 6% and listing price of \$79,900. By July 31, 1998, despite West's efforts, the property had not sold and was not generating much interest. Consequently, West and Bowlds entered into a written agreement to auction the property on September 5, 1998. Pursuant to the auction agreement, which did not have a reserve, West was to advertise, promote, and conduct the auction for which she would be compensated a 10% buyer's premium, which was 10% of the sale price to be paid by the buyer. However, the listing agreement was not rescinded but remained in full force until terminated by its own provisions on October 11, 1998.

On the day before the auction, September 4, 1998, Bowlds was in an automobile accident and was hospitalized. However, since the auction had already been advertised, it was conducted as planned on September 5, 1998. The highest bid at the auction was \$57,200. Nevertheless, Bowlds declined to sell at that price on that date because he wanted to gross \$65,000.

Sometime prior to the auction, Bowlds made an offer on a home in Owensboro subject to the sale of his property on September 5, 1998. However, because Bowlds had been in the hospital after the auction, the woman who owned the Owensboro house allowed Bowlds more time to obtain funds to buy the house. By the end of September, Bowlds urgently needed to sell his property in order to not lose the opportunity to buy the Owensboro home. Accordingly, West began actively marketing the property again under the listing agreement. On September 21, 1998, appellee, Daniel Clark, contacted West and learned the listing price was \$65,000. At the hearing, Clark testified that between September 21 and October 8, 1998, he twice verbally offered to purchase the property for \$50,000 and West responded that Bowlds would probably accept \$55,000. On October 8, 1998, Clark again approached West about the property and West informed Clark of some of Bowlds' circumstances, including Bowlds' fast-declining health and his need for proceeds from the sale to purchase his next home. Later that same day, Clark made a written offer to purchase the property for \$55,000.

The requested closing date in the offer was November 10, 1998. However, Bowlds needed to move sooner than that to be near his doctors and could not wait until that date to close on the Owensboro property. Consequently, Bowlds and West agreed to an arrangement whereby West would purchase the

property from Bowlds for \$50,000, the amount Bowlds needed to close on the Owensboro property, and West would then sell the property to Clark for \$55,000, keeping the \$5,000 difference for her commissions from the listing and auction agreements.

Relative to this arrangement, Bowlds stated the following in his affidavit:

I told her you purchase my home at Rough River for \$50,000 so I can purchase the other home. Since the contract is for \$55,000 that will give you the buyers premium and expenses of the auction and still give me \$50,000.

On the basis of this arrangement, Bowlds accepted Clark's offer to purchase the property for \$55,000. Under the "Further Conditions" provision of the offer/purchase contract, was the following language: "In the event the property has to be conveyed to Aretta West prior to this closing, Aretta West Broker/Realtor/Auctioneer will honor this Purchase Agreement." West testified that she also told Clark that she may need to purchase the property prior to the closing date because Bowlds needed the sale proceeds prior to that time. Contemporaneous with the preparation of the purchase contract on October 8, 1998, West provided Clark with an agency disclosure form which indicated that West, with West Realty & Auction, had a family relationship with the seller and that she was the agent of both the buyer and the seller in the transaction.

On October 14, 1998, West purchased the property from Bowlds for \$50,000. The closing statement for this transaction did not reflect that West was paid any commission.

On November 11, 1998, West deeded the subject property to Clark. On November 12, 1998, when Clark was recording the deed at the courthouse, he decided to look at the property's history in the deed books. In so doing, he learned for the first time that Bowlds had sold the property to West for only \$50,000. Clark assumed that West bought the property from Bowlds in order to make a \$5,000 profit from the sale to Clark. As a result of his discovery, Clark filed a complaint against West with the KREC claiming that he was entitled to the \$5,000 difference in the price paid by West and the price he paid.

The KREC charged West with violating KRS 324.160(1)(e) and (q). On October 26, 1999, a full evidentiary hearing was conducted. Based on evidence from that hearing, the hearing officer found that West violated KRS 324.160(1)(e) by not fully disclosing she was acting for more than one party in the transaction. The hearing officer also found that West violated KRS 324.160(1)(q) by failing to act in a fiduciary manner as required by 201 KAR 11:121 Section 1(4). Specifically, the hearing officer found that West improperly failed to disclose to Clark how much West actually paid for the property and the fact that Clark would be paying \$5,000 more than what West paid. The

KREC thereafter adopted in full the hearing officer's findings and recommendations, suspending West's license for a period of thirty (30) days and ordering her to pay restitution to Clark in the amount of \$5,000. West appealed to the Daviess Circuit Court which upheld the KREC's decision. This appeal by West followed.

When an administrative agency acts within its jurisdiction, judicial review is limited to a determination of whether the agency's action was arbitrary. Burch v. Taylor Drug Store, Inc., Ky. App., 965 S.W.2d 830 (1998); Commonwealth, Department of Public Safety v. Glasscock, Ky., 415 S.W.2d 106 (1966). An agency's ruling is considered arbitrary: where the agency exceeded its statutory powers; the party affected by the administrative order was not afforded procedural due process; or the agency's action was not supported by substantial evidence. Kentucky Board of Nursing v. Ward, Ky. App., 890 S.W.2d 641 (1994).

West first argues that the KREC's finding that she violated KRS 324.160(1)(e) was not supported by the evidence. KRS 324.160(1)(e) provided in 1998:

(1) The commission may suspend or revoke any license or levy fines not to exceed five hundred dollars (\$500), or both, and place any licensee on probation for a period of up to twelve (12) months or require successful completion of academic credit hours in real estate courses from an accredited or

approved real estate school or issue a formal reprimand or order a licensee to pay restitution in an amount to be determined by the commission after a hearing, as a condition of continued licensure, for any of the following causes:

(e) Acting for more than one (1) party in a transaction without the knowledge of all parties for whom the licensee acts;

1. A real estate licensee shall not directly or indirectly buy property listed with him **or her** nor acquire an interest therein without making his **or her** true position clearly known in writing on the sales contract or offer to purchase;

2. Before a real estate licensee buys, sells, or receives compensation for property in which the licensee owns an interest, the licensee shall disclose any interest in the property to all parties to the transaction;

As stated earlier, West executed a disclosure form stating that she was the agent for both the buyer and the seller in the transaction. Further, the language in the purchase contract specifically acknowledged the possibility that West might buy the subject property and sell it to Clark. Even the hearing officer found that West told Clark that she might actually purchase the property from Bowlds prior to the November 10 closing date so that Bowlds could sooner have access to the sale proceeds and that "Clark understood this arrangement and voiced no objection."

KREC asserts that while West may have told Clark that she might be first purchasing Bowlds' property, she never told

Clark that she was in fact purchasing the property. However, it is undisputed that Clark knew that West did indeed purchase the property from Bowlds, and the deed to Clark clearly indicated that was the case. There was no allegation or evidence that West was attempting to misrepresent or hide the fact that she had bought the subject property and was transferring it to Clark.

From our review of the record, we do not believe there was substantial evidence to support the KREC's finding that West violated KRS 324.160(1)(e). The evidence established that West made it clearly known to Clark in the purchase agreement that she might be purchasing the property from Bowlds before conveying it to Clark and also verbally disclosed this fact to Clark. The evidence further established that at the time the property was conveyed to Clark, Clark was aware of West's interest in the property in that West was the individual transferring the property to him. KRS 324.160(1)(e)2. only requires that the licensee disclose an interest in the property to the buyer and, from our reading, does not further require the licensee to disclose what she paid for the property.

West next argues that the evidence did not support the finding that she violated KRS 324.160(1)(q). KRS 324.160(1)(q) provided in 1998 that a real estate licensee could be disciplined (license suspended or revoked, fined, or restitution

ordered) for "[v]iolating any of the provisions in this chapter or any lawful order, rule, or administrative regulation made or issued under the provisions of this chapter." In particular, the hearing officer found that West violated 201 KAR 11:121 Section 1(4) which in 1998 stated that it is improper conduct for a licensee to "fail to act in accordance with a fiduciary standard toward his client." The hearing officer essentially found that West violated her fiduciary duty to Clark when she failed to disclose to him that she purchased the subject property for \$50,000.

At the hearing, West testified, in keeping with Bowlds' affidavit, that the \$5,000 difference in what Bowlds sold the property to her for and what Clark paid her for the property constituted her commissions under the listing and auction agreements. However, the hearing officer found this testimony to not be credible, which was within the hearing officer's exclusive province as factfinder. Energy Regulatory Commission v. Kentucky Power Co., Ky. App., 605 S.W.2d 46 (1980). The hearing officer found that the \$5,000 difference constituted a profit from the sale of the property and not a commission. What troubles us with regard to this finding is that the evidence established that West was legally entitled to a commission for her sale of the property, which was not disputed by the hearing officer or the KREC on appeal.

Moreover, contrary to the hearing officer's legal conclusion, we believe that West was likewise legally entitled to the commission under the auction agreement with Bowlds. Although, as pointed out by the hearing officer, the 10% buyer's premium in the auction agreement was to be paid by the buyer in the event of a sale and no sale occurred, Bowlds did get a legitimate bid on the house for \$57,200, which Bowlds rejected. Thus, despite the fact that a sale did not result from the auction, West fully performed her duties under the agreement by finding a willing buyer. See Neel v. Wagner-Shuck Realty Co., Ky. App., 576 S.W.2d 246 (1978). Accordingly, West was legally entitled to commissions of well over the \$5,000 difference in the sale price of the subject property.

The question is, did West have a fiduciary duty to disclose to Clark what her commission was with regard to her agreements with Bowlds and specifically justify to Clark the \$5,000 difference in the sale price of the property as her commission from Bowlds? We do not think so. We would note that nothing in KRS 324.160(1)(e) or (q) specifically provides how a commission must be paid or characterized in a real estate transaction. Nor is there any requirement in that statute that a licensee must disclose to a buyer the amount of commission being paid by the seller. The fact is that Bowlds legally owed West more than \$5,000 in commissions and, pursuant to his

arrangement with West, Bowlds did essentially sell the property for \$55,000 since the consideration from West to Bowlds was not simply \$50,000, but was additionally a waiver of the 6% commission on the listing agreement and the 10% commission on the auction agreement, as well as her promise to immediately pay cash for the property. Hence, West did not misrepresent the fact that Bowlds would not take less than \$55,000 for the property. Although the arrangement was unconventional, we do not believe it constituted a breach of fiduciary duty to Clark. While we can see how Clark might have mistakenly believed that West's motive was to make a \$5,000 profit on the sale, that was simply not the case since she was legally entitled to be compensated for her services. Accordingly, we adjudge that the KREC's finding of a violation of KRS 324.160(1)(q) was not supported by substantial evidence.

Given our decision above, West's final argument challenging the constitutionality of KRS 324.160(1) is moot. For the reasons stated above, the judgment of the Daviess Circuit Court is reversed and this matter is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Glenn E. Acree
Lexington, Kentucky

BRIEF FOR APPELLEE:

Geraldine Lee B. Harris
Louisville, Kentucky