

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

JOHN D. VILLABONA, :
 : C.A. No. 09A-10-001 WLW
Appellant, :
 :
v. :
 :
DELAWARE REAL ESTATE :
COMMISSION, :
 :
Appellee. :

Submitted: May 7, 2010
Decided: August 23, 2010

OPINION AND ORDER

Upon an Appeal from a Decision of
the Real Estate Commission.

Affirmed.

Robert C. Collins, II, Esquire of Schwartz & Schwartz, Dover, Delaware; attorney for
the Appellant.

Barbara J. Gadbois, Esquire of the Department of Justice, Wilmington, Delaware;
attorney for the Appellee.

WITHAM, R.J.

Villabona v. Delaware Real Estate Comm.
C.A. No. 09A-10-001WLW
August 23, 2010

On October 12, 2009, Appellant John D. Villabona (“Villabona”) filed this appeal from the September 10, 2009 decision of the Delaware Real Estate Commission (the “Commission”). Villabona is a real estate broker licensed in Delaware. The Commission voted to place Villabona’s real estate broker’s license on probation for a minimum of six months and to require six additional hours of continuing education.

FACTS

This appeal stems from Villabona’s participation in a real estate transaction involving property in Smyrna, Delaware. Prior to Villabona’s involvement, both parties to the transaction were represented by other real estate agents. The buyer, Katherine Mitchell (“Mitchell”), was previously represented by Dave Stoval (“Stoval”) of Century 21 Gold Key Realty. The sellers, Raymond and Monta Merrylees (the “Merrylees”) were represented by Katherine Walter (“Walter”) of Re/Max Alliance.

After becoming dissatisfied with Stoval’s performance, Mitchell’s son, James, contacted Villabona on her behalf. Similarly, the Merrylees contacted Villabona after finding it difficult to communicate with Walter. On July 26, 2008, Villabona, acting as a dual agent, prepared an Agreement of Sale and related documents for Mitchell and the Merrylees.

On or about June 10, 2008, before Villabona’s involvement, the parties signed a prior agreement. Pursuant to that contract, Mitchell was required to make a \$1,000 deposit, which she paid. Despite the contract, however, the parties were having

difficulty proceeding to settlement. Further complicating matters, the Merrylees owed \$28,000 to a construction firm for their new home by July 31, 2008.¹

In an effort to assist both parties, Villabona convinced the parties to enter into a long-term Occupancy Prior to Settlement agreement (“OPS”), combined with an Agreement of Sale. Villabona sought to create a lease-purchase transaction. Under this new agreement, Mitchell was required to put down an additional deposit of \$27,000. This \$27,000 deposit would then provide the Merrylees with the necessary cash to purchase their new home.² In exchange, Mitchell was permitted to occupy the house in question while she sought approval for a mortgage.³

In January 2009, Mitchell filed a complaint with the State of Delaware (the “State”) claiming that the Merrylees, as the landlords, refused to make necessary repairs. After initially investigating the Merrylees’ obligation to make repairs, the State eventually shifted its investigation to Villabona’s July 26, 2008 transaction.

On February 22, 2009, Mitchell’s sister, Lois Monk, passed away. With her sister’s passing, Mitchell was unable to qualify for a mortgage. As a result, in March 2009, the parties signed a Mutual Release Agreement. This Mutual Release

¹ In addition, the Merrylees previously put down a \$20,000 non-refundable deposit.

² This additional \$27,000 brought Mitchell’s deposit to \$28,000, given that Mitchell put down \$1,000 under the June 10, 2008 agreement.

³ This new agreement set the date of June 15, 2009 as the deadline to obtain a commitment for financing. A final settlement date of July 31, 2009 was set as well. On January 8, 2009, the parties agreed to an Addendum to the Agreement of Sale that rescheduled the settlement for September 30, 2009.

Villabona v. Delaware Real Estate Comm.
C.A. No. 09A-10-001WLW
August 23, 2010

Agreement discharged the previous Agreement of Sale, and required the Merrylees to refund Mitchell's \$28,000 deposit. The Merrylees, however, had used the \$28,000 deposit to purchase their new home. Consequently, in order to refund Mitchell's deposit, the Merrylees borrowed \$24,300 from Villabona.⁴

On March 10, 2009, the State filed a formal Complaint with the Commission against Villabona. The State alleged that, in connection with the real estate transaction in question, Villabona had violated various provisions of 24 *Del. C.* § 2912(a), and certain Commission Rules. Pursuant to 24 *Del. C.* § 2914(e), the State requested that the Commission temporarily suspend Villabona's license on an emergency basis. After an emergency hearing on March 12, 2009, the Commission denied the State's request for emergency relief. A full hearing was held on April 9, 2009 and May 14, 2009. The parties submitted written closing arguments on May 21, 2009.

The Commission's Decision⁵

On September 10, 2009, the Commission concluded that Villabona had

⁴ The Merrylees received \$24,300 after Villabona deducted one-half of his commission from Mitchell's \$28,000 deposit.

⁵ See, *In re: John D. Villabona*, DREC Case No. 02-01-09 (Sept. 10, 2009).

Villabona v. Delaware Real Estate Comm.
C.A. No. 09A-10-001WLW
August 23, 2010

violated 24 *Del. C.* §§ 2912(a)(1)⁶, (6)⁷, and (12)⁸. First, the Commission concluded that Villabona violated Sections 2912(a)(6) and (12) by having the buyers sign the OPS stating that they had completed a walk-through inspection of the property.⁹ The Commission found that an OPS should not be used for a transaction meant to be a lease-purchase agreement. The Commission concluded that Villabona did not serve the parties' interests by using an OPS, and that instead, he should have consulted an attorney to draft an appropriate document.

Second, the Commission concluded that Villabona violated Sections 2912(a)(1) and (12) by having the parties enter into an Agreement of Sale providing that the deposits were non-refundable.¹⁰ The Commission noted that the parties never intended the deposit to be non-refundable. Therefore, the Commission found that the Agreement of Sale did not reflect the actual agreement between the parties.

Third, the Commission concluded that Villabona violated Sections 2912(a)(6) and (12) by including a provision in the OPS that required the buyers to vacate the

⁶ An individual violates 24 *Del. C.* § 2912(a)(1) where he “mak[es] any substantial misrepresentation.”

⁷ An individual violates 24 *Del. C.* § 2912(a)(6) where he is “[i]ncompetent to act as a real estate broker or salesperson in such manner as to safeguard the interest of the public.”

⁸ An individual violates 24 *Del. C.* § 2912(a)(12) for “[a]ny other conduct, whether of the same or of a different character from that specified in this section, which constitutes improper, fraudulent or dishonest dealing.”

⁹ *In re: John D. Villabona*, DREC Case no. 02-01-09 (Sept. 10, 2009) at 19-20.

¹⁰ *Id.* at 21-22.

property in fifteen days after receiving fair notice from the sellers.¹¹ The Commission again noted that an OPS was inappropriate for the transaction in question. The Commission further noted that neither party expressed an intent to enforce the fifteen days' notice provision. Consequently, the Commission concluded that the OPS did not express the parties' intent.

Fourth, the Commission concluded that Villabona violated Sections 2912(a)(1) and (12) by including a provision in the OPS that the buyers' deposit was non-refundable.¹² Once again, the Commission concluded that an OPS was inappropriate in this situation, and that a non-refundable deposit did not reflect the parties' intent.

When considering an appropriate sanction for the above violations, the Commission noted the following:

Mr. Villabona tried to assist both Ms. Mitchell and Mr. and Mrs. Merrylees. However, he relied too much on standard forms, included contradictory provisions in the documents and demonstrated numerous judgment errors. While the Commission found that revocation was not warranted, the Commission also found that Mr. Villabona's license should be placed on probation for a period of time[,] and he should be required to complete additional hours of continuing education.¹³

Consequently, the Commission placed Villabona's license on probation for a minimum of six months, and required him to complete three hours of continuing

¹¹ *Id.* at 22-23.

¹² *Id.* at 23-24.

¹³ *Id.* at 24.

Villabona v. Delaware Real Estate Comm.
C.A. No. 09A-10-001WLW
August 23, 2010

education in the Delaware Landlord Tenant Code and three hours of continuing education in ethics. The Commission noted that Villabona’s probation “shall be lifted at the conclusion of the six months or upon receipt of Mr. Villabona’s continuing education documentation, whichever occurs later.”¹⁴

Standard of Review

“The function of the Superior Court on appeal from a decision of an administrative agency is to determine whether the agency’s decision is supported by substantial evidence and whether the agency made errors of law.”¹⁵ “Substantial evidence is ‘evidence which affords a substantial basis of fact from which the fact in issue can be reasonably inferred.’”¹⁶ “The Court does not re-weigh the evidence, nor does the Court substitute its judgment for the factual determinations made by the Board or Council below.”¹⁷ “Absent an error of law, the Commission’s decision will not be disturbed where there is substantial evidence to support its conclusions.”¹⁸

¹⁴ *Id.* at 24-25.

¹⁵ *Morris v. Real Estate Comm’n*, 2008 WL 1735072, at *1 (Del. Super.) (citing *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965)).

¹⁶ *McCain v. Council on Real Estate Appraisers*, 2009 WL 1515594, at *2 (Del. Super.) (citations omitted).

¹⁷ *Hoopes v. Del. Council of Real Estate Appraisers*, 2006 WL 3308203, at *1 (Del. Super.) (citation omitted).

¹⁸ *Morris*, 2008 WL 1735072, at *1 (citing *Dellachiesa v. Gen. Motors Corp.*, 140 A.2d 137 (Del. Super. Ct. 1958)).

DISCUSSION

Villabona raises three arguments on appeal: (1) that the Commission incorrectly interpreted the Agreement of Sale and the OPS; (2) that the Commission violated Villabona's rights to due process by sanctioning him for allegations that were never properly before the Commission; and (3) that the Commission violated 29 *Del. C.* § 10128(b)(5) by failing to indicate clearly which portion of 24 *Del. C.* § 2912(a)(12) Villabona violated.

I. *Interpretation of the Agreement of Sale and the OPS.*

Villabona maintains that the contract, as drafted, when utilizing well-settled principles of contract interpretation, adequately reflected the parties' intentions. The State, however, contests the relevancy of Villabona's arguments concerning contract interpretation after the fact. The State contends that the Commission's concerns and conclusions were based on the circumstances surrounding the agreement, including the conflicts and inconsistencies of the documents drafted by Villabona.

Villabona essentially advances a "no harm, no foul" argument. That is, Villabona maintains that, despite the language of the documents, and despite their many inconsistencies, the documents were nevertheless appropriate because, in effect, they reflected the parties' intentions. The problem with this argument, however, is that the Commission's concern was not based upon the effect of the documents. Instead, the Commission concluded, generally, that Villabona "relied too much on standard forms, included contradictory provisions in the documents and demonstrated

numerous judgment errors.”¹⁹

Villabona does not contest the Commission’s conclusion that an OPS was inappropriate in this particular transaction. Nor does Villabona contest the Commission’s conclusion that the parties never agreed to a non-refundable deposit. If, however, the parties never agreed to a non-refundable deposit, why did the agreement contain references to a non-refundable deposit? Similarly, if the parties never agreed to vacate the property within fifteen days of receiving fair notice, and such a provision violated Delaware’s Landlord Tenant code, why was this provision included in the agreement?²⁰

The Commission concluded, after considering a lengthy record with considerable evidence, that Villabona erred in drafting the July 26, 2008 agreement. Villabona’s attempts, after the fact, to explain how the agreement, despite its inconsistencies, actually reflected the intent of the parties does not excuse his mistakes in drafting the agreement. Beyond explaining how the agreement may be interpreted to reflect the intent of the parties, Villabona has failed to address the Commission’s concerns.

The Court can understand Villabona’s desire to “have his record accurately reflect the mistakes he made without misleading an unknowing reader of his record to believe he acted with malicious intent to harm a kind, elderly lady whom he was

¹⁹ *In re: John D. Villabona*, DREC Case no. 02-01-09 (Sept. 10, 2009) at 24.

²⁰ This Court further notes its concern that, given the complexity of the issues involved, Villabona did not consult with counsel regarding the drafting of the agreement.

actually trying very hard to help.”²¹ The question before the Court, however, is simply whether the Commission’s decision is supported by substantial evidence and free from legal error.²² Villabona admits that he made some mistakes. In fact, he informed the Court that, “[he] does not expect to have his record wiped totally clean because he knows that he made some mistakes.”²³ After reviewing the record in this case, it is clear that substantial evidence exists to support the Commission’s decision.

II. Due Process.

Villabona maintains that the Commission violated his rights to due process by sanctioning him for conduct not previously raised in the State’s March 10, 2009 Complaint. Villabona further asserts that the Commission improperly sanctioned him repeatedly for the same conduct. The State contends that the Commission’s decision was based upon a thorough review of the independent allegations set forth in the Complaint.

The Commission, in outlining its findings of fact and conclusions of law, first quoted each of the State’s allegations. The Commission then examined the facts and law for each independent allegation. Consequently, contrary to Villabona’s assertions, the Commission did not sanction him repeatedly for the same conduct. Instead, the Commission sanctioned Villabona based upon its separate conclusions

²¹ Appellant’s Reply Br. at 6.

²² See *Morris*, 2008 WL 1735072, at *1.

²³ Appellant’s Reply Br. at 6.

regarding the State's individual allegations.

In addition, this Court cannot conclude that Villabona was sanctioned for conduct not previously raised in the State's Complaint. Villabona asserts that whether an OPS was appropriate for this transaction was never argued by the parties. The State, however, alleged that the walk-through provision of the OPS was improper. The Commission, in reviewing that allegation, agreed, in part, because an OPS should not have been used for this particular transaction. Relatedly, the State alleged that the fifteen day notice provision within the OPS was improper. The Commission again agreed with this allegation on the basis that the OPS was improper for this transaction.

Villabona's argument that the Commission is prohibited from concluding that the OPS, as a whole, was an improper document because the State only alleged that a specific provision within the OPS was improper is without merit. "In the exercise of quasi-judicial or adjudicatory administrative power, administrative hearings[,] like judicial proceedings[,] are governed by the fundamental requirements of fairness which are the essence of due process, including fair notice of the scope of the proceedings and adherence of the agency to the stated scope of those proceedings."²⁴

In the case *sub judice*, each party was afforded an equal opportunity to present its case. The State's Complaint set forth the allegations against Villabona. Villabona, in turn, was given an opportunity to address each allegation. The Commission, after

²⁴ *Carousel Studio v. Unemployment Ins. Appeal Bd.*, 1990 WL 91108, at *1 (Del. Super.) (citations omitted).

Villabona v. Delaware Real Estate Comm.
C.A. No. 09A-10-001WLW
August 23, 2010

reviewing all of the evidence, clearly set forth its findings concerning each of the State's allegations. The Court is satisfied that Villabona was afforded due process.

III. Section 10128(b)(5).

Villabona advances that 29 *Del. C.* § 10128(b)(5) requires the Commission to delineate specifically whether his conduct was “improper,” “fraudulent,” or “dishonest.” The Commission found four instances where Villabona violated 24 *Del. C.* § 2912(a)(12). Section 2912(a)(12) provides that the Commission may discipline an individual upon concluding that the individual is guilty of, “[a]ny other conduct, whether of the same or a different character from that specified in this section, which constitutes improper, fraudulent, or dishonest dealing.”²⁵

Section 10128(b)(5) requires that the Commission incorporate in its final order, “[a] concise statement of the agency’s determination or action on the case.”²⁶ Without citing any supporting authority, Villabona maintains that the Commission’s use of “and/or” violates Section 10128(b)(5). That is, Villabona contends that the Commission, pursuant to Section 10128(b)(5), may not conclude that his conduct was “improper, fraudulent, and/or dishonest.”²⁷

While the Court agrees that the Commission’s use of “and/or” is peculiar, it does not violate Section 10128(b)(5). To hold otherwise would place form over

²⁵ 24 *Del. C.* § 2912(a)(12).

²⁶ 29 *Del. C.* § 10128(b)(5).

²⁷ See e.g., *In re: John D. Villabona*, DREC Case no. 02-01-09 (Sept. 10, 2009) at 24.

Villabona v. Delaware Real Estate Comm.
C.A. No. 09A-10-001WLW
August 23, 2010

substance. “Concise” has been defined as “marked by brevity of expression or statement.”²⁸ Thus, while the Commission’s choice of words renders its decision somewhat unclear, such that the Commission should avoid using “and/or” in the future, the Commission’s determination or action on the case is nevertheless “concise.”

CONCLUSION

For the foregoing reasons, the September 10, 2010 decision of the Delaware Real Estate Commission is **AFFIRMED**.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Honorable William L. Witham, Jr.

WLW/dmh
oc: Prothonotary
xc: Counsel

²⁸ Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/concise> (last visited Aug. 20, 2010).