DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

AVI STERN,
Appellant,

v.

DEPARTMENT OF BUSINESS & PROFESSIONAL REGULATION,
Appellee.

No. 4D19-3836

[May 12, 2021]

Appeal from the Department of Business and Professional Regulation, Florida Real Estate Commission; DBPR Case No. 2018-059072.

Scott J. Edwards of Scott J. Edwards, P.A., Boca Raton, for appellant.

Joseph Yauger Whealdon, III, Chief Appellate Counsel, Department of Business & Professional Regulation, Tallahassee, for appellee.

ARTAU, J.

Appellant, Avi Stern ("sales associate"), appeals the imposition of a fine and revocation of his real estate license pursuant to section 475.25(1)(f), Florida Statutes (2018). What led to these disciplinary sanctions was a conviction for conspiring to unreasonably restrain trade by suppressing and eliminating competition while he personally bid on foreclosed properties in violation of Section 1 of the Sherman Antitrust Act (the "Sherman Act"), 15 U.S.C. § 1 (2018). The sales associate argues that a violation of the Sherman Act, in and of itself, does not permit the Department of Business & Professional Regulation ("Department") to discipline him pursuant to section 475.25(1)(f). We agree with the sales associate, and therefore reverse the sanctions.

Section 475.25(1)(f) authorizes the Department to discipline a licensed sales associate, which may include the fine and license revocation imposed here, if the sales associate is "convicted or found guilty of, or entered a plea of nolo contendere to . . . a crime in any jurisdiction which directly relates to the activities of a licensed broker or sales associate, or *involves moral turpitude or fraudulent or dishonest dealing*." § 475.25(1)(f), Fla. Stat. (2018) (emphasis added).

It is undisputed that the sales associate's Sherman Act violation did not include any criminal act "which directly relates to [his] activities" as a licensed sales associate. Thus, the question we must answer is whether a Sherman Act violation "involves moral turpitude or fraudulent or dishonest dealing," as section 475.25(1)(f)'s second clause requires, before the Department can impose discipline.

At common law, crimes involving moral turpitude were forbidden because those crimes were "seen as ethically wrong without any need for legal prohibition (acts wrong in themselves, or *malum in se*)," while other crimes from regulated activities "are ethically neutral and forbidden only by positive enactment (acts wrong because they are so decreed, or *malum prohibitum*)." *Ali v. Mukasey*, 521 F.3d 737, 740 (7th Cir. 2008). "[A]cts that are wrong in themselves, but not those forbidden only by positive enactment, [were] treated as crimes of moral turpitude." *Id.* Conversely, "*mala prohibita* crimes were regulatory in nature and were enacted to protect the public health, safety and welfare. Unlike their common law counterparts [*malum in se* crimes], many such crimes . . . may not result in direct injury to persons or property but merely create a danger or possibility of [harm] that the law seeks to minimize." *State v. Oxx*, 417 So. 2d 287, 289 n.4 (Fla. 5th DCA 1982); *see also Rodriguez Sanchez v. State*, 503 So. 2d 436, 438 (Fla. 4th DCA 1987) (enumerating "crimes that are *malum in se*, or inherently evil at common law").

Offenses involving economic regulations have generally been categorized as *malum prohibitum*—and not *malum in se*—crimes. *See, e.g.*, *U.S. v. Socony-Vacuum Oil. Co.*, 23 F. Supp. 531, 532 (W.D. Wisc. 1938) ("The Court is of the opinion that the wrong here complained of is not *malum in se*, but rather *malum prohibitum*, one peculiarly of an economic nature and one in which the attainment of a proper understanding between the parties is of itself a desirable end.").

Moreover, "fraud has ordinarily been the test to determine whether crimes not of the gravest character involve moral turpitude." *Jordan v. De George*, 341 U.S. 223, 227 (1951) (citing *U.S. ex. rel. Berlandi v. Reimer*, 113 F.2d 429 (2d Cir. 1940)). A Sherman Act violation does not contain any element requiring the government to prove fraudulent or dishonest dealing. *See generally U.S. v. Cont'l Grp., Inc.*, 456 F. Supp. 704, 715 (E.D. Pa. 1978). Instead, to establish a violation, the government must prove "(1) that there existed a conspiracy as charged in the indictment, that the conspiracy was knowingly formed and that the defendants knowingly participated in the conspiracy; (2) that the conspiracy unreasonably restrained trade; and (3) that the restraint was on interstate trade and commerce." *Id.* "To involve moral turpitude, intent to defraud must be an

'essential element' of [a defendant's] conviction." *Notash v. Gonzales*, 427 F.3d 693, 698 (9th Cir. 2005) (quoting *Carty v. Ashcroft*, 395 F.3d 1081, 1084 (9th Cir. 2005)).

While it is possible that a Sherman Act violation may also involve fraud or dishonest dealing, neither was present here.

Our sister court addressed whether section 475.25 authorizes discipline against a real estate licensee after he was convicted of possessing lottery tickets that were part of a prohibited lottery scheme. *Everett v. Mann*, 113 So. 2d 758 (Fla. 2d DCA 1959). In determining that the licensee was not subject to discipline because his gambling crime did not constitute moral turpitude, the Second District reasoned that "'[i]f a crime is one involving moral turpitude it is because the act denounced by the statute grievously offends the moral code of mankind and would do so even in the absence of a prohibitive statute.'" *Id.* at 760 (quoting *U.S. v. Carrollo*, 30 F. Supp. 3, 6 (W.D. Mo. 1939)). In other words, our sister court treated the gambling crime as a *malum prohibitum* crime—not a *malum in se* crime.

Although a Sherman Act violation is certainly much more than a relatively minor gambling crime, we also conclude that it is not a *malum in se* crime. Instead, it is a *malum prohibitum* crime because Congress decreed that this kind of behavior, in an economic context, hampers commerce and free enterprise through monopoly. It became forbidden only by positive enactment when Congress decided in 1890 that the time had come to outlaw monopolistic business practices.

Therefore, we conclude the Department did not have the authority to discipline the sales associate based solely on his Sherman Act conviction. Accordingly, we reverse the Department's discipline order—not because we condone what the sales associate did—but because section 475.25(1)(f)'s text simply does not authorize the Department to revoke the sales associate's professional license or impose a fine in the absence of a crime involving "moral turpitude or fraudulent or dishonest dealing."

Reversed and remanded for further proceedings consistent with this opinion.

WARNER and MAY, JJ., concur.

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Not final until disposition of timely filed motion for rehearing.