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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001216-MR

COMMONWEALTH OF KENTUCKY,
KENTUCKY UNEMPLOYMENT
INSURANCE COMMISSION — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 17-CI-00709

JP MORTGAGE COMPANY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, GOODWINE, AND TAYLOR, JUDGES.

COMBS, JUDGE: The Kentucky Unemployment Insurance Commission and Kentucky Division of Unemployment Insurance (the Division) appeal from the opinion and order of the Franklin Circuit Court reversing the Commission's determination that JP Mortgage Company is the successor-in-interest to the tax

account and tax rate of Aaron Mortgage Company (Aaron Mortgage) pursuant to the former provisions of KRS[1] 341.540. We affirm.

Aaron Mortgage was a mortgage loan brokerage firm founded in 1993. The firm originated mortgage loans and quickly sold them to other lenders. Solely owned by Daniel Golden, Aaron Mortgage operated several branches, but its base of operations was in an office condominium on Shelbyville Road in Louisville. The office condominium (along with several more in the complex) was owned by Golden and his wife and was leased to Aaron Mortgage.

In early 2010, Partners Financial Group LLC (PFG) purchased from Golden and his wife the office condominium leased by Aaron Mortgage. Aaron Mortgage was not involved in the transaction, but it continued as a tenant of PFG. PFG is owned by James Davis and his wife. Davis had begun working as a mortgage originator for Aaron Mortgage in 2001. Over the course of his employment, Davis also served as an officer of the firm.

Later in 2010, after his wife had died, Golden advised the employees of Aaron Mortgage that he intended to wind up the firm's affairs. While Aaron Mortgage was winding up, Davis founded JP Mortgage Company. Davis secured the required licenses, and JP Mortgage began operations on May 17, 2011. In late-July, three employees of Aaron Mortgage came to work for JP Mortgage.

[1] Kentucky Revised Statutes.

In November 2011, Aaron Mortgage ceased business operations, surrendered its mortgage loan brokerage license, and dissolved the business entity. The Division of Unemployment Insurance closed the reserve account of Aaron Mortgage. By this time, six employees of Aaron Mortgage had gone to work for JP Mortgage. JP Mortgage was operating out of the office condominium leased from PFG and vacated by Aaron Mortgage.

In July 2016, five years after the founding of JP Mortgage, the Division notified JP Mortgage that pursuant to the provisions of KRS 341.540, it had become the successor-in-interest to the unemployment reserve account of Aaron Mortgage on July 1, 2011. As a result, JP Mortgage would be liable for any delinquent tax or penalties owed by Aaron Mortgage and would inherit the tax rate of its predecessor.

In August 2016, the Division sent a notice of additional tax assessment to JP Mortgage. Utilizing the amended contribution rate, the assessment stretched back to enhance taxes imposed in the third and fourth quarters of 2011; the first two quarters of 2013; the first three quarters of 2014; the first three quarters of 2015; and the first two quarters of 2016.

JP Mortgage contested the Division's determination. However, following an evidentiary hearing before the Commission's referee, the

Commission affirmed the determination that JP Mortgage was the successor-in-interest to Aaron Mortgage.

JP Mortgage appealed the administrative decision to the Franklin Circuit Court. Upon its review, the circuit court concluded that the decision of the Commission was not adequately supported by the evidence. The court reversed the decision and remanded the matter for further proceedings. This appeal followed.

Pursuant to the provisions of KRS 13B.150, reviewing courts are bound to the administrative record compiled by the agency. Appellate courts must review but not reweigh the evidence. Instead, reviewing courts determine only whether the agency's final order is supported by substantial evidence. *Kentucky State Racing Comm'n v. Fuller*, 481 S.W.2d 298 (Ky. 1972). "'Substantial evidence' is evidence which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the minds of reasonable persons." *Hughes v. Kentucky Horse Racing Auth.*, 179 S.W.3d 865, 871 (Ky. App. 2004) (citations omitted). Administrative decision-makers are afforded wide latitude, and this standard of review is, indeed, a highly deferential one. *Curd v. Ky. State Bd. of Licensure for Prof'l Eng'rs & Land Surveyors*, 433 S.W.3d 291, 304 (Ky. 2014).

The Division determined that JP Mortgage was the successor to Aaron Mortgage's reserve tax account based upon the provisions of KRS 341.540,

entitled "Reserve accounts of successive employing units." The applicable version of the statute provides as follows:

> (2)(a) . . . if a subject employer transfers all or part of its trade or business to another employing unit, the acquiring employing unit shall be deemed a successor if the transfer is in accordance with administrative regulations promulgated by the secretary, or if the transferring and acquiring employing units have substantially the same ownership, management, or control. If an employing unit is deemed a successor, the transferring employing unit shall be deemed a predecessor.
>
> (3) Any successor to the trade or business of a subject employer shall assume the resources and liabilities of the predecessor's reserve account, including interest, and shall continue the payment of all contributions and interest due under this chapter, except that the successor shall not be required to assume the liability of any delinquent contributions and interest of a predecessor or predecessors unless the cabinet notifies the successor of the delinquency within six (6) months after the department has notice of the succession.

KRS 341.540(2)-(3). The statutory provisions include a list of possible, non-dispositive factors that may be considered when determining whether the acquiring employer will be deemed a successor -- *after a subject employer transfers all or part of its trade or business to another employer*. For instance, KRS 341.540(1) provides the factors indicating shared management or control between the subject employers, which include: common owners, directors, shareholders, or executive officers, and titles to property, parent companies, workforce, assets, legal and

professional representation, physical location, client pools, marketing services, Web sites, telephone numbers, or e-mail addresses.

The Commission concluded that JP Mortgage was the successor employing unit of Aaron Mortgage because Aaron Mortgage transferred its employees to JP Mortgage and the firms shared substantially the same ownership, management, or control. Upon its review, the Franklin Circuit Court held that the Commission's decision was arbitrary because it was not based upon substantial evidence tending to show that Aaron Mortgage transferred all or part of its trade or business to JP Mortgage or that Aaron Mortgage and JP Mortgage had substantially the same ownership, management, or control.

The issue in this case is whether there is substantial evidence of probative value to indicate that JP Mortgage is a successor employing unit as defined by statute. After our limited scope of review, we are persuaded that the evidence is insufficient to support the Commission's decision and affirm the conclusion of the circuit court.

During the referee's hearing, Golden testified that he wanted to close Aaron Mortgage because of his wife's debilitating illness. He had no desire to sell the business and never intended to do so. He stated that he did not negotiate with anyone for his employees; did not sell his name or goodwill; did not transfer company assets, accounts, or liabilities; and did not transfer any licenses. He

testified that there were no negotiations or transactions of any kind between Aaron Mortgage and JP Mortgage. He explained that there would be no real value in the transfer of any part of his mortgage firm to another and, as a consequence, he received no consideration for any part of it. Furthermore, he indicated that in his capacity as vice-president, Davis had absolutely no authority to make decisions about the firm, nor did he exercise any control over the firm.

Davis confirmed during his testimony that he had never had an ownership interest in Aaron Mortgage and that he had never had authority to make decisions about the firm. He indicated that Golden had never expressed a desire to negotiate for the sale of the firm or any part of it. Davis stated that he did not negotiate with Aaron Mortgage in any transaction. He denied having: purchased customer accounts; negotiated for employees; or acquired any assets of Aaron Mortgage. Davis explained that he had incurred substantial start-up costs to establish JP Mortgage and that when the business started, he was its sole employee. He stated that JP Mortgage eventually took on employees of Aaron Mortgage. Davis indicated that the purchase of the office condominium was not a transaction between the firms and that the physical location of a mortgage originator is largely, if not entirely, unimportant to its clients.

The Division's representative testified that she concluded that Aaron Mortgage had transferred part of its business to JP Mortgage because Davis bought

the office condominium and made a commitment to the employees of Aaron Mortgage. However, she admitted that she had no evidence to show that any provisions had been made by JP Mortgage for the employees of Aaron Mortgage. On the contrary, her investigation indicated that Golden had simply informed the employees that he intended to shutter the firm. She testified, "Mr. Davis knew those employees because he was one of those employees and he worked with those employees every day. So I found it hard to believe he didn't speak with them about his new business, which would be negotiation . . . ." She confirmed that Golden received no consideration for his part in the alleged exchange; she could not say that the employees who went to work for JP Mortgage had come on board without a break in service or intervening employment. Furthermore, she admitted that neither firm had negotiated for the transfer of the Goldens' office condominium to PFG. In fact, the Division failed to produce any evidence whatsoever to contradict the firms' assertions.

In *Wildot, Inc., v. Kentucky Unemployment Ins. Comm'n,* 762 S.W.2d 17 (Ky. 1988), the Kentucky Supreme Court reversed a finding of the Commission that Wildot was a successor employing unit pursuant to the provisions of KRS 341.540. Wildot had negotiated a lease with the owner of the premises on which Zenco Corporation operated a restaurant under the franchise name, "Duff's Smorgasbord." Zenco ceased operations at the premises the day before Wildot

took over the lease and began operating a restaurant also named, "Duff's Smorgasbord." Wildot paid Zenco's debts on the movable restaurant equipment, hired several Zenco employees, and acquired certain inventory from Zenco. The court held that in order to impose liability on Wildot, the plain language of KRS 341.540 and associated regulations required that there be some "connection, negotiation, or transaction between [the parties.]" *Id.* at 19. Under these facts, the court concluded that "Wildot did not succeed to or acquire anything from Zenco." *Id.*

In the more recent case of *Competitive Auto Ramp Services, Inc. v. Kentucky Unemployment Ins. Comm'n*, 222 S.W.3d 249 (Ky. App. 2007), the Commission found that when Competitive Auto took over the contract for rail car services from the Shelbyville Mixing Center, it became its successor. We reversed that determination, holding that even though Competitive Auto conducted the same type of business in the same location, there was no connection – as was required by the applicable law.

Additionally, we cited language included in *Mascom Management. Inc. v. Labor and Industrial Relations Comm'n*, 586 S.W.2d 802 (Mo. Ct. App. 1979), a Missouri case with similar facts. In *Mascom*, the court recognized an equitable component to the issue and observed that, "a new enterprise has been undertaken with fresh assets to operate a similar business in the same location.

This has had the effect of continuing the employment of the employees of the old enterprise, but that salutary end should not be burdened by saddling the new enterprise with the debts of the old enterprise." *Id.* at 807.

In the case before us, the firms' representatives testified specifically that they had not negotiated for the purchase/sale of Aaron Mortgage or any part of it. The record establishes that no negotiations occurred between the employers for any part of the trade or business of Aaron Mortgage and that no part of the trade or business of Aaron Mortgage was ever transferred to JP Mortgage.

There is no dispute that JP Mortgage leased the same office condominium vacated by Aaron Mortgage and began its business operations there. Nor is there any dispute that JP Mortgage hired most of Aaron Mortgage's employees. However, the office condominium was not transferred between the firms, and the office condominium was completely outfitted specifically for the use of JP Mortgage. Although JP Mortgage hired the majority of Aaron Mortgage's workforce, the decision to hire the employees was not the result of negotiations between the mortgage firms but rather between JP Mortage and the individual employees. JP Mortgage negotiated its own contracts with its employees.

There was no evidence to show that there were negotiations between the firms or that there was any agreement, assignment of rights or liabilities, or transfer of assets between them. Absent any evidence of a connection, negotiation,

or transaction between Aaron Mortgage and JP Mortgage, JP Mortgage cannot be held to be a successor employing unit under the applicable provisions of KRS 341.540.

JP Mortgage, a wholly new firm, chose to employ individuals who otherwise would have lost their jobs due to the closure of Aaron Mortgage. This is a laudable decision and perhaps a necessary one. A determination that JP Mortgage is to be penalized under these circumstances is not consistent with the construction of our tax code and is not in keeping with the public policy of the Commonwealth.

We AFFIRM the order of the Franklin Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
Joshua R. Hurley Frankfort, Kentucky	Thomas M. Williams Louisville, Kentucky