

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Mark A. DiLuciano,	:	
Appellant-Appellant,	:	
v.	:	No. 11AP-1035 (C.P.C. No. 09CVF-05-7537)
Ohio Real Estate Commission,	:	(REGULAR CALENDAR)
Appellee-Appellee.	:	

D E C I S I O N

Rendered on June 29, 2012

Michael R. Szolosi, Jr., for appellant.

Michael DeWine, Attorney General, and *Keith O'Korn*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶ 1} Appellant, Mark A. DiLuciano, appeals a judgment of the Franklin County Court of Common Pleas that affirmed the adjudication order of appellee, the Ohio Real Estate Commission ("Commission"). For the following reasons, we affirm in part, reverse in part, and remand this matter to the Commission for further proceedings.

{¶ 2} In April 2004, Robert L. Smith inherited commercial property located at 1833 Broadway in Lorain, Ohio. Smith immediately placed the property on the market, but he was unable to find a buyer. In the summer of 2005, Smith hired DiLuciano to advertise the property online. Smith and DiLuciano agreed that Smith would pay DiLuciano \$1,000 to design and post an online advertisement for the property and to perform the HTML programming necessary to direct internet search traffic to the

advertisement. Smith and DiLuciano also agreed that Smith would pay DiLuciano \$10,000 if the property sold within 30 days of the posting of the advertisement.

{¶ 3} At the time Smith and DiLuciano reached their agreement, DiLuciano was not a licensed real estate broker or real estate salesperson. DiLuciano eventually obtained a license to act as a real estate salesperson, but not until November 2007.

{¶ 4} On August 24, 2005, DiLuciano posted the advertisement for Smith's property in ebay's classifieds marketplace. The advertisement included DiLuciano's user name, "mega-cart," but not his actual name or any of DiLuciano's contact information. DiLuciano designed the advertisement so that people who responded received Smith's contact information.

{¶ 5} Daniel Hale saw the ebay advertisement for Smith's property and decided to submit an offer, which Smith accepted. Hale ultimately purchased the property on November 23, 2005. According to Hale, DiLuciano facilitated the transaction, doing "everything [from] forwarding to me all the paperwork [to] act[ing] as a middleman between me and the insurance company, [t]itle [c]ompany, [and] the seller[.]" Hale affidavit, at ¶ 3.

{¶ 6} After Hale acquired the property, he asked DiLuciano to take care of the property and try to rent it. Hale later testified that he and DiLuciano agreed that if DiLuciano found a tenant for the property, DiLuciano would receive a fee in the amount of the first month's rent, plus five percent of the monthly rent thereafter. DiLuciano admitted that he agreed to assist Hale in finding a tenant for the property. However, DiLuciano disputed Hale's claim that he agreed to accept any compensation for his efforts.

{¶ 7} At Hale's request, DiLuciano posted a description of the property on his private website, www.sunmarkinc.com, to advertise the property to potential tenants. That advertisement included DiLuciano's cell and office telephone numbers, as well as DiLuciano's email address.

{¶ 8} Although DiLuciano identified multiple individuals interested in renting the property, Hale's insistence on lease terms unfavorable to the tenant resulted in those individuals deciding not to rent from Hale. In a letter dated December 1, 2006, DiLuciano

informed Hale that he would no longer assist Hale in renting the property. DiLuciano explained that:

I have spent OVER \$1,200 of my money advertising to try and help you lease your building. Not to mention showing it hundreds of times. I can not [sic] even begin to imagine how many hours were wasted.

It has come to a point where I finally realize, no matter who I find, or what I do, you are still the owner and have the final say. And it seems that final say always goes against what I think is best.

Exhibit C-10.0.

{¶ 9} On December 17, 2007, the Commission received a complaint from Hale against DiLuciano. Jeffrey L. Davis, an investigator for the Department of Commerce, Division of Real Estate and Licensing ("Division"), interviewed Hale regarding his complaint. Based on Hale's statements, Davis drafted an affidavit, which Hale signed. As part of his investigation, Davis also spoke with DiLuciano and Smith.

{¶ 10} In a letter dated April 1, 2009, the Division notified DiLuciano that Davis' investigation had revealed reasonable and substantial evidence that DiLuciano had violated R.C. 4735.02. According to that provision, "no person * * * shall act as a real estate broker or real estate salesperson, or advertise or assume to act as such, without first being licensed as provided in this chapter." The notice letter alleged that DiLuciano violated R.C. 4735.02 in three ways: (1) DiLuciano "[a]dvertised or held [him]self out as engaged in the business of selling, exchanging, purchasing, renting, or leasing in an advertisement for the subject property when [he] advertised the subject property on ebay on or about August 24, 2005," (2) DiLuciano "[n]egotiated the sale, exchange, purchase, rental, or leasing of the subject property from on or around August 24, 2005 to on or about November 23, 2005," and (3) "[f]rom on or about November 23, 2005 to December 1, 2006, [DiLuciano] managed the subject property."¹

¹ According to the Division, the alleged conduct amounted to 461 violations. The Division arrived at that number by counting each day that DiLuciano engaged in the alleged conduct as a violation. For purposes of this decision, we will refer to each of the three factual allegations as a violation. Thus, we will cite to violations one through three, not one through 461.

{¶ 11} The Commission conducted a hearing regarding the violations listed in the notice letter. Davis testified at that hearing, and the Division introduced affidavits from Hale and Smith. DiLuciano introduced his own affidavit testimony.

{¶ 12} At the conclusion of the hearing, the Commission determined that DiLuciano had committed the three violations alleged in the notice letter. The Commission imposed on DiLuciano a civil penalty of \$23,050. On May 13, 2009, the Commission issued an adjudication order stating its determination and imposition of the civil penalty.

{¶ 13} Pursuant to R.C. 119.12, DiLuciano appealed the adjudication order to the trial court. In a judgment entered November 18, 2011, the trial court affirmed the adjudication order.

{¶ 14} DiLuciano now appeals the November 18, 2011 judgment, and he assigns the following errors:

1. The Franklin County Court of Common Pleas erred by allowing the Ohio Real Estate Commission to rely upon *unsworn* testimony of an out of state witness (Dan Hale) elicited through the testimony of the State of Ohio's Investigator to establish substantive points in the Division of Real Estate & Professional Licensing's case in chief.
2. The Franklin County Court of Common Pleas erred by allowing the Ohio Real Estate Commission to deny DiLuciano his right to cross examine Investigator Davis on relevant, non-privileged topics based upon investigatory privilege.
3. The Franklin County Court of Common Pleas erred as a matter of law because DiLuciano cannot violate R.C. 4375.02 [sic] when he never identified himself to the public as selling, offering to sell, listing or offering to list real estate for Smith and no reliable, probative and substantial evidence exists that DiLuciano was paid or expected to be paid any money for the free assistance he provided to Hale.

{¶ 15} Pursuant to R.C. 119.12, when a common pleas court reviews an order of an administrative agency, the court must consider the entire record to determine if the agency's order is supported by reliable, probative, and substantial evidence and is in accordance with law. To be "reliable," evidence must be dependable and true within a reasonable probability. *Our Place, Inc. v. Ohio Liquor Control Comm.*, 63 Ohio St.3d

570, 571 (1992). To be "probative," evidence must be relevant or, in other words, tend to prove the issue in question. *Id.* To be "substantial," evidence must have some weight; it must have importance and value. *Id.*

{¶ 16} In reviewing the record for reliable, probative, and substantial evidence, the trial court " 'must appraise all the evidence as to the credibility of the witnesses, the probative character of the evidence, and the weight thereof.' " *AmCare, Inc. v. Ohio Dept. of Job & Family Servs.*, 161 Ohio App.3d 350, 2005-Ohio-2714, ¶ 9 (10th Dist.), quoting *Lies v. Ohio Veterinary Med. Bd.*, 2 Ohio App.3d 204, 207 (10th Dist.1981). In doing so, the trial court must give due deference to the administrative resolution of evidentiary conflicts because the agency, as the fact finder, is in the best position to observe the manner and demeanor of the witnesses. *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 111 (1980).

{¶ 17} Unlike a trial court, an appellate court may not review the evidence. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621 (1993). An appellate court is limited to determining whether the trial court abused its discretion. *Id.* Absent such an abuse of discretion, an appellate court must affirm the trial court's judgment, even if the appellate court would have arrived at a different conclusion than the trial court. *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.*, 40 Ohio St.3d 257, 261 (1988). When reviewing the trial court's judgment as to whether an agency's decision is in accordance with law, an appellate court's review is plenary. *Spitznagel v. State Bd. of Edn.*, 126 Ohio St.3d 174, 2010-Ohio-2715, ¶ 14.

{¶ 18} By DiLuciano's first assignment of error, he argues that the Commission erroneously relied on unsworn testimony. DiLuciano objects to the testimony that Davis gave regarding what Hale told him during the investigatory interviews. DiLuciano contends that the Commission and trial court should have disregarded that testimony because Hale did not swear a truthfulness oath before speaking with Davis. We find this argument unpersuasive. At the administrative hearing, Davis was sworn in before testifying. Consequently, his testimony—including his statements as to what Hale told him—is sworn testimony.

{¶ 19} The testimony at issue is only objectionable because it constituted hearsay, not because it was unsworn. Hearsay, however, is admissible in administrative hearings.

Kellough v. Ohio State Bd. of Edn., 10th Dist. No. 10AP-419, 2011-Ohio-431, ¶ 47. See also *HealthSouth Corp. v. Testa*, ___ Ohio St.3d ___, 2012-Ohio-1871, ¶ 13 ("The rules of evidence, including the hearsay rule, do not control administrative hearings[.]"). While an administrative agency may not arbitrarily admit hearsay into evidence, *Kellough* at ¶ 47, DiLuciano does not assert, and we do not find, any problem in the Commission's consideration of the hearsay at issue. Davis incorporated Hale's version of events into an affidavit, which Hale signed and the Division introduced at the administrative hearing. In large part, Davis merely repeated the averments in Hale's affidavit when he testified. We thus conclude that the testimony at issue is not so inherently unreliable that the Commission erred by not excluding it from the record. Accordingly, we overrule DiLuciano's first assignment of error.

{¶ 20} By DiLuciano's second assignment of error, he argues that the trial court erred in not reversing the adjudication order because the Commission limited his cross-examination of Davis. We disagree.

{¶ 21} Pursuant to R.C. 4735.05(D):

All information that is obtained by investigators and auditors performing investigations * * * pursuant to division (B)(4) of this section, from licensees, complainants, or other persons, and all reports, documents, and other work products that arise from that information and that are prepared by the investigators * * * or other personnel of the department, shall be held in confidence by the superintendent, the investigators, * * * and other personnel of the department.

In three instances, the Commission sustained an objection based on the confidentiality provision contained in R.C. 4735.05(D) to a question that DiLuciano's counsel had posed to Davis. The Commission prohibited DiLuciano's counsel from eliciting from Davis: (1) the date when Davis received Hale's complaint for investigation, (2) whether Davis provided DiLuciano with a complete copy of his investigation file, and (3) whether Davis asked DiLuciano about the various businesses that he operated.

{¶ 22} In order to secure a reversal based on the Commission's evidentiary rulings, DiLuciano must demonstrate that the exclusion of evidence materially prejudiced him. *Banford v. Aldrich Chemical Co.*, 126 Ohio St.3d 210, 2010-Ohio-2470, ¶ 38; *Beard v. Meridia Huron Hosp.*, 106 Ohio St.3d 237, 2005-Ohio-4787, ¶ 20. As to the exclusion of

evidence regarding the timing of the investigation, DiLuciano contends that the Commission precluded him from proving that Davis did not begin investigating Hale's complaint until long after the Division received it in December 2007. According to DiLuciano, he needed that testimony to buttress his argument that the Division unreasonably delayed its investigation into Hale's complaint. As a result of this delay, DiLuciano had destroyed many of the records that he maintained regarding his transactions with Hale and Smith, and thus, he could not produce those records to prove that he did not violate R.C. 4735.02.

{¶ 23} Although the Commission precluded Davis from testifying as to when he received Hale's complaint for investigation, DiLuciano's counsel elicited testimony from Davis that he did not contact DiLuciano about Hale's complaint until January 2009. DiLuciano testified in his affidavit that he destroyed relevant records pursuant to his record retention policy prior to Davis' initial contact. Thus, DiLuciano introduced the evidence necessary to support his argument that the Division unreasonably delayed its investigation and, by doing so, prejudiced him.

{¶ 24} DiLuciano does not explain what prejudice he suffered because the Commission sustained an objection to the question, "And you've not provided [the investigatory file] to me or to Mr. DiLuciano, isn't that true?" (Tr. 46.) We perceive no prejudice, particularly in the light of Commissioner Paul's comment that "[w]e understand you didn't get it." *Id.* Finally, DiLuciano does not identify, and we do not perceive, any prejudice from the exclusion of testimony regarding whether Davis asked DiLuciano about the various businesses that DiLuciano operated. Accordingly, we overrule DiLuciano's second assignment of error.

{¶ 25} By his third assignment of error, DiLuciano argues that the trial court erred in finding that reliable, probative, and substantial evidence proved that he committed the first and third violations alleged in the notice letter. We find DiLuciano's challenge to the first violation meritorious, but we reject the challenge to the third violation.

{¶ 26} As we stated above, R.C. 4735.02 prohibits any person from acting as a real estate broker or real estate salesperson without a license issued by the Division. The statutory definition of "real estate broker" includes:

[A]ny person, * * * who for another, * * * and who for a fee, commission, or other valuable consideration, or with the

intention, or in the expectation, or upon the promise of receiving or collecting a fee, commission, or other valuable consideration does any of the following:

(1) [N]egotiates the sale, exchange, purchase, rental, or leasing of any real estate;

* * *

(5) [M]anages * * * any building or portions of buildings to the public as tenants;

(6) Advertises or holds self out as engaged in the business of selling, exchanging, purchasing, renting, or leasing real estate.

R.C. 4735.01(A). A "real estate salesperson" is "any person associated with a licensed real estate broker to do or to deal in any acts or transactions set out or comprehended by the definition of a real estate broker, for compensation or otherwise." R.C. 4735.01(C).

{¶ 27} In the notice letter, the Division first alleged that DiLuciano advertised or held himself out as engaged in the business of selling real estate when he advertised Smith's property on ebay on August 24, 2005. Because that alleged conduct falls within the ambit of R.C. 4735.01(A)(6), the Division maintained that, by committing such conduct without a license, DiLuciano violated R.C. 4735.02.

{¶ 28} The Commission relied on Hale's affidavit testimony to prove its allegation that DiLuciano advertised or held himself out as engaged in the business of selling real estate in the ebay advertisement. In relevant part, Hale testified:

On or about October 4, 2005 I found a property listed on Ebay at the address of 1833 Broadway Lorain, Ohio 44052 and phoned the contact person listed, Mark Diluciano [sic], 440-245-1700 (office) or 440-315-4359 (cell).

Hale affidavit, at ¶ 2. However, at the hearing, Davis, the Division investigator, explained that the listing Hale referred to in his affidavit was not the ebay advertisement, but the advertisement posted at www.sunmarkinc.com/ebay/1833/ (the "Sunmark advertisement"). Hale confused the Sunmark and ebay advertisements, and he erroneously identified the Sunmark advertisement as the ebay advertisement. Although the URL for the Sunmark advertisement contained the word "ebay," the advertisement appeared on www.sunmarkinc.com, not www.ebay.com. As DiLuciano explained,

www.sunmarkinc.com "is my domain [so the Sunmark advertisement] is not a google.com or yahoo.com or ebay.com advertisement. If it where, [sic] [the URL] would start with www.google.com or www.yahoo.com...etc." Exhibit R-1.0. The "/ebay/1833/" portion of the URL is only the file name.

{¶ 29} Additionally, the Sunmark advertisement is marked "NOV. & DEC. 2005." This inscription confirms Hale's confusion of the two advertisements. DiLuciano posted the ebay advertisement on August 24, 2005. Hale purchased the property on November 23, 2005, and thereafter asked DiLuciano to post an advertisement for the property on www.sunmarkinc.com. Thus, the dates written on the Sunmark advertisement correlate with the dates on which DiLuciano posted that advertisement on his web site.

{¶ 30} While the Sunmark advertisement included the telephone numbers Hale cited in his affidavit, the ebay advertisement did not. Moreover, the ebay advertisement only included DiLuciano's user name ("mega-cart"), not his actual name. In his affidavit, DiLuciano stated that "no way existed for individuals who viewed the property description [posted on ebay] to get my contact information." DiLuciano affidavit, at ¶ 34. The Division failed to introduce any evidence to contradict this testimony.

{¶ 31} Given the state of the record, we conclude that the trial court abused its discretion in finding that reliable, probative, and substantial evidence established that DiLuciano advertised or held himself out as engaged in the business of selling real estate in the ebay advertisement. Thus, the evidence does not sufficiently support the first violation of R.C. 4735.02 alleged in the notice letter.

{¶ 32} DiLuciano also argues that the trial court erred in finding reliable, probative, and substantial evidence supported the Division's third allegation; i.e., that he violated R.C. 4735.02 by managing the property for Hale after the purchase. DiLuciano maintains that he did not act as a real estate broker or real estate salesperson when assisting Hale because he did not receive or expect a fee.

{¶ 33} DiLuciano testified that he did not expect or request compensation from Hale for the assistance that he rendered. DiLuciano claimed that he helped Hale because he was sympathetic to Hale's situation as an out-of-state resident attempting to rent a property located thousands of miles away. Hale, however, testified that he and DiLuciano

agreed that if DiLuciano obtained a tenant for the property, DiLuciano would receive a fee in the amount of the first month's rent and five percent of each subsequent month's rent. Thus, the record contains a classic evidentiary conflict. The trial court deferred to the Commission's determination that Hale's testimony was more credible than DiLuciano's. We find no abuse of discretion in the trial court's decision to accord deference to the Commission's resolution of the evidentiary conflict, or in the trial court's decision that reliable, probative, and substantial evidence supported the third violation alleged in the notice letter.

{¶ 34} In sum, we sustain DiLuciano's third assignment of error, but only to the extent that it alleges error in the ruling on the first violation alleged in the notice letter. In all other respects, we overrule the third assignment of error.

{¶ 35} If a reviewing court concludes that not all of the violations found by the administrative agency are supported by the evidence or in accordance with law, the court may remand the matter to the agency to fashion a different penalty, if the agency so chooses. *Parrish v. Ohio Dept. of Agriculture*, 10th Dist. No. 06AP-314, 2006-Ohio-6434, ¶ 20; *Monkey Joes, Inc. v. Ohio State Liquor Control Comm.*, 10th Dist. No. 03AP-723, 2004-Ohio-1010, ¶ 22; *Rossiter v. Ohio State Med. Bd.*, 10th Dist. No. 01AP-1252 (Apr. 25, 2002). In light of our ruling on DiLuciano's third assignment of error, we remand this matter so that the Commission may reconsider the penalty that it imposed.

{¶ 36} For the foregoing reasons, we overrule DiLuciano's first and second assignments of error, and we sustain in part and overrule in part DiLuciano's third assignment of error. We affirm in part and reverse in part the judgment of the Franklin County Court of Common Pleas, and we remand this matter to the Ohio Real Estate Commission for further proceedings consistent with law and this decision.

*Judgment affirmed in part and reversed in part;
cause remanded.*

BRYANT and TYACK, JJ., concur.
