[Cite as **_Fenway Fin., L.L.C. v. Greater Columbus Realty, L.L.C._, 2013-Ohio-3623.**]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Fenway Financial, LLC dba Commission Express,	:	
Plaintiff-Appellant,	:	No. 12AP-291 (C.P.C. No. 08CVH 7 10611)
v.	:	(REGULAR CALENDAR)
Greater Columbus Realty, LLC dba Keller Williams Greater Columbus Realty, LLC et al.,	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on August 22, 2013

Dinsmore & Shohl, LLP, *Donald B. Leach, Jr.*, *Michael J. King*, and *Gregory P. Mathews*, for appellant.

Kevin R. Nose, for appellee Greater Columbus Realty, LLC, dba Keller Williams Greater Columbus Realty, LLC.

Michael DeWine, Attorney General, *Cheryl R. Hawkinson*, *Keith L. O'Korn*, and *Jennifer S. M. Croskey*, for appellee Ohio Department of Commerce.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶ 1} This is an appeal by plaintiff-appellant, Fenway Financial, LLC dba Commission Express, from a decision and entry of the Franklin County Court of Common Pleas granting summary judgment in favor of defendant-appellee, Greater Columbus

Realty, LLC, dba Keller Williams Greater Columbus Realty, LLC ("Keller Williams"), and defendant-appellee, Kimberly A. Zurz, Director, Ohio Department of Commerce ("director").

{¶ 2} On July 24, 2008, appellant filed a complaint against Keller Williams, seeking a declaratory judgment and alleging breach of contract. In the complaint, appellant alleged it had purchased accounts receivable, comprised of earned but unpaid sales commissions, from real estate agent Stacey Lambright ("Lambright"). Appellant alleged that Lambright's real estate license is associated with Keller Williams, a real estate broker, and that Keller Williams had failed to pay funds due to appellant following notice of Lambright's assignment of certain accounts receivable attributable to five transactions.

{¶ 3} On October 15, 2008, appellant filed an amended complaint, naming the director as a defendant; appellant asserted a claim for declaratory relief after the Ohio Department of Commerce (hereafter "the department") issued subpoenas to appellant in which the department alleged that appellant's business model violated provisions of R.C. 1321.02 (requiring a person engaged in the business of lending to obtain a license from the division of financial institutions). On November 18, 2008, the director filed an answer and counterclaim, seeking in the counterclaim a declaration that R.C. 4735.20 precluded Keller Williams from paying the amounts allegedly owed to appellant.

{¶ 4} On July 21, 2010, the parties entered into a joint stipulation and agreed statement of facts ("joint stipulation"); the parties subsequently submitted the matter to the trial court on cross-motions for summary judgment. The following facts, set forth in the trial court's decision on the motions for summary judgment, are based upon the joint stipulation:

> Plaintiff, as a franchisee, conducted its business in accordance with the national model established by Commission Express, set forth in a manual. * * * Plaintiff requires a real estate agent with whom it does business to execute a Master Repurchase and Security Agreement * * * and a Business Purpose Checklist and Declaration * * *. Ms. Lambright executed both documents. * * * Thereafter, Plaintiff filed a UCC-1 Financing Statement, listing Plaintiff as the Secured Party and Ms. Lambright as the Debtor. * * * Each time Plaintiff purchased one of Ms. Lambright's real estate commission accounts, it requested that Ms. Lambright execute five documents

> (collectively "Transaction Documents"): 1) an Application to Sell Receivable; 2) a Certification; 3) an Account Receivable Sale and Assignment Agreement; 4) a Notice of Assignment; and 5) a Receivable Summary. * * * Ms. Lambright or her husband executed almost all of the Transaction Documents for eighteen properties for which she expected to receive commission. * * * Plaintiff then sent a Notice of Assignment to Defendant Keller Williams for each of the eighteen transactions and a Reminder of Commission Assignment before the closing dates for the properties.
>
> Keller Williams never sent Plaintiff any of the money it received for commissions earned by Ms. Lambright or her husband. * * * Instead, Keller Williams informed Plaintiff that it was precluded from sending Plaintiff the money under R.C. 4735.20(F). * * * Six of the transactions Ms. Lambright entered into with Plaintiff are in default. * * * Plaintiff sent Ms. Lambright a Notice of Default for each of those accounts, demanding payment of the full amount of the commission, plus eighteen percent interest per annum on the unpaid balance. * * * Plaintiff also sent a Notice of Default and Demand for Future Commissions to Keller Williams, demanding payment of the full amount of the commission, plus eighteen percent interest per annum on the unpaid balance.

{¶ 5} On March 2, 2012, the trial court filed a decision granting summary judgment in favor of Keller Williams and the director, and denying appellant's motion for summary judgment. The trial court concluded that the transactions between appellant and Lambright constituted a series of loans by appellant (and not the purchase of accounts receivable), therefore making appellant a third-party creditor under R.C. 4735.20(F) and precluding Keller Williams from transferring commissions earned by Lambright to appellant. The court also determined that the loans at issue violated the statutory provisions of R.C. 1321.02 and that there existed no conflict between the provisions of R.C. 4735.20(F) and 1309.406(F).

{¶ 6} On appeal, appellant sets forth the following five assignments of error for this court's review:

> <u>First Assignment of Error</u>: The trial court erred in granting the Defendants' motions for summary judgment and denying Plaintiff's motion for summary judgment because the

> transactions at issue effected assignments of accounts receivable.
>
> Second Assignment of Error: The trial court erred in granting the Defendants' motions for summary judgment and denying Plaintiff's motion for summary judgment because the transactions at issue do not violate R.C. 1321.02.
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> Third Assignment of Error: The trial court erred in granting the Defendants' motions for summary judgment and denying Plaintiff's motion for summary judgment because R.C. 4735.20(F) does not preclude Defendant Keller Williams from transferring commissions earned by a real estate agent to Plaintiff.
>
> Fourth Assignment of Error: The trial court erred in granting the Defendants' motions for summary judgment and denying Plaintiff's motion for summary judgment because R.C. 1309.406(F) precludes the trial court's application of R.C. 4735.20(F).
>
> Fifth Assignment of Error: The trial court erred in granting the Defendants' motions for summary judgment and denying Plaintiff's motion for summary judgment because it should have severed the repurchase provision from the Master Repurchase and Security Agreement.

{¶ 7} Appellant's assignments of error are interrelated and will be considered together. Under these assignments of error, appellant argues that the trial court erred in granting summary judgment in favor of Keller Williams and the director because: (1) the transactions at issue effected assignments of accounts receivable (and not loans), (2) the transactions do not violate the provisions of R.C. 1321.02, (3) R.C. 4735.20(F) does not preclude Keller Williams from transferring commissions earned by a real estate agent to appellant, (4) R.C. 1309.406(F) precludes the trial court's application of R.C. 4735.20(F), and (5) the trial court should have severed the repurchase provision from the Master Repurchase and Service Agreement.

{¶ 8} Pursuant to Civ.R. 56(C), summary judgment shall be granted if the filings in the action, including pleadings and affidavits, "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

This court's review of a trial court's decision granting summary judgment is de novo. *Bonacorsi v. Wheeling & Lake Erie Ry. Co.,* 95 Ohio St.3d 314, 2002-Ohio-2220, ¶ 24.

{¶ 9} Appellant first argues that the trial court erred in its determination that the transactions between it and Lambright were loans, thereby creating a debtor-creditor relationship. As noted under the facts, appellant sought a declaratory judgment that the transactions at issue were not loans subject to the licensing requirement of R.C. 1321.02. Appellant maintains that it purchased accounts receivable, thus establishing a "factoring" relationship with Lambright. According to appellant, because the transactions were not loans, the provisions of R.C. 4735.20, prohibiting a licensed real estate broker from paying a commission due an affiliated licensee to a third-party creditor of the affiliated licensee, are inapplicable.

{¶ 10} In arguing that the transactions at issue created a factoring relationship between it and Lambright, appellant contends that each of Lambright's earned but unpaid commissions represents a right to payment of a monetary obligation for services rendered by Lambright; further, that Lambright's right to payment falls within the statutory definition of an "account" as set forth under R.C. 1309.102. Appellant argues that the Account Receivable Sale and Assignment Agreement between the parties established the full transfer of ownership of the accounts receivable.

{¶ 11} The trial court, in considering whether appellant's transactions with Lambright were either loans or purchases of accounts receivable, looked for guidance from an earlier decision of this court, *Grossman v. Butcher*, 10th Dist. No. 91AP-1023 (June 30, 1992). In *Grossman,* this court noted the definition of "factoring" as "a 'sale of accounts receivable of a firm to a factor at a discounted price * * * ' or ' * * * [t]he purchase of accounts receivable from a business by a factor who thereby assumes the risk of loss in return for some agreed discount.' " *Id.*, quoting Black's Law Dictionary 532 (5th Ed.Rev.1979). An agreement to factor is, in essence, "an assignment of a chose in action, and is a transaction covered by the Uniform Commercial Code." *Grossman,* citing R.C. 1309.37 and 1309.45.

{¶ 12} In *Grossman,* this court noted the following characteristics of an agreement to factor an account:

> 1) Language indicating the daily assignment of the sold receivables as they are generated, with full transfer of ownership from the seller to the factor;
>
> 2) An indication of the type of accounts that the factor purchase is limited to;
>
> 3) An agreement by the lender to take the accounts with limited recourse. In other words, the seller agrees to repurchase the account if there is a failure of performance on the part of the seller, or if other similar circumstances occur;
>
> 4) An agreement that the invoice will notify the customer of the sale of the account to the factor, and that the customer will be required to pay the factor directly;
>
> 5) A stipulation that the particular transactions between the seller and the customer which are the subject of the factor agreement will require credit approval of the factor;
>
> 6) Conditions regarding payment of the purchase price by the factor, and payment of the credit balance due from the factor to the seller upon the customer's payment of the accounts receivable;
>
> 7) An indication of whether it is the factor or the seller who will be responsible for keeping records of payment of the accounts receivable.

{¶ 13} As noted in the joint stipulation, appellant and Lambright executed a number of documents, including: (1) a Master Repurchase and Security Agreement ("security agreement"), (2) a Business Purpose Checklist and Declaration, (3) an Application to Sell Receivable, (4) an Account Receivable Sale and Assignment Agreement ("assignment agreement"), and (5) a Notice of Assignment ("notice of assignment").

{¶ 14} In analyzing the transactions between appellant and Lambright, the trial court noted that "some facts" support appellant's contention that the transactions were purchases, including the fact that appellant "characterizes its business as one that purchases accounts," and "states that it does not make loans or provide financing." The trial court also observed that the language of the security agreement and the various transaction documents "purports to 'irrevocably' transfer or sell full ownership of the accounts receivable from Ms. Lambright to [appellant]," and that parts of the transaction documents "use the terms 'purchase' and 'discount,' * * * consistent with a factoring agreement." The court additionally noted that the transaction documents "specifically identify and limit the account receivable, i.e., the commission, being transferred," and that the payment terms are set forth; further, appellant "provided notice of each purported assignment to Keller Williams."

{¶ 15} The trial court found, however, upon "closer examination," that the transactions were loans. More specifically, the court held in part:

> First, just as some of the language used in the documents is consistent with a factoring agreement, other language is more consistent with a loan. In several places, the Transaction Documents refer to the money Plaintiff provided to Ms. Lambright as an "advance." * * * Furthermore, in the U.C.C. financing statement, Ms. Lambright is referred to as the "debtor," and the Master Agreement contemplates that Ms. Lambright may incur a "debt" as a result from Plaintiff's advances. * * * Looking to the substance of the parties' transactions also shows that they were loans, not purchases.
>
> Plaintiff's agreement with Ms. Lambright * * * is not one of limited recourse. Plaintiff not only has a right of recourse against Ms. Lambright if she fails to perform her obligations under the parties' agreement, but Plaintiff also has a right of recourse against Ms. Lambright if Plaintiff is not paid on the account for any reason.
>
> Both the Security Agreement and the specific Transaction Documents require Ms. Lambright to "repurchase" the account receivable for the <u>full</u> commission price plus eighteen percent interest if Plaintiff is not paid timely on the account for any reason. * * * As such, Ms. Lambright, not the account debtor, remains obligated to pay Plaintiff even if the reason Plaintiff was not paid has nothing to do with Ms. Lambright. Thus, if the real estate transaction ultimately fails to close, or, as here, Keller Williams refuses to pay Plaintiff, Ms. Lambright remains obligated on the account. In fact, Plaintiff's right of recourse against the <u>account debtor</u> is more limited than its right of recourse against Ms. Lambright, the purported account seller. * * * Plaintiff has a full right of recourse from Ms. Lambright. Such an arrangement is inconsistent with a factoring agreement and supports this

> Court's determination that the parties' entered into a series of loan agreements.

(Emphasis sic.)

{¶ 16} Appellant argues that the trial court erred in discounting the seven specific terms listed in *Grossman,* and that the court incorrectly focused upon the issue of risk of loss. Appellant further argues that, even if risk of loss is a valid consideration, the trial court incorrectly assumed appellant did not retain any risk of loss.

{¶ 17} Contrary to appellant's contention, the issue of risk of loss, which was discussed in *Grossman,* is a critical factor for courts in examining whether a particular transaction is a true sale or a loan. In *Grossman,* this court held in relevant part:

> In determining the difference between a true sale of accounts receivable and the use of the accounts as security for a loan, the trier of fact must consider the documentation of the transaction in order to discover whether the alleged buyer of the accounts has assumed the risk of loss:
>
> "Broadly stated, in a true sale transaction, the buyer will at some point be subject to some risk of loss and/or will be entitled to some benefit beyond a fixed amount of money. In the case of receivables, the risks would be of non-payment or of late payment, and the benefits would be the receipt of early payment or the receipt of payments in excess of the purchase price paid. Other benefits might include the right to retain benefits arising from changes in market rates payable on obligations of the type purchased. The failure of the buyer to receive or bear any of these suggests that the transaction is not a true sale."

(Citations omitted.)

{¶ 18} In this respect, federal courts have noted that one of the immediate advantages a seller receives from a true factoring agreement is that "the factor assumes the risk of loss." *In re Metro. Environmental, Inc.,* 293 B.R. 893, 895 (Bankr.N.D.Ohio 2003). On the other hand, "[w]hen a buyer of accounts receivable holds substantial recourse against the seller, thereby shifting all risk of non-collection on the seller, courts have routinely held the transaction to be a financing arrangement and not a sale." *In re Siskey Hauling Co., Inc.*, 456 B.R. 597, 607 (N.D.Ga.2011). *See also Wiers Farm, Inc. v.*

Waverly Farms, Inc., No. 8:09-cv-1742-T-30TBM (M.D.Fla. Mar. 31, 2011) (factoring agreement did not provide for true purchase of accounts receivable where factor "did not agree to assume the risk of nonpayments on all accounts"); *Majors Furniture Mart, Inc. v. Castle Credit Corp., Inc.*, 602 F.2d 538, 546 (3d Cir.1979) (holding that a sale of accounts receivable was a loan, as "none of the risks present in a true sale is present here").

{¶ 19} In *Nickey Gregory Co., LLC v. AgriCap, LLC*, 597 F.3d 591 (4th Cir.2010), the issue before the court was whether a "factoring agreement" between a produce distributor (Robison Farms) and a finance company (AgriCap) was a loan or a sale, i.e., whether the accounts receivable were sold for value or were simply subjected to a security interest to collateralize a loan. The court found that, under the terms of the relevant documents, Robison Farms "did not enter into a traditional factoring arrangement in the sense that it transferred the risk of the noncollection of the accounts receivable to AgriCap." *Id.* at 601-02. Rather, under the parties' agreement, "AgriCap had the right to demand that Robison Farms 'repurchase' any receivables that went unpaid or was disputed." *Id.* Further, the security agreement executed by the parties gave AgriCap a security interest in virtually all of Robison Farms' assets, and the parties entered into a subordination agreement in which Robison Farms subordinated its "other debts 'to the payment in full of AgriCap Indebtedness' and gave AgriCap 'a first priority security interest in the Collateral.' " *Id.* at 603. AgriCap also filed a UCC-1 Financing Statement claiming liens "in all of Robison Farms' assets to secure 'the prompt and full payment and performance of Secured Obligations.' " *Id.*

{¶ 20} Under the purchase agreement between the creditor and debtor in *Siskey Hauling*, the creditor could charge back any receivable to debtor that remained unpaid after 90 days, and the creditor held a reserve of ten percent of the purchase price on each receivable against non-collection. The creditor could also charge the debtor for any deficiency on an account, as well as for any fees or costs associated with a disputed account. In considering the applicable terms, the court in *Siskey Hauling* found that the creditor's "recourse against Debtor effectively transfers the risk of non-collection on Debtor." *Id.* at 607. The court therefore construed the transaction "as a loan, not a sale." *Id.*

{¶ 21} In the present case, we agree with the trial court that the transactions between appellant and Lambright are inconsistent with a true sale (or factoring) of accounts receivable. While appellant focuses upon the general terms listed in *Grossman*, we find that the trial court correctly considered the overall substance of the parties' relationship and the transactions at issue. *See, e.g., Majors Furniture Mart* at 545 (in determining whether a particular assignment constitutes a sale or a transfer for security, courts look beyond the words used in the contract and examine the parties' "practices, objectives, business activities and relationships").[1]

{¶ 22} In its analysis, the trial court noted that the security agreement established a repayment schedule, whereby Lambright warranted that appellant receive payment within a certain time period following a specified event; the failure of appellant to receive timely payment triggered a default, requiring Lambright to repurchase the account receivable. Additionally, Lambright agreed to pay appellant all of its expenses in enforcing the agreement, including attorneys' fees, and she also agreed to pay interest of 18 percent per annum on the accounts owed. The security agreement granted to appellant a security interest under the Uniform Commercial Code ("U.C.C.") "in all of Agent's right, title and interest in and to Agent's current and future accounts receivable, deposit accounts and general intangibles, of every nature, type and description * * * and all cash and non-cash proceeds of the foregoing * * * without limitation, to secure payment of the accounts receivable." The security agreement further provided that the security interest "granted herein shall attach to any and all accounts receivable, whether such accounts receivable have been assigned to [appellant] or not."

{¶ 23} Appellant perfected its security interest by filing a U.C.C. financing statement. The financing statement filed by appellant denoted Lambright as "Debtor," and listed the following collateral:

> All of Debtor's right, title, and interest in and to Debtor's current and future accounts receivable, general intangibles,

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[1] Appellant's operations manual places much emphasis on terminology, instructing its franchisees that "your customers may initially view you as a lender," but that "you must dispel that notion by using terminology germane to the factoring business." In this respect, the operations manual further instructs its franchisees to (1) stress that "you <u>purchase Receivables</u> at a discount * * * you do <u>not</u> make loans"; (2) to refer to the amount initially paid to the customer as an advance, "not a loan"; and (3) to "always refer to your income as the <u>Discount</u> or <u>Fee</u> * * * <u>never</u> as interest." (Emphasis sic.)

> accounts, contract rights, leases, chattel paper and other rights of Debtor to the receipt of money, of every nature, type, and description, whether now owing to Debtor or hereafter arising, and all cash and non-cash proceeds of the foregoing, whether now owned or hereafter acquired, without limitation.

{¶ 24} The notice of default from appellant to the agent informs the agent that, under the terms of the security agreement, agent "has agreed to immediately repurchase the commission (account receivable)"; the notice of default further informs the agent that appellant "is also entitled to initiate legal action to obtain a judgment against Agent," and that such action would result in: "1. All reasonable Attorney's fees and costs will be added to the amount you owe [appellant]. 2. A lien will attach the proceeds of your real estate when sold. 3. The judgment will be reported to the Credit Bureaus. 4. Your income and assets will be garnished/attached."

{¶ 25} Under the security agreement, the agent warrants that appellant will receive full payment (1) "within 3 days from Agent in the event Agent wrongfully receives payment of any account receivables," (2) within ten days after (a) the actual settlement date, (b) a change of settlement agent, or (c) a "kick-out" of the contract, or (3) within 30 days after the settlement date listed in the certification. Appellant's operations manual indicates that remedies against the agent for default can include: (1) a certified or cashier's check from "other resources," (2) a simple notice of assignment with no advance or discount, (3) the liquidation of "other assets (boats, recreational vehicles, etc.)," (4) the factoring of "additional Receivables," (5) partial payments from "other settlements (by NOA's or checks)," and (6) "[f]ixed monthly payments from other income (i.e. salary)."

{¶ 26} In considering the terms of the agreements, the trial court found that appellant had effectively insulated itself from risk of loss from the transactions, noting that appellant "may look to Ms. Lambright if it is not paid on the account for any reason," and that appellant "then secures this right of recourse against Ms. Lambright by taking a security interest in nearly all of Ms. Lambright's current and future assets." Further, the parties' agreement allows appellant "to pursue collection actions against Ms. Lambright, collect attorneys' fees * * *, garnish Ms. Lambright's income and attach liens to the proceeds of her sold real estate, provide information about Ms. Lambright to credit bureaus, and retain holdbacks from other transactions."

{¶ 27} The trial court also noted that, under the parties' agreement, appellant "is not entitled to benefit fully from its purported purchase if the transaction goes smoothly." More specifically, if the property closes and the account debtor pays appellant the full commission owed to the real estate agent, appellant does not keep the entire commission; rather, appellant retains only the amount of its advance to the real estate agent plus the agreed fee, while the remainder must be returned to the real estate agent. By contrast, the court noted, appellant "is only entitled to keep the full commission, plus interest, if there is a default under the parties' agreement." (Emphasis sic.)

{¶ 28} In instances "[w]here the 'seller' retains 'virtually all of the risk of noncollection,' the transaction cannot properly be considered a true sale." *In re Qualia Clinical Serv., Inc.*, 441 B.R. 325, 330 (8th Cir.2011), citing *Nickey Gregory* at 602. In the present case, the course of conduct of the parties and the manner in which the transactions were structured reflects that appellant did not bear the risks (or receive the benefits) associated with a "true sale transaction." *Grossman.* Rather, as found by the trial court, virtually all the risk of non-payment remained with Lambright. Accordingly, we find no error with the trial court's determination that the transactions at issue constituted a series of loans and not a true sale of accounts receivable.

{¶ 29} Having determined that the trial court properly found the transactions between appellant and Lambright to be loans, and not a sale, we further agree with the court that Keller Williams was precluded, under the provisions of R.C. 4735.20(F), from transferring commissions earned by Lambright to appellant. Pursuant to R.C. 4735.20(F), "[n]o broker shall pay a fee, commission, or other compensation that is due to an affiliated licensee to a third-party creditor of the affiliated licensee." Here, the trial court rejected appellant's contention that it was an assignee and not a third-party creditor. We have noted above various provisions of the documents supporting the trial court's determination that the transactions between appellant and Lambright constituted loans (including (1) the default provision of the security agreement, triggering the agent's requirement to repurchase the account receivable, (2) the agent's liability for all expenses of appellant in enforcing its rights, (3) the language of the notice of default to agent, (4) the grant to appellant of a security interest in all of the agent's current and future commissions, accounts, general intangibles, etc., and (5) the financing statement listing

Lambright as "debtor"). Because of the creditor/debtor relationship between appellant and Lambright, Keller Williams (a broker) was precluded from paying a commission of its agent to a third-party creditor under the provisions of R.C. 4735.20(F).

{¶ 30} Although not dispositive, we note that at least two other jurisdictions have found appellant's business model to constitute a lending practice. *See Decision Point, Inc. v. Reece & Nichols Realtors, Inc.*, 282 Kan. 381, 386 (2006) ("Essentially, Commission Express creates debt by paying money to the real estate agents before their commissions become available. This type of transaction qualifies as a loan" under the Kansas Uniform Consumer Credit Code); *Kentucky Real Estate Comm. v. Hilliard Fin.*, 246 S.W.3d 910, 912 (2008) (describing appellant's business model as "akin to a consumer loan").

{¶ 31} We also find no error with the trial court's determination that, "because five of the six transactions * * * involved loans that were less than five thousand dollars and [appellant] does not have a license from the division of financial institutions under sections 1321.01 to 1321.19 of the Revised Code, such loans violate R.C. 1321.02." R.C. Chapter 1321 sets forth the provisions of the Ohio Small Loans Act. Pursuant to the terms of R.C. 1321.02, "[n]o person shall engage in the business of lending money, credit, or choses in action in amounts of five thousand dollars or less * * * without first having obtained a license from the division of financial institutions."

{¶ 32} Appellant contends that the Small Loan Act does not apply to the sale of an account receivable, citing the following language from the third paragraph of R.C. 1321.02: "This section does not preclude the acquiring, directly or indirectly, by purchase or discount, of a bona fide obligation for goods or services when such obligation is payable directly to the person who provided the goods or services."

{¶ 33} As noted by the director, however, the obligation in the instant case was not paid "directly to the person who provided the * * * services." Rather, under Ohio law, a real estate salesperson may not maintain an action for commissions against the principals to a purchase contract. *Smith v. Stevens*, 2d Dist. No. 15871 (Nov. 15, 1996), citing R.C. 4735.21 ("No real estate salesperson * * * shall collect any money in connection with any real estate * * * brokerage transaction, whether as a commission, deposit, payment, rental, or otherwise, except in the name of and with the consent of the licensed real estate broker * * * under whom the salesperson is licensed at the time the salesperson earned the commission"). Furthermore, appellant's argument that R.C. 1321.02 is inapplicable is premised on its contention, which we have rejected above, that actual ownership of the accounts receivable (i.e., obligation) was transferred from Lambright to appellant.

{¶ 34} Appellant also contends, as it did before the trial court, that prohibiting its business model under R.C. 4735.20(F) would restrict the assignment of accounts in violation of R.C. 1309.406 (which generally prohibits restrictions on assignments of accounts). The trial court rejected this argument, holding in relevant part:

> These statutes are not in conflict * * * because R.C. 4735.20(F) does not prohibit or restrict assignments. R.C. 4735.20(F) provides only that the broker may not pay a real estate agent's commission directly to the agent's creditor. It does not prohibit the agent from transferring her rights in accounts receivable; nor does it prohibit a broker from sending the agent's commission to a third party outside of the debtor-creditor relationship.

{¶ 35} We agree with the trial court's determination that there exists no conflict between R.C. 1309.406(F) and 4735.20(F). Further, under Ohio law, if a court is faced with an apparent conflict between two statutes, "they shall be construed, if possible, so that effect is given to both." R.C. 1.51. If the conflict is irreconcilable, "the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail." Here, R.C. 4735.20(F) is a more specific statute enacted later in time and, as such, prevails over the general UCC provision of R.C. 1309.406(F).

{¶ 36} Finally, appellant argues that the trial court erred in failing to sever the repurchase provision from the security agreement. Appellant cites to paragraph 11 of the security agreement, which states in part: "If any provision herein is found to be unenforceable, it shall be deemed severed and all other provisions shall remain in full force and effect." As noted by the director, however, the trial court did not find the repurchase provision to be unenforceable; rather, the court's discussion of that provision was in the context of analyzing whether the transaction documents evinced a true sale of the accounts or a loan. *See Shearer v. VCA Antech, Inc.*, 10th Dist. No. 11AP-44, 2011-Ohio-5171, ¶ 30 (trial court did not err in refusing to sever provisions from agreement where no showing that provisions were unenforceable).

{¶ 37} Further, severance of unenforceable provisions of an agreement is appropriate where the provisions are "not material to the contract." *McDonald v. State Farm Mut. Auto. Ins. Co.*, 8th Dist. No. 76808 (Aug. 10, 2000). We note, in the instant case, appellant did not raise the issue of severance in its motion for summary judgment; rather, the issue was first raised in a footnote to its reply brief. Appellant did not, however, raise before the trial court the issue of whether the repurchase provision was an essential part of the security agreement.

{¶ 38} Based upon this court's de novo review, the trial court did not err in granting summary judgment in favor of the director and Keller Williams, and in denying appellant's motion for summary judgment. Accordingly, appellant's first, second, third, fourth, and fifth assignments of error are not well-taken and are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

TYACK and DORRIAN, JJ., concur.

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