

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT ANCHORAGE

LESLIE YOUNG, )  
 )  
 Appellant, )  
 )  
 vs. )  
 )  
 COMMISSIONER OF COMMERCE, )  
 COMMUNITY, AND ECONOMIC )  
 DEVELOPMENT ET AL, )  
 )  
 Appellee. )  
 \_\_\_\_\_ )

Case No. 3AN-10-10339CI

**ORDER**

Leslie Young (“Young”) appeals a final decision issued by the Commissioner of Commerce, Community, and Economic Development (the “Commissioner”). Young had challenged a temporary cease and desist order issued by the Department of Commerce, Community, and Economic Development, Division of Corporations, Business, and Professional Licensing (the “Division”). The matter was presented to the Office of Administrative Hearings (the “OAH”) for adjudication.

**Background**

Young lives and holds a real estate license in California. Homeowners who wish to sell their homes themselves, without engaging a local agent, contract with Young so that their home can be advertised on the Internet, including sites such as Realtor.com. Homeowners pay a flat fee. Young receives no commission if the home sells. Young’s service is for an MLS entry only. Young posts the advertisement on a local MLS site in

California and the advertisement is aggregated onto sites like Realtor.com and comes up when people search specifically for Alaska properties.

Young's activities came to the attention of Alaska real estate licensees who then filed a complaint with the Division which alleged that Young was violating Alaska's real estate licensing laws. The Division issued a temporary cease and desist order after investigating the allegations and Young filed a notice of defense. An Administrative Law Judge (ALJ) presided over the case and issued a Final Decision (the "Final Decision") which was adopted in full by the Commissioner.

The Final Decision held that Young had not violated AS 08.88.161(2) because the information made available on Realtor.com was not a "listing" but rather an advertisement. Young also did not violate AS 08.88.161(8) in that Young had not assisted in procuring buyers.

Nonetheless, the Final Decision held that Young had assisted in negotiating a transaction within the meaning of AS 08.88.161(8), had violated AS 08.88.161(10) by holding herself out to the public as being in business that required an Alaska real estate license, and that Young had violated AS 08.88.161(9) for accepting a fee for performing actions covered by subsection (8) and (10).

Young filed a timely notice of appeal challenging the tribunal's personal jurisdiction over herself, alleging violations of due process, and alleging that the tribunal misapplied the law.

### Points on Appeal

Ms. Young raised a multitude of points on appeal.

Ms. Young claimed she was denied due process based on an alleged lack of personal jurisdiction argument made by the Division and the ALJ's examination of cases relating to personal jurisdiction and application of those cases to find personal jurisdiction over Young.

Ms. Young alleged that the Division failed to meet its burden to establish a prima facie case before resting and that it was error for the ALJ to fail to grant Young's motion for involuntary dismissal; because the APA did not apply to her case, the Division had an obligation to establish a prima facie case, and, when it allegedly did not, the ALJ should have granted the involuntary dismissal.

Ms. Young also alleged that her due process rights were violated because the final decision was based upon an issue beyond the specifically identified issues in the order for written closing arguments. This allegedly deprived Young of the right and opportunity to brief the issue.

Young alleged that AS 08.88.161 was applied to her in a way that violated her constitutional rights. Young claims the application of the statute to her violated her equal protection and free speech rights. Young further claims that the "becoming embroiled in" language in the Final Decision which pertains to "assisting in negotiating" is unconstitutionally vague.

Young makes an additional argument that the statutory construction and legislative intent of the statute do not establish that the construction of the statute or the intent of the

legislature were that AS 08.88.161(8) or (10) applies to actions of an out-of-state individual that are legal in another state.

Finally, Young claims that the Commissioner's decisions on the merits were in error. As to "assisting in negotiation," there was no evidence the concerns expressed by the Commissioner (that Young assisted in negotiations and so there cannot be a violation based purely on speculation of what might happen in the future. As to subsection (10), Young claims that the asserted violation of this section fails the reasonable basis test because it is inconsistent with the Commissioner's holding that the information appealing on Realtor.com was an advertisement. As such, Young claims, there could be no "holding out" by Young under AS 08.88.161(10).

#### Final Decision Is Remanded To The OAH For Further Consideration

The Court finds that the ALJ erred in failing to request briefing from the parties on the issue of whether Young did or attempted to "assist in the negotiation of a transaction." Young should have be afforded an opportunity to brief this issue in closing arguments.

On reconsideration, the ALJ should also address the language used in the Final Decision, "becoming embroiled in," which pertains to "assisting in negotiating." If necessary, the ALJ should consider whether the language is sufficiently clear so as to not be unconstitutionally vague.

### Administrative Law Judge's Decision On All Other Points Is Affirmed

The review of the proceeding below is conducted on the record.<sup>1</sup> The record includes the agency records and the transcripts of the hearings. On review of the briefs of the parties and the administrative record, the Court finds no issues with the Final Decision aside from that mentioned above. The ALJ's Final Decision provided sufficient legal and factual justification which squarely addresses the points raised by Young on appeal. The Court upholds the ALJ's decision on Young's points on appeal based on the ALJ's reasoning in the Final Decision.

The Court will briefly discuss its decision on two of the contested points to provide clarification for the parties.

#### *1. Specific Jurisdiction and ALJ's Findings Thereon Were Appropriate*

This Court agrees with the ALJ's reasoning and decision on specific jurisdiction and his application of the law to the facts presented by the Division.

"It is . . . not the duty of the trial court to supply points and authorities for either side on a motion [to dismiss]. However, neither may a court accept one party's assertions as to the present state of the law simply because the opposing party fails to adequately respond to those assertions."<sup>2</sup> The Supreme Court has "consistently found that the fact that a motion is uncontested does not mean that it must be granted as a matter of right."<sup>3</sup>

The superior court is statutorily bound to consider common law, in addition to

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<sup>1</sup> AS 22.10.020(d).

<sup>2</sup> *State v. Johnson*, 525 P.2d 532, 535 n. 4 (Alaska 1974).

<sup>3</sup> *Pomeroy v. Rizzo ex rel. C.R.*, 182 P.3d 1125, 1131 (Alaska 2008).

constitutional and statutory law, in formulating its decisions.<sup>4</sup> A trial court may independently consult the sources of Alaska law.<sup>5</sup>

Here, the Division only made a general oral reference to the existence of cases which would support a finding of specific jurisdiction over Young. The Division did present sufficient facts for the ALJ to find that the tribunal had specific personal jurisdiction over Young. As cited above, the tribunal had an obligation to consider the applicable law, including constitutional, statutory, and common law. The ALJ acted appropriately when he consulted this law and applied it to the facts provided by the Division.

Accordingly, the ALJ's finding of specific jurisdiction over Young was appropriate.

## *2. The Division Made A Prima Facie Case*

Alaska has “recognized four principal standards of review for administrative decisions: (1) the substantial evidence standard applies to questions of fact; (2) the reasonable basis standard applies to questions of law involving agency expertise; (3) the substitution of judgment standard applies to questions of law where no expertise is involved; and (4) the reasonable and not arbitrary standard applies to review of administrative regulations.”<sup>6</sup> Therefore, the Court reviews the ALJ's factual determinations regarding Young's involuntary dismissal motion under the substantial

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<sup>4</sup> Id.

<sup>5</sup> Id.

<sup>6</sup> Doubleday v. State, Commercial Fisheries Entry Com'n, 238 P.3d 100, 105 (Alaska 2010).

evidence standard and its legal determinations under the substitution of judgment standard.

The burden of proof in an administrative hearing is on the state.<sup>7</sup> Under the regulations which apply to such hearings, the burden of proof is the preponderance of the evidence.<sup>8</sup> “To prove a fact by a preponderance of the evidence, a party with the burden of proof must show that the fact more likely than not is true.”<sup>9</sup>

On denying the motion for involuntary dismissal, the ALJ commented in his footnote: “The [motion for involuntary dismissal] is denied because the ALJ believes that once the hearing was convened on the two surviving claims, it made sense to compile as full a record as possible from those present to assist the commissioner in his final decision regarding those claims.” There is no procedural or other rule limiting the ALJ’s discretion to delay his decision until the evidence closed. While the ALJ does not specifically mention whether the Division made a prima facie case or what Division’s burden was in making that prima facie case, he did expressly deny the motion for involuntary dismissal. The ALJ’s denial of the motion and his consideration of the evidence provided by Young supports the conclusion that the ALJ weighed the evidence and found that the Division did make a prima facie case.

On review of the record, the Court finds substantial evidence that the Division’s case-in-chief met the preponderance of the evidence standard. All of the parties’ exhibits

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<sup>7</sup> Morgan v. State, 139 P.3d 1272, 1278 (Alaska App. 2006) (characterizing Snyder v. Dept. of Public Safety, 43 P.3d 157 (Alaska 2002)).

<sup>8</sup> 2 AAC 64.290(e).

<sup>9</sup> Id.

were admitted into evidence at the start of the Division's case-in-chief.<sup>10</sup> These exhibits included the complaint against Young, email correspondence between Division and Young, the Property Agency Listing Agreement for two Alaska properties which contained a buyer's broker fee clause, the Division's expert's report, and numerous internet advertisements for Alaska properties which list Young as "Agent" or "brokered by e-list.me [Young's d/b/a]."

The Division presented three witnesses in its case-in-chief. Ms. Stacy Risner, the original complainant, testified that she saw Young's advertisements on Realtor.com, that Young appeared to be brokering the property, and that Young was not licensed in Alaska.<sup>11</sup>

Ms. Wall-Rood, an investigator for the Division, testified that she investigated Ms. Risner's complaint. Ms. Wall-Rood testified that she verified that Young was not licensed in Alaska and was advertising Alaska properties for sale on Realtor.com.<sup>12</sup> Ms. Wall-Rood testified that Young provided the Division with two property agency listing agreements for properties advertised by Young<sup>13</sup> and that she had contacted Young via email and determined that Young was not co-listing the property with an Alaska licensee.<sup>14</sup> Ms. Wall-Rood also authenticated the complaint against Young, the

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<sup>10</sup> Transcript of Proceedings, Administrative Hearing, ("Tr."), at 102:15-21.

<sup>11</sup> Tr. at 115:18-118:3, 121:6-12.

<sup>12</sup> Tr. at 134:19-22.

<sup>13</sup> Tr. at 138:9-15.

<sup>14</sup> Tr. at 134:19-22.



correspondence between herself and Young, and the demand that Young cease and desist her practices.<sup>15</sup>

Ms. Kowalczyk testified as the Division's expert witness and authenticated her expert report.<sup>16</sup> Ms. Kowalczyk testified that only the broker's name is placed on properties which appear on Realtor.com because the purpose of Realtor.com marketing is lead generation back to the broker so that the broker can procure buyers back to the seller.<sup>17</sup> Ms. Kowalczyk also testified that the information placed on Realtor.com by Young looks the same as information placed on Alaskan Multiple Listing Service sites and uploaded to Realtor.com and that there is no way to differentiate the properties Young placed from any other properties which are placed by a broker with an Alaska real estate license.<sup>18</sup> Ms. Kowalczyk's testimony was that it was proper for the public and Alaska real estate licensees to believe, based the properties' placement on Realtor.com, that Young was representing sellers in procuring buyers for the properties.<sup>19</sup> Ms. Kowalczyk also testified that soliciting the phone calls and emails through Realtor.com amounted to procuring buyers.<sup>20</sup> Ms. Kowalczyk's testimony also indicated that Young's contracts were structured in such a way as to oblige the seller to pay the agreed upon buyer's broker fee listed in the contract between Young and the seller.<sup>21</sup>

Between this testimonial evidence and the contents of the exhibits placed into evidence, the record presents substantial evidence that the Division met its burden of

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<sup>15</sup> Tr. at 137:20-138:8, 138:18-22.

<sup>16</sup> Tr. at 183:11-17.

<sup>17</sup> Tr. at 184:1-23.

<sup>18</sup> Tr. at 184:15-23, 185:4-12, 186:6-187:4,

<sup>19</sup> Tr. at 187:17-188:3, 189:11-20, 195:18-196:10.

<sup>20</sup> Tr. at 294:4-5.

<sup>21</sup> Tr. at 304:11-305:23.

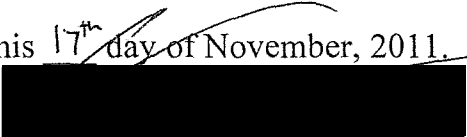
proof to make a prima facie case based on the preponderance of the evidence standard. Accordingly, the ALJ's decision to deny Young's motion for involuntary dismissal was correct.

Conclusion

Young's appeal of the Final Decision is GRANTED IN PART and DENIED IN PART. This matter is remanded to the OAH for further consideration consistent with this opinion.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 17<sup>th</sup> day of November, 2011.

  
ERIC A. AARSETH  
Superior Court Judge

I certify that on 18 November, 2011, a  
copy was mailed to:

Auth, Walter

Eric Land, Law Clerk 