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Association Legal Issues Update

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WORKING IN TEAMS

It is now extremely common for REALTORS® within a brokerage firm to work as teams. As a part of this practice, the team members adopt a team name. It would appear that the next evolution in the process is for the team to advertise itself as a team. It should be noted that these “teams” are not licensed as real estate brokers under Article 25 of the Michigan Occupational Code and related rules (the “License Law”). During the past year, the same question often arose with respect to whether a certain form of team advertising was lawful under the License Law or was potentially in violation of NAR’s Code of Ethics (the “Code”).

The question arose as to “For Sale” signs which prominently displayed the name of the team and the telephone number at which the team may be reached with, on the same sign, the broker’s name and address or telephone number in a lower corner of the sign in a size and font which arguably could be read only by someone standing a couple feet away from the sign (the “Team Advertising”).

The License Law

As most REALTORS® are aware, the License Law does not contain extensive regulations with respect to advertising by licensed real estate brokers and salespersons. Rule 339.22329 is the primary source for regulation of advertising. This rule provides in pertinent part:

(1) Except as provided in subrule (2) of this rule, all advertisements to buy, sell, exchange, rent, lease, or mortgage real estate or business opportunities by a broker shall include the broker’s name as licensed and telephone number or street address. All advertising shall indicate affirmatively that the party advertising is a real estate broker.

* * *

(3) Except as provided in subrule (4) of this rule, advertising by a salesperson or an associate broker shall be under the supervision of, and in the licensed name of, the individual’s broker.

(the “Rule”). Obviously, the question was whether the arguably obscure placement of the name of the broker and her address or telephone number on the Team Advertising complied with the Rule.

In trying to provide an answer to this question, various communications with the Department of Labor & Economic Growth (“DLEG”) occurred. DLEG is the governmental entity charged with administering and enforcing the License Law. DLEG has neither formally nor informally formulated any opinion as to whether the Team Advertising violates the Rule. Further, we reviewed communications with persons within DLEG which appear to indicate that there is inconsistency within DLEG with respect to whether the Team Advertising violates the Rule.

The Rule requires that all advertising “indicate affirmatively” that the party advertising is a real estate broker and that all advertising by a salesperson shall be in the “licensed name of the individual’s broker.” A review of Michigan case law and authorities nationwide was undertaken to determine if there was any particular legal meaning of the use of the term “affirmatively” in the Rule. It was concluded that the use of the word “affirmatively” in the Rule simply means that the broker’s name and address or street number has to be on an advertisement, nothing more. The use of the term “affirmatively” in the Rule appears to be superfluous. The same conclusion was reached with respect to the requirement that all advertising by a salesperson shall be in the “licensed name of the individual’s broker.” It would appear that compliance with this requirement would be met by providing the broker’s name and street address or telephone number somewhere within the advertisement.

There being no Michigan law on point, we reviewed the law of fourteen (14) states that have adopted regulations substantially similar to the Rule. None of those states provided any judicial precedent for interpretation of the Rule. More importantly, three (3) of the states had regulations which specifically addressed the question regarding the relative size of the agent’s or team’s information versus the size of the broker’s information.

Pennsylvania regulation 35.305(c) provides:

An advertisement by an associate broker, [or] salesperson . . . shall contain the business name and telephone number of the employing broker. The names and telephone numbers shall be of equal size.

Indiana regulation 1-1-26 provides:

Any display, classified advertising, [or] signs . . . which carries . . . a licensee’s name must contain the name of the principal

broker or firm with whom the licensee is associated, and, except for business cards, said principal broker or firm's name must be in letters larger than those used in advertising the licensee's name. . . . A licensee . . . shall use no advertising where only a post office box number, telephone number, or street address appears.

Finally, Georgia regulation 520-1-.09 provides:

(6)(a) Any firm using a trade name or any franchisee in advertising specific properties for sale in any media [must] clearly and unmistakably include said firm's name as registered with the Commission in a manner reasonably calculated to attract the attention of the public. The firm's name shall appear adjacent to any specific properties said firm advertises for sale so that the public may unmistakably identify the firm responsible for the handling of the listing of the specific property. In advertising a specific property or properties for sale . . . the name of the licensed firm offering the property . . . shall appear in equal or greater size, prominence, and frequency than the name or names of any affiliated licensees or groups of licensees.

The absence of similar provisions in the Rule precludes us from forming any opinion that Michigan law imposes any requirements as to advertising other than a requirement that the real estate brokerage firms' names and street address or telephone number appear somewhere within the advertisement. We are unable to conclude that there are any size or prominence requirements imposed by the Rule or otherwise. An amendment to the Rule containing language similar to those quoted above from Pennsylvania, Indiana or Georgia would be necessary to impose any such requirements.

Code of Ethics

We reviewed several advertisements, including websites, maintained by teams which prominently displayed the name of the team but contained no reference to the real estate brokerage firm with whom the team is affiliated, other than a depiction of the firm's logo or a listing of the firm's name and address or telephone number in small type at the bottom of the website. The guidance provided by Standard of Practice 12-5 indicates that one or more of these

websites may constitute a violation of Article 12 of the Code. Standard of Practice 12-5 provides:

REALTORS® shall not advertise nor permit any person employed by or affiliated with them to advertise listed property in any medium (e.g., electronically, print, radio, television, etc.) without disclosing the name of that REALTOR®'s firm in a reasonable and readily apparent manner.

Further, Standard of Practice 12-9 provides:

REALTOR® firm websites shall disclose the firm's name and state(s) of licensure in a reasonable and readily apparent manner.

Websites of REALTORS® and non-member licensees affiliated with a REALTOR® firm shall disclose the firm's name and that REALTOR®'s or non-member licensee's state (s) of licensure in a reasonable and readily apparent manner.

Certain of the examples of Team Advertising, on signs, in print or in the electronic media, could be determined to be in violation of Article 12 on the basis that the name of the REALTOR®'s firm is not "reasonably and readily apparent" to anyone viewing the advertisement. However, under the Code of Ethics, such a determination can only be made on a case-by-case basis.

Conclusion

In sum, if teams are going to be required to display the name of their broker more prominently, it would appear there would need to be a change in the License Law similar to the rules and regulations cited above for Pennsylvania, Indiana and Georgia. Obviously, teams' compliance with the NAR Code of Ethics must always be determined upon a case-by-case basis.

THREATS OF LAWSUITS

Unfortunately, members occasionally become so upset with their local association that they threaten to sue the association. These types of threats typically arise when the member either believes he or she is being unfairly forced to participate in a professional standards proceeding or does not like the result of a professional standards proceeding. While the vast majority of threats never actually end up in litigation, unfortunately, a member did in fact initiate litigation against the West Michigan Lakeshore Association of REALTORS® (“WMLAR”). Fortunately, WMLAR obtained a result in the case that should significantly help to reduce risk to all local associations within Michigan.

As an aside, REALTORS® are well aware that the Code requires that associations treat all ethics proceedings confidentially. In this instance, however, the REALTOR® in question disclosed all the facts in the case in a public forum when he filed the litigation, and WMLAR was required to respond in order to defend itself. Everything disclosed in this article is now a matter of public record.

The facts that led up to this case against WMLAR are straightforward. REALTOR® Dean Borland (“Borland”) became a member of WMLAR in July 2002. In doing so, Borland, in his application for membership, expressly agreed to “abide by the Code of Ethics of the NATIONAL ASSOCIATION OF REALTORS® and the Constitution, Bylaws and Rules and Regulations of [WMLAR], the State Association, and the National Association of REALTORS®. As a result of his WMLAR membership, Borland was able to advertise properties both for sale and for rent using the copyrighted REALTOR® logo and WMLAR’s multiple listing service.

In September 2005, an ethics complaint was filed with WMLAR against Borland by Edward and Kathleen Butler (the “Butlers”). The Butlers are members of the public who had rented a vacation home through Borland. The Butlers’ complaint alleged that Borland had made various misrepresentations about the location of the vacation property that he rented to them and had otherwise mishandled their account. The Butlers claimed that Borland’s listing of the property they rented in the multiple listing service maintained by WMLAR contained deceptive terms.

WMLAR processed the Butlers’ ethics complaint against Borland through the procedures set forth in NAR’s Code of Ethics and Arbitration Manual, as amended to comply with Michigan law (the “Manual”). A hearing was held, at which Borland was afforded a full opportunity to present evidence and cross-examine witnesses presented by the Butlers, as specified in the Manual. Upon completion of the hearing, the hearing panel found Borland to be in violation of Articles 1, 2, 11 and 12 of the Code of Ethics. The hearing panel imposed the following

sanctions: (a) a letter of reprimand be placed in Borland's file; and (b) Borland must complete a course entitled "Ethics for the Real Estate Property Manager." Borland appealed the hearing panel's decision to WMLAR's Board of Directors. Borland retained legal counsel for his appeal to WMLAR's Board of Directors. He claimed before WMLAR's Board of Directors that WMLAR lacked jurisdiction to hear the Butlers' complaint because Borland's property management of rental and vacation property to the Butlers is not a real estate transaction covered by the Code of Ethics. This argument was considered and rejected by WMLAR's Board of Directors, and the decision of the hearing panel was upheld.

Borland then commenced a lawsuit against WMLAR in the Ottawa County Circuit Court. In his litigation, Borland sought a declaration from the Ottawa County Circuit Court that WMLAR had no authority to process and hear the Butlers' ethics complaint because "the rental and management of transient vacation accommodations does not constitute a transaction in real estate" and that the Code of Ethics "does not apply to Plaintiff's [Borland] entire life, but rather his conduct as a REALTOR® while completing a transaction in real estate."

WMLAR did not take the position in the litigation that the Code of Ethics applied to Borland's entire life. WMLAR did take the position that the management and rental of transient vacation accommodations is in fact a "real estate transaction" under the Code. WMLAR further took the position that the Code of Ethics is much broader and covers far more than a REALTOR®'s conduct in a "real estate transaction." WMLAR took the position that the Code of Ethics not only applies to a "real estate transaction," but also to any "real estate-related activity."

WMLAR also contended that the litigation initiated by Borland constituted nothing more than an internal matter involving membership in a fully voluntary trade association. By agreeing to be a member of the REALTOR® organization and of WMLAR, Borland had agreed to be bound by the decision of WMLAR and to waive any cause of action arising from that decision.

The Ottawa County Circuit Court found that Borland had been engaged in a real estate-related activity which fell within the Code of Ethics; thus, it granted WMLAR's motion for summary disposition. Borland then appealed the decision by the Ottawa County Circuit Court to the Michigan Court of Appeals.

On appeal, WMLAR argued, among other things, that its conduct in this case was not subject to judicial review in light of the waiver provision contained in the Manual, which states:

Every member, for and in consideration of his right to invoke arbitration proceedings and to initiate complaints under the

Code of Ethics as a member of the NATIONAL ASSOCIATION OF REALTORS®, hereby waives any right of action against the Board, any Board member, or any member of a Hearing Panel or tribunal arising out of any decisions, determinations, or other action taken or rendered under these procedures in the absence of willful or wanton misconduct. Further, as a condition of continued membership, every member expressly waives any cause of action for libel, slander, or defamation that might arise from the filing or consideration of any ethics complaint or arbitration request.

(the “Waiver”). On December 11, 2007, the Michigan Court of Appeals issued its decision. A copy of the decision is attached to this article. In finding in favor of WMLAR, the Michigan Court of Appeals held:

The WMLAR hearing panel held a hearing with regard to the complaint about the rental property in question. After the hearing panel found grounds to sanction plaintiff [Borland], WMLAR’s Board of Directors entertained plaintiff’s appeal and ultimately denied it. Plaintiff then attempted to circumvent WMLAR’s internal procedures by filing a complaint in the circuit court. However, by voluntarily joining WMLAR, plaintiff agreed to be bound by the Code of Ethics. The Code specifically provides that a member “hereby waives any right of action against the Board, any Board member, or any member of a hearing panel or tribunal arising out of any decisions, determinations, or other action taken or rendered under these procedures in the absence of willful or wanton misconduct.”

The Court of Appeals analyzed the effect of the Waiver as part of the contract between WMLAR and Borland with respect to his membership in WMLAR. In construing this contract, the Michigan Court of Appeals held:

The waiver provision at issue here is unambiguous and clearly reflects an intent to bar a lawsuit such as the one initiated by plaintiff [Borland]. Indeed, there was no evidence of “willful or wanton misconduct” on the part of WMLAR, and plaintiff’s complaint does not even allege such conduct. Under the circumstances, plaintiff simply cannot circumvent the Code of

Ethics and the rulings of WMLAR by resorting to a lawsuit in the circuit court. WMLAR was entitled to summary disposition.

In obtaining this decision from the Court of Appeals, WMLAR achieved the broadest victory possible, *i.e.*, a determination by the Court that the Waiver was effective and that a member may not circumvent the Code of Ethics by resorting to a lawsuit in the circuit court. In the absence of willful or wanton misconduct by a local association, the Waiver effectively protects against risk of lawsuits arising from a local association's handling of professional standards proceedings with respect to arbitration or ethics. Obviously, great care should be taken to adhere to the procedures set forth in the Manual so there can never be a claim that an association engaged in any "willful or wanton misconduct." In the absence of such conduct, a local association may respond firmly when threatened with litigation by a disgruntled member involved in a professional standards proceeding.

COMMON CORPORATE QUESTIONS

There are a number of recurring questions which are posed to association executives (“AEs”) and officers, particularly during difficult economic times. The answer to many of these questions lies within the Michigan Nonprofit Corporation Act.

Profit or Nonprofit Corporation?

When AEs and officers are looking for answers to corporate questions, the first thing that needs to be determined is what law governs the association. There is oftentimes confusion on this issue which arises from a loose use of terms. On more than one occasion, members believe that an association is organized on a “for-profit” basis. This leads them and their lawyers to believe that the association is governed by the provisions of the Michigan Business Corporation Act. They are often led down this path based upon their understanding that the association is not tax-exempt.

The issue of whether an association has obtained an exemption under section 501 (c) (6) of the Internal Revenue Code does not address this question of whether the association is organized as a profit or nonprofit corporation under Michigan law. An association of REALTORS® in Michigan may be organized as a nonprofit corporation but claim no exemption under Internal Revenue Code section 501 (c) (6).

We have checked. Every REALTOR® association formally incorporated under Michigan law is incorporated as a nonprofit corporation. Thus, any corporate questions to be resolved under Michigan law will be resolved under the Michigan Nonprofit Corporation Act (the “Act”).

Disclosure of Information

On occasion, associations receive requests or demands from members for very detailed information about the financial affairs of the association. These requests can include information as to the salary and benefits of employees of the association, specific expenditures by the association, and account balances of the association. The question arises as to what information associations are required to provide to members by law or what members are entitled to know about the affairs of the association.

Many members somehow believe that the Michigan Freedom of Information Act (the “FOIA”) applies to a nonprofit corporation. There is absolutely no question – the FOIA has absolutely no application to a Michigan nonprofit

corporation. The FOIA only applies to governmental entities.

The amount of information an association is required to provide its members is very limited under the Act. First, under section 487(1) of the Act, upon written request by a member, the association is required to mail to the member its balance sheet as of the end of the preceding fiscal year, its statement of income for that fiscal year, and, if one has been prepared by the association, a statement of source and application of funds for that fiscal year.

Second, if a member provides at least ten days' written demand, the member is permitted under the Act to examine "for any proper purpose," either by himself or through his agent or attorney, during regular business hours at the location where the records are maintained, the minutes of members' meetings and the record of members. Again, under the Act, an association is only required to make the minutes of meetings available for review by its members. Also, under section 487(2) of the Act, the member is permitted to make "extracts" (*i.e.*, copies) of those documents.

Finally, if members want greater detail, they have to proceed to the circuit court. A circuit court, upon proof by a member of a proper purpose, may require an association to produce, for examination by a member, the books and records of account, minutes, and records of members of the association. There is no reported case law in Michigan describing what a "proper purpose" would be for a member seeking to examine the books and records of account of the association. Members usually express surprise at the limited amount of information they are entitled to receive under the Act. There are a couple of good reasons why members are entitled to so little information under the Act. First, each REALTOR® association in Michigan is organized so that it acts and operates through its officers and board of directors. All persons acting as directors and officers are privy to all information of the association. They are also bound by a duty of confidentiality as part of the fiduciary duty which they owe to the association. Second, while associations may be organized as nonprofit corporations, they are nonetheless in a competitive environment by reason of NAR's board of choice policy. An association would be deemed to exercise good business judgment if it chose not to, for example, make public the salaries and benefits of its employees or, as another example, the financial condition of its multiple listing service.

STATE OF MICHIGAN
COURT OF APPEALS

DEAN BORLAND,

Plaintiff-Appellant,

v

WEST MICHIGAN LAKESHORE
ASSOCIATION OF REALTORS,

Defendant-Appellee.

UNPUBLISHED

December 11, 2007

No. 276908

Ottawa Circuit Court

I.C.No. 06-054627-CH

Before: Bandstra, P.J., and Meter and Beckering, JJ.

PER CURIAM.

In this declaratory judgment action, plaintiff Dean Borland, a licensed realtor and a member of defendant West Michigan Lakeshore Association of Realtors (WMLAR), appeals as of right from an order granting summary disposition to WMLAR. We affirm.

Plaintiff alleged in his February 28, 2006, complaint that, "[i]n addition to acting as a real estate agent," plaintiff "rents houses, townhomes, and condominiums to tourists for vacation use." In 2005, plaintiff rented a home to a family for vacation use, and the family filed a complaint with WMLAR against plaintiff. According to plaintiff, WMLAR "sent [p]laintiff a written reprimand and sanctioned him even though the rental was for transient/vacation type use." Plaintiff requested the following declarations in his complaint:

A. The rental and management of transient vacation accommodations does [sic] not constitute a transaction in real estate.

B. The "membership agreement" between Plaintiff and [WMLAR] applies only to Plaintiff's conduct as a realtor and a transaction in real estate.

C. [WMLAR] does not have jurisdiction or authority to discipline Plaintiff for conduct not involving a transaction in real estate.

D. [WMLAR]'s "Code of Ethics" does not apply to Plaintiff's entire life but, rather, to his conduct as a realtor while completing a transaction in real estate.

On November 2, 2006, WMLAR moved for summary disposition under MCR 2.116(C)(7), (8), and (10). WMLAR alleged that it had the authority to discipline plaintiff

because its Code of Ethics specifically states that WMLAR has the authority to discipline members for "real estate-related activities," and plaintiff's activity in renting the vacation home was a real estate-related activity. WMLAR also alleged that its conduct in this case was not subject to judicial review in light of the waiver provision contained in the Code of Ethics, which states:

Every member, for and in consideration of his right to invoke arbitration proceedings and to initiate complaints under the Code of Ethics as a member of the NATIONAL ASSOCIATION OF REALTORS®, hereby waives any right of action against the Board, any Board Member, or any member of a Hearing Panel or tribunal arising out of any decisions, determinations, or other action taken or rendered under these procedures in the absence of willful or wanton misconduct. Further, as a condition of continued membership, every member expressly waives any cause of action for libel, slander, or defamation that might arise from the filing or consideration of any ethics complaint or arbitration request.

After hearing oral arguments, the trial court ruled that the activity plaintiff engaged in was a real estate-related activity, and it therefore granted WMLAR's motion for summary disposition.

Plaintiff contends that the court erred in granting summary disposition to WMLAR. We review de novo a court's decision regarding a motion for summary disposition. *Gyarmati v Bteiffeld*, 245 Mich App 602; 629 NW2d 93 (2001). The court did not specify on which subrule of MCR 2.116(C) it relied in making its ruling, but from context it appears that the court relied on MCR 2.116(C)(10). In evaluating a summary disposition motion brought under MCR 2.116(C)(10), a court considers the "affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties" in the light most favorable to the opposing party. *Corley v Detroit Bd of Ed*, 479 Mich 274, 278; 681 NW2d 342 (2004). "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id.*

Although the trial court did not reach the issue, WMLAR's issue regarding the waiver provision is governed by MCR 2.116(C)(7), which allows for summary disposition if "[t]he claim is barred because of release. . . ." "In determining whether a party is entitled to judgment as a matter of law pursuant to MCR 2.116(C)(7), a court must accept as true a plaintiff's well-pleaded factual allegations, affidavits, or other documentary evidence and construe them in the plaintiff's favor." *Wood v Bednako*, 272 Mich App 558, 562; 727 NW2d 654 (2006) (internal citations and quotation marks omitted).

We conclude that the court did not err in granting summary disposition to WMLAR because the disciplinary action was not subject to judicial review. A WMLAR hearing panel held a hearing with regard to the complaint about the rental property in question. After the hearing panel found grounds to sanction plaintiff, WMLAR's Board of Directors entertained plaintiff's appeal and ultimately denied it. Plaintiff then attempted to circumvent WMLAR's internal procedures by filing a complaint in the circuit court. However, by voluntarily joining WMLAR, plaintiff agreed to be bound by the Code of Ethics. The code specifically provides that a member "hereby waives any right of action against the Board, any Board Member, or any member of a Hearing Panel or tribunal arising out of any decisions, determinations, or other

action taken or rendered under these procedures in the absence of willful or wanton misconduct.” “Board” is defined in the Code of Ethics as including a local association of realtors such as WMLAR.

As noted in *In re Smith Trust*, 274 Mich App 283, 285; 731 NW2d 810, lv granted 479 Mich 853 (2007):

The proper interpretation of a contract is a question of law that this Court reviews de novo. In interpreting a contract, this Court's obligation is to determine the intent of the parties. This Court must examine the language of the contract and accord the words their ordinary and plain meanings, if such meanings are apparent. If the contractual language is unambiguous, courts must interpret and enforce the contract as written. Thus, an unambiguous contractual provision is reflective of the parties' intent as a matter of law. [Internal citations and quotation marks omitted.]

The waiver provision at issue here is unambiguous and clearly reflects an intent to bar a lawsuit such as the one initiated by plaintiff. Indeed, there was no evidence of “willful or wanton misconduct” on the part of WMLAR, and plaintiff's complaint does not even allege such conduct. Under the circumstances, plaintiff simply cannot circumvent the Code of Ethics and the rulings of WMLAR by resorting to a lawsuit in the circuit court. WMLAR was entitled to summary disposition. As noted in *Howe v Detroit Free Press*, 219 Mich App 150, 158; 555 NW2d 738 (1996), aff'd 457 Mich 871 (1998), we may affirm a trial court's summary disposition decision on an alternative basis.

Affirmed.

/s/ Richard A. Bandstra
/s/ Patrick M. Meter
/s/ Jane M. Beckering