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Firm vicariously liable for actions of associate

Attorney used offices for fraudulent closings

By: Eric T. Berkman September 25, 2014

A Braintree law firm was vicariously liable for the actions of a former associate who conducted fraudulent real estate closings in connection with a "straw buyer" mortgage scheme, a U.S. District Court judge has decided.

Under the scheme, the associate served as closing counsel for a pair of transactions in which the plaintiff — a homeless, mentally ill, semi-literate veteran — unwittingly signed onto more than $800,000 in mortgage loans and was saddled with crushing debt as a group of real estate and finance professionals collected thousands of dollars in transaction fees.

The defendant law firm, RKelley-Law, argued that it gave no express or implied authority to the associate to close loans involving straw buyers such as the plaintiff, and thus it could not be held accountable for the actions he undertook.

But Judge Richard G. Stearns disagreed, finding that the closings were conducted within the scope of the associate's employment.

The law firm acknowledged that the closing meetings at which the associate presided all took place at the firm's offices during regular business hours and that they constituted the associate's only interactions with the plaintiff, Stearns said in entering judgment for the plaintiff.

Stearns went on to say that no reasonable jury could find that the associate was not at least partially motivated by a desire to receive commissions from the firm's fees, "which necessarily incorporates a desire to generate fees for the firm."

Thus, the firm is liable for the harm that resulted from the associate's fraud and his violations of G.L.c. 93A, he said.

The 10-page decision is *Smith v. RKelley-Law, P.C.*, Lawyers Weekly No. 02-462-14. The full text of the ruling can be found at masslawyersweekly.com.

'Accurate and faithful application'

Jonathan D. Plaut of Cohan, Rasnick, Myerson, Plaut in Boston, one of the plaintiff's attorneys, called the ruling "an accurate and faithful application of the employer respondeat superior law."

A decision the other way would have "gone against the grain" of years of well-established law on the topic, he added.

More broadly, Plaut said, the decision "underscores the necessity of supervising attorneys to carefully monitor the

conduct of their associate attorneys."

Jeffrey S. Baker of Boston, who also represented the plaintiff, said the fraudulent nature of the closings would have been uncovered by the firm had its management been paying closer attention.

"I was a conveyancing attorney myself in the 1980s, and my boss looked at every single package to make sure I, as a young associate, was doing things correctly," he said. "Here, the fraud perpetrated by [the associate] would have been detected if the employer had reviewed closing packages and said, 'Wait a minute, how is this guy buying two homes in a three-week span as a place of principal residence?'"

Boston lawyer Richard M. Zielinski, who handles attorney professional liability litigation but had no role in the case, said the ruling highlights the need to ask tough questions of particularly productive lawyers under one's supervision.

"Sometimes, when the cash is rolling in from a particular lawyer, client or practice group, firms don't want to ask those questions for fear that it may upset the apple cart," said Zielinski, a partner at Goulston & Storrs. "But that in itself can sometimes be a red flag for management — for example, when a lawyer seems to be spinning straw, so to speak, into gold."

Zielinski also noted that the decision does not address whether the firm would be held accountable for the multiple damages component of the Chapter 93A award, but said he would be prepared to argue that they should not, "as those parts of the award are punitive and the firm itself did nothing to trigger that part of the award."

Michael J. Stone of Peabody & Arnold in Boston, who also handles professional liability cases involving lawyers and law firms, questioned whether, in a situation like the one in *Smith,* a law firm's professional liability insurer would disclaim coverage under an exclusion for intentional conduct.

"If coverage is excluded for [the associate], would the firm, which presumably did not itself engage in intentional conduct, still have coverage notwithstanding?" Stone asked. "We have fights over coverage all the time, and you really don't want to put yourself in a position where coverage is at risk."

That is why it is so critically important to keep a close eye on associates, he reiterated.

"If you don't supervise, you may put coverage at risk," he warned.

James F. McLaughlin of Brockton represented the defendant. He declined to comment in light of ongoing litigation in the case.

Straw buyer scheme

In January 2005, plaintiff Robert Smith — a military veteran who suffered from schizophrenia, post-traumatic stress disorder, depression and mild mental retardation — was working as a trash collector when he was approached by a woman named Laurice Taylor, who represented herself as an agent at a RE/MAX real estate office in Dorchester.

Taylor told the plaintiff that RE/MAX was sponsoring a special real estate investment program that would require no money to join.

The plaintiff followed up and scheduled a meeting with Taylor at her office and was told that, if he agreed to become part of the program, he would receive $10,000 for every investment made on his behalf while RE/MAX would take care of everything else.

A month later, Taylor told the plaintiff to report to the Braintree law firm of Robert E. Kelley in Braintree, the defendant in the case. When the plaintiff arrived, he was met by Kelley associate Louis Bertucci, who identified himself as the lawyer in charge of the paperwork for the plaintiff's first investment. He was also introduced to Dwight Jenkins, who said he would be working with RE/MAX in managing the plaintiff's investments.

Bertucci then placed a stack of documents in front of the plaintiff and told him to sign them. The plaintiff was not encouraged to read the documents and, he claimed, it was clear to everyone in the room that he did not understand their contents.

Nonetheless, he was apparently led by those present to believe he was making a good investment and that they would "take care of everything." He signed and was told he would receive $10,000 in a few days.

The documents were, in fact, real estate closing documents that saddled him with a $400,000 mortgage on residential property in Dighton. Meanwhile, the loan application that RE/MAX submitted to the bank contained false statements about the plaintiff's income, education level and employment status.

The parties involved, including Taylor and Jenkins, earned thousands of dollars of fees on the transaction while Bertucci earned a commission from his firm, which apparently did not know about the fraudulent nature of the transaction, for conducting the closings.

Three weeks later, Bertucci conducted another closing with the plaintiff at his firm's offices, this time for the purchase of residential property in Boston. As in the prior transaction, the plaintiff took on mortgage debt of more than $400,000 while those involved in the scheme earned thousands more dollars in fees.

Several months later, the plaintiff began receiving phone calls from banks about missing mortgage payments and from tenants of the properties complaining that their utility bills had not been paid. RE/MAX, Jenkins and Taylor assured the plaintiff that they would take care of everything, but the calls persisted and the properties ultimately went into foreclosure, leaving the plaintiff liable for more than $800,000 in borrowed debt, ruining his credit, and triggering depression, stomach problems and high blood pressure.

The plaintiff included the defendant in his subsequent fraud and Chapter 93A suit.

A jury delivered a verdict in the plaintiff's favor, doubling and trebling certain damages.

At the close of the plaintiff's case, however, Stearns granted the defendant a judgment as a matter of law on grounds that there was insufficient evidence that its principal, Robert Kelley, was involved in the scheme to allow the question to go to a jury.

On appeal, the 1st Circuit ruled that while Kelley himself could not be held liable, a jury might have found the firm vicariously liable. Accordingly, the panel vacated the judgment as a matter of law and remanded the issue of vicarious liability back to U.S. District Court.

In the scope of employment

Stearns found on remand that Bertucci's actions were undertaken in the scope of his employment, and the defendant was therefore vicariously liable.

First, the judge observed, conducting closings on the firm's behalf was among Bertucci's duties as an associate; *Smith* involved Bertucci closing transactions that brought the firm a fee, even if the firm did not hire or authorize Bertucci to engage in wrongful conduct.

Additionally, both closings involving the plaintiff took place at the firm's offices during business hours.

"Thus, any actions of Bertucci for which the jury could have possibly found him liable for fraud necessarily occurred 'within the authorized limits of time and space' [at the firm]," Stearns said, quoting the defendant's statement of facts. "The fact that '[t]he mortgage fraud was perpetrated almost exclusively outside the offices of Kelley Law' … is therefore irrelevant to the question of whether [the defendant] is vicariously responsible for the actions of [Bertucci]."

Finally, the judge found, Bertucci's behavior was motivated at least in part to promote the interests of his employer.

"Certainly Bertucci may have also been motivated by any number of other factors, including personal gain and career enhancement, but only '[i]f an employee "acts from purely personal motives … in no way connected with the employer's interests, [is] he … considered in the ordinary case to have departed from his employment,""' Stearns said, quoting the Supreme Judicial Court's 1988 decision in *Pinshaw v. Metro. Dist. Comm'n.*

Accordingly, Stearns concluded that the defendant was vicariously liable for the harm the plaintiff suffered as a result of Bertucci's actions and for violations of Chapter 93A. The judge went on to order that a hearing be held for the purposes of damages assessment.

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