Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2022-000274-001 DT 06/27/2023

HONORABLE JOSEPH P. MIKITISH

CLERK OF THE COURT
D. Tapia
Deputy

BERNARDINE ANN MICHALIK
SEAN P SHIELDS

MICHAEL J LAVELLE

v.

ARIZONA CORPORATION COMMISSION (001)
STATE OF ARIZONA (001)

ARIZONA CORPORATION COMMISSION
1300 W WASHINGTON ST
PHOENIX AZ 85007
PAUL SEHMAN KITCHIN

JUDGE MIKITISH
REMAND DESK-LCA-CCC

MINUTE ENTRY

Arizona Corporation Commissioner Cause No. S-20996-A-16-0467

In this judicial review action, the Plaintiffs Bernardine Ann Michalik ("Ms. Michalik") and Sean P. Shields, husband-and-wife, seek judicial review of a final administrative decision rendered by the Arizona Corporation Commission along with the opinion and order dated July 27, 2022. For the reasons stated below, this Court affirms the agency's decision.

BACKGROUND

Premier Asset Management Group, LLC ("Premier") was a real estate company that purported to specialize in acquiring, renovating, and leasing real estate with the potential for appreciation. Premier's principal place of business was located in Arizona. Michael Eckerman ("Mr. Eckerman") served as Premier's CEO and Manager. Mr. Eckerman authorized Ms. Michalik to execute documents on behalf of Premier. Between April 3, 2015, and April 4, 2017, Ms. Michalik, using the name Bernardine Ann Shields, signed the majority of Premier's notes

and loan contracts with total investment amounts of $2,677,729.41. The notes signed by Ms. Michalik offered annual interest rates of 7.0% to 10.25% and were unsecured.

Premier and Ms. Michalik failed to disclose risks including that the notes were highly speculative and involve substantial risks, including that Premier's monthly debt obligations exceeded its cash flow.

Between 1998 and 2013, Ms. Michalik worked with Mr. Eckerman at a minimum of three other real estate investment companies that Mr. Eckerman managed. Ms. Michalik was aware that government legal actions against those companies led to their closure. Ms. Michalik and Premier failed to disclose Mr. Eckerman's previous real estate companies' failures to investors with Premier. In approximately 2003, Mr. Eckerman consented to a judgment under the Arizona Consumer Fraud Act enjoining him from offering some real estate actions. Ms. Michalik and Premier failed to disclose that legal action to investors. On February 12, 2016, the Nevada Department of Business and Industry, Division of Mortgage Lending, issued a preliminary order fining Mr. Eckerman $3 million for providing unlicensed mortgage broker services by offering investments and promissory notes. Ms. Michalik and Premier failed to disclose the Nevada order to investors with Premier.

Premier eventually failed to pay investors their interest payments and principal. Several elderly investors were significantly harmed. Evidence in the record shows that the facts of the previous companies' failures would have been significant to the investors' decisions to invest.

On December 12, 2016, the Commission's Securities Division filed a temporary order to cease and desist notice of opportunity for hearing against Premier and other third parties in connection with the offer and sale of securities. On March 8, 2017, the Securities Division filed an amended notice that added Appellants Michalik and her husband Sean Shields as respondents. After the Appellants filed an answer to the notice, an administrative hearing was held from November 30 through December 2, 2020.

The Commission's Hearing Division filed a Recommended Opinion and Order on June 23, 2022, followed by a correction order to revise a typographical error. The Appellants filed exceptions to the Recommended Opinion and Order on July 6, 2022, and the Commission issued its Final Opinion and Order on July 27, 2022. The Commission unanimously found the following: Ms. Michalik violated the anti-fraud provisions of the Securities Act of Arizona; Ms. Michalik sold unregistered securities within and from Arizona even though she was not registered as a securities salesman or dealer, in violation of A.R.S. §§ 44-1841 and -1842; and Ms. Michalik was liable for having made and participated in unlawful security sales pursuant to A.R.S. § 44-2003.

At the hearing, the complaining witness testified that Mr. Eckerman managed the business and Ms. Michalik did not have a controlling function. None of the purchasers indicated that Ms. Michalik was involved in their decision to purchase. The Commission's Order indicated as follows:

> We find that Ms. Michalik is not a controlling person under A.R.S. § 44-1999 (B), and is not liable to the same extent as Premier and Mr. Eckerman under A.R.S. § 44-1991. Opinion and Order, pp. 66-67.

The Commission, however, concluded that Ms. Michalik was liable for securities fraud and the unlawful sale of securities that were misleading due to the omission of material facts to investors.

On August 26, 2022, Ms. Michalik filed a complaint for judicial review of Arizona Corporation Commission decision. This Court has jurisdiction pursuant to A.R.S. § 44-1981.

LEGAL STANDARD OF REVIEW

A final decision of an administrative agency must be affirmed unless it is "contrary to law, is not supported by substantial evidence, arbitrary and capricious, or is an abuse of discretion." A.R.S. § 12-910 (F); *Berenter v. Gallinger*, 173 Ariz. 75, 77 (App. 1992). A decision that is supported by substantial evidence may not be set aside as arbitrary, capricious, or an abuse of discretion. *Smith v. Ariz. Long Term Care Syst.*, 207 Ariz. 217, 220 ¶ 14 (App.2004). An agency's decision will be found to be supported by substantial evidence as long as the "decision is supported by the record," even if the record could also support a different conclusion. *Gaveck v. Ariz. State Board of Podiatry Examiners*, 222 Ariz. 433, 436 ¶ 11 (App 2009). The Appellate Court will review conclusions of law *de novo*. *Rail N Ranch Corp. v. Hassell*, 177 Ariz. 487 (App. 1994). A decision is an abuse of discretion if it is based on an error of law. *Grant v. Ariz. Public Service Company*, 133 Ariz. 434, 455-56 (1982).

DISCUSSION

In her Opening Memorandum, Ms. Michalik first raises the issue of whether A.R.S. § 44-2003 (B) creates liability for a company representative who signs investment contracts but is not actively engaged in the sale. She notes that under the Uniform Commercial Code, a person who signs on behalf of an entity does not become liable if the form of the signature "shows unambiguously that the signature is made on behalf of the represented person (including corporations and LLCs) who is identified in the instrument…." A.R.S. §47-3402(B)(1). She argues that an LLC who commits a tort is liable for the conduct, but the individual who signs on behalf of the LLC is not. She argues that, under A.R.S. § 44-1991, only persons who had the

power to control the activities of those persons or entities directly or indirectly are liable as primary violators.

Ms. Michalik next argues that Arizona law imposes liability only on "any person… who made, participated in or induce the unlawful sale or purchase." A.R.S. § 44-2003(A). She argues that under the 1996 amendments to the statute, joint and several liability was eliminated except for those defendants who acted knowingly and recklessly. She argues that "participation" was modified to provide that "no person shall be deemed to have participated in any sale or purchase only by reason of having acted in the ordinary course of that person's professional capacity…." A.R.S. § 44-2003(A). She argues that the Commission found that "any signatures on the documents by Ms. Michalik were done at the behest of Mr. Eckerman and in the performance of her day-to-day duties." Based on the finding, she concludes that she the Commission's Order did not deem her to have participated in the sale of the contract and mortgages at issue.

Ms. Michalik further argues that our Courts also limited the scope of liability under the statute. She argues that a person takes part in a sale is liable only if the person "persuaded" or "prevailed" upon the purchaser to make the transaction. *See Standard Chartered, PLC v. Price Waterhouse*, 190 Ariz. 6, 22-23 (App. 1996). The *Standard Chartered* Court noted that the statute does not impose liability on individuals "who neither financially participate or promote or solicit the transactions…." *Id*. at 22. She argues that she only worked at Premier, was not a decision-maker, did not participate in the purchasers' purchase of the notes, and only acted in the ordinary course of her position. She argues that she only did what Mr. Eckerman said, therefore she is not subject to the liability imposed by the Commission.

The Commission argues that in reviewing the administrative decision, all evidence must be viewed in light most favorable to sustaining the decision. *Special Fund Division V. Industrial Commission of Arizona*, 182 Ariz. 341, 346 (App.1995). It argues that the Commission found that Ms. Michalik committed securities fraud by omitting material facts in connection with security sales. In addition to her fraud, according to the Commission, the Commission determined three different bases for holding Ms. Michalik liable for premium's unlawful security sales. First, it found that Ms. Michalik herself sold the securities within the meaning of the Securities Act. Second, it found that Ms. Michalik "made" unlawful security sales within the meaning of A.R.S. § 44-2003(A). Third, it found that Ms. Michalik "participated in" unlawful security sales within the meaning of A.R.S. §2003(A). The Commission argues that the security sales were unlawful because the securities were not registered with the Commission, premium and its salespersons were not registered with the Commission, and that premium and Ms. Michalik committed securities fraud.

The Commission argues that Ms. Michalik waived any argument against its conclusion that she committed securities fraud. It argues that Ms. Michalik made only a conclusory

argument that she did not "become liable for securities fraud" in her opening memorandum. It concludes that this Court should treat her fraud arguments as being waived. It further argues that the Securities Act antifraud provision prohibits the omission of any material fact necessary to make a statement not misleading. *See* A.R.S. §44-1991(A)(2). It notes that the speaker's knowledge that a statement is false is not required. The Commission argues that an omission is misleading if it misleads potential investors in any way. It further argues that Ms. Michalik is liable for fraud based on misleading omissions in the written representations she made in the notes she executed. It argues that while the notes indicated that premium "promises to pay" certain amounts, Ms. Michalik failed to disclose associated risks, prior fraud actions, and Mr. Eckerman's long history of failing to pay investors from various real estate companies. The Commission argues that Ms. Michalik does not dispute that these omissions were material and misleading. It argues that Ms. Michalik can be liable even if she was not present when the underlying representations were made. It argues that Ms. Michalik was present when the representations were made in the premium notes that she signed.

The Commission goes on to argue that it correctly found that Ms. Michalik sold securities. It argues that the Securities Act's definition of "sale" or "sell" "includes a contract to make such sale or disposition." A.R.S. § 44-1801 (22). It argues that Ms. Michalik sold premium notes by signing the notes and accompanying loan contracts. It argues that premium authorized Michalik to sign notes and contracts and Ms. Michalik used this authority to execute the securities and loan contracts and dispose of minutes. According to the Commission, this constitutes the sale of securities.

The Commission argues that the security sales were unlawful because securities were not registered, and Ms. Michalik was not registered. *See* A.R.S. §§44-1841 and -1842. It argues that the Uniform Commercial Code is inapposite to this result. It argues that the Commission is not requiring Ms. Michalik to perform under the premium notes, but rather found that Ms. Michalik signed unlawful notes.

The Commission further argues that Michalik made and participated in unlawful security sales. It argues that the Securities Act language extends liability to persons other than actual seller of securities.

Finally, the Commission argues that the exemption for selling secured instruments does not apply because Ms. Michalik signed notes that were unsecured.

THE COURT'S ANALYSIS

Arizona law sets forth the proper standard of review in an action for judicial review of an administrative decision. A final decision of an administrative agency must be affirmed unless it

is "contrary to law, is not supported by substantial evidence, arbitrary and capricious, or is an abuse of discretion." A.R.S. § 12-910(F); *Berenter v. Gallinger,* 173 Ariz. 75, 77 (App. 1992).

Ms. Michalik 's legal argument that the Uniform Commercial Code does not impose liability is unavailing. The fact that a representative may sign on behalf of an entity and not be personally liable for the debt is not the issue in this case. No one is seeking to hold Ms. Michalik responsible for the obligations that were entered on behalf of Premier. Rather, the Commission is requiring Ms. Michalik to pay restitution pursuant to the Arizona Securities Act for her own actions. See A.R.S. § 44-2032(1). Whether she is liable under the securities law requires an assessment of each specific statutory provision. In addition, Ms. Michalik cites no authority for her argument that an actor is not liable in tort if she is acting on behalf of a company. Arizona cases establish otherwise. *See Laurence v. Salt River Project Agricultural Improvement & Power District,* 255 Ariz. 95 (2023) (addressing claims brought against both employee and employer). The statute cited by Ms. Michalik does not provide otherwise. *See* A.R.S. § 44-1991.

As to the Commission's finding that Ms. Michalik omitted material facts that misled investors, there is substantial evidence in the record to support the Commission's conclusion. The Securities Act prohibits the omission of "any material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." A.R.S. §44-1991(A)(2). This requirement imposes "an affirmative duty not to mislead." *Aaron v. Fromkin,* 196 Ariz. 224, 227 ¶ 15 (App. 2000). A misleading omission is material if there is a "substantial likelihood that, under all the circumstances, the stated or omitted fact would have assumed actual significant in the deliberations of a reasonable buyer." *Trimble v. American Savings Life Insurance Company,* 152 Ariz. 548, 533 (App.1986).

In this case, Ms. Michalik executed notes stating that Premier "promises to pay" a specified principal amount plus interest. However, Ms. Michalik was aware that a minimum of four real estate companies operated by Mr. Eckerman failed after government agencies intervened. Despite this knowledge, Ms. Michalik failed to disclose these facts to investors. A reasonable buyer may have found these facts significant in determining whether or not to invest. While Ms. Michalik argues that she did not have personal interactions with the investors, evidence in the record shows at least on one occasion that she led an investor to the bank with adequate time to discuss potential disclosures. Therefore, the evidence in the record supports the Commission's conclusion that Ms. Michalik personally committed securities fraud with her own misleading omissions.

Likewise, concerning the Commission's finding that Ms. Michalik unlawfully sold securities, substantial evidence in the record supports the Commission's conclusion. The Securities Act defines "sale" or "sell" as a "sale or other disposition of a security or interest in a security… for value and includes a contract to make such sale or disposition." A.R.S. § 44-1801

(22). Likewise, the Act defines an "offer to sell" or "offer for sale" as "an attempt or offer to dispose of, or solicitation of an order or offer to buy, a security or interest in a security for value…." A.R.S. § 44-1801 (16).

In this case, Ms. Michalik signed the notes and accompanying loan contracts. This is substantial evidence that she sold the securities. The sales were unlawful because the securities were not registered with the Commission and Michalik was not registered as a securities dealer or salesperson. *See* A.R.S. §§41-1841, -1842. Together, these constitute substantial evidence that Ms. Michalik violated Arizona law by unlawfully selling the securities.

Finally, there is substantial evidence to support the Commission's finding that Ms. Michalik "made" and "participated in" unlawful securities sales pursuant to A.R.S. § 44-2003 (A). These statutes broadly apply to persons "other than the seller of the securities." Grand v. Nacchio, 225 Ariz. 171, 174 ¶ ¶ 13, 18 (2010). As the Commission notes, the common definitions of "to make" include "to execute in an appropriate manner", "to cause to exist, occur or appear," and "to cause to happen or be experienced by someone." Merriam-Webster Dictionary (online edition, December 19, 2022). Likewise, "participate in" means to take part in something such as an enterprise or activity, usually in common with others, or to have a part or share in something. *See Standard Chartered,* 190 Ariz. at 21.

In this case, Ms. Michalik executed the notes and contracts, thereby bringing them into being with legal consequences. In effect, her actions formalized the investments. Thus, the evidence supports the Commission's conclusions that Ms. Michalik "made" or "participated in" the unlawful securities sales.

Ms. Michalik's arguments that the 1996 Arizona Securities Act amendments eliminates any liability for her are misplaced. The Act continues to contain very broad language for liability as discussed. Likewise, the *Standard Chartered* decision likewise does not prevent all liability for Ms. Michalik. Ms. Michalik had more than "collateral involvement" in these actions.

CONCLUSION

Based on the foregoing,

IT IS ORDERED affirming the decision of the Arizona Corporation Commission.

IT IS FURTHER ORDERED remanding the matter to the Arizona Corporation Commission for further proceedings as necessary.

No matters remain pending in connection with this appeal. This is a final order pursuant to J.R.A.D. 13 and Ariz.R.Civ.P. 54 (c).

/s/ Joseph P. Mikitish
THE HON. JOSEPH P. MIKITISH
Judge of the Superior Court

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