SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2022-000275-001 DT 07/25/2023

HONORABLE JOSEPH P. MIKITISH

CLERK OF THE COURT
J. Eaton
Deputy

SYNC TITLE AGENCY L L C
ROSICELLA JOPLIN
SEAN JOPLIN
CHRISTOPHER OLSON

M PHILIP ESCOLAR
ROSICELLA JOPLIN
10601 N HAYDEN #1-103
SCOTTSDALE AZ 85260
SEAN JOPLIN
1713 CLARK
PADUCAH KY 42003
CHRISTOPHER OLSON
7323 E NARANJA AVE
MESA AZ 85209

v.

ARIZONA CORPORATION COMMISSION (001)

PAUL SEHMAN KITCHIN

JUDGE MIKITISH
REMAND DESK-LCA-CCC
ARIZONA CORPORATION COMMISSION
1300 W WASHINGTON ST
PHOENIX AZ 85007-2996

MINUTE ENTRY

Agency Case No. S21131A-20-0345.

Appellants Sync Title Agency LLC (Sync), Rosicella Joplin (Ms. Joplin), her spouse, and Chris Olson (Mr. Olson) (collectively Appellants) bring this Judicial Review Action of the Arizona Corporation Commission's Opinion and Order, Decision No.78642 (the Decision) issued on July 27, 2022. The Decision found the Appellants violated the antifraud provisions of

the Securities Act of Arizona (Securities Act) and sold unregistered securities within or from Arizona while not registered as securities sales persons or dealers, in violation of A.R.S. §§ 44-1841 and 44-1842, and ordered the Appellants to pay restitution and administrative penalties. The Appellants filed a timely Notice of Appeal on August 26, 2022. This Court has jurisdiction pursuant to A.R.S. §§ 44-1981; 12-901 et seq.

I. BACKGROUND

Mr. Olson is a real estate broker and member of the brokerage TopRealty LLC. (Record on review, C17) (for the sake of brevity, the court will cite the record on review solely by the Tab identifier and, where applicable, page number). Ms. Joplin is also a real estate broker and owner of Joplin Realty LLC. C19. Mr. Olson and Ms. Joplin also are members of Lime Mortgage LLC, a mortgage loan business. B2 at 139. Together, Mr. Olson and Ms. Joplin formed Sync to provide professional title and closing services to homebuyers. C3 at 209-210.

Investors Marcus and Megan Williams (the Williamses) were Arizona residents at all times relevant to these actions. B2 at 23. The Williamses met Ms. Joplin and Mr. Olson in August 2018 when they engaged Ms. Joplin as a real estate agent for the purchase of a new home. B2, at 24. Ms. Joplin agreed to represent the Williamses as a buyer's agent. B2 at 24. The Williamses later discovered that Ms. Joplin and Mr. Olson also ran a mortgage company. B2 at 24-25.

Mr. Olson, Ms. Joplin, and the Williamses became personal friends with personal interactions, including meals, visits, babysitting, etc. B2 at 140, 146-147, 266. From August through November 2018, the Williamses also utilized Ms. Joplin as a real estate broker in their residential home investment efforts. B2 at 140.

In November 2018, Ms. Joplin and Mr. Olson began discussing with the Williamses the possibility of investing in their startup title company, Sync. B2 at 26. Mr. Williams understood that he was investing in Sync, that Ms. Joplin and Mr. Olson "would do title transactions through it with real estate," that Ms. Joplin and Mr. Olson would bring their own customers into the company, and outside customers would also generate income. B2 at 64. Ms. Joplin and Mr. Olson told the Williamses that the company would be successful because, with their real estate and mortgage companies, they would refer clients to Sync for closings. B2 at 39. Mr. Olson told the Williamses that investing in Sync was failsafe because of their knowledge of real estate and with all of their customers and contacts. B2 At 70. Mr. Olson told the Williamses they could expect investment returns of $6000-$7000 per month based on the expected volume of business. B2, at 31. On January 11, 2019, prior to the Williamses investment, Mr. Olson told them, "We definitely have a slam dunk going on." C13 at ACC 001540, ACC 001566. Also prior to the

investment, Mr. Olson also told Mr. Williams that Sync would be operating within a month. B2, at 65-66.

The parties began to discuss the business and potential investment. B3, at 277-280. Mr. Olson then prepared a purchase agreement and transmitted it to the Williamses in January 2019. C34 at 60. The Williamses had an attorney review the agreement and make proposed changes, which Mr. Olson and Ms. Joplin approved. C34 at 60-62; B3 324-326. Mr. Olson and Ms. Joplin had an attorney prepared a revised purchase agreement. B2 at 35. The revised agreement was executed on January 31, 2019. B3 at 326.

The Williamses had limited experience in real estate investments, having engaged in only buying, fixing, and then reselling residential properties. B2, at 55; C3 at ACC 001527. The record is unclear as to whether those investments were profitable.

Mr. Olson told the Williamses that he and Ms. Joplin were seeking investment into Sync to help it grow faster, and that their investment funds would be used to secure office space, purchase software access, and hire a title agent. B2, at 38-39; C13 ACC 001577. Mr. Olson and Ms. Joplin, however, in fact used significant portions of the Williamses' investments for their own personal uses and other businesses. C26; B2 at 24-25, 113-115; C15; C17; C19; C28. See also, C29; B2 at 15; C29; B2 at 116-118. Ms. Joplin and Mr. Olson did not tell the Williamses that part of their investments would be used to benefit them personally rather than Sync. B2 at 52, 72.

Mr. Olson and Ms. Joplin provided inaccurate information on several occasions before and after the Williamses' investment and provided the Williamses with untimely communications. Shortly after proposing the investment in Sync but before the Williamses had committed money, Ms. Joplin falsely told Ms. Williams that she was a CPA when she was not. B2 at 53, 132; C23. Approximately three weeks after the Williamses made their investment, Mr. Olson told Mr. Williams that he had submitted an application for a title agent license, when he had not. C13 at ACC 001547; B3 at 353. When the Appellants did apply for the license about six weeks later, Mr. Olson and Ms. Joplin falsely represented on their application that they were the only members of Sync with a 50% ownership each, failing to acknowledge the Williamses' ownership. C14 at ACC 001758.

The licensing agency responded that the application was deficient on April 18, 2019. B3, at 303-304. One of the deficiencies noted was the lack of an audited financial statement showing a net worth of $100,000. C14. Mr. Olson and Ms. Joplin waited about two weeks before telling the Williamses of the deficiency and did so only when Mr. Willens inquired when Sync would open. C38; C32, at Respondent Sync 37. On more than six occasions over the next four weeks, the Appellants delayed providing information and updates that the Williamses requested

regarding when Sync would open. C3 at ACC 001553-1559. The Appellants also failed to tell the Williamses that the application was withdrawn on April 21, 2019, because of the Appellants' failure to communicate with the regulating agency. B2 at 71, 84.

On June 7, 2019, Mr. Williams requested a refund of the couple's investment. C13 at ACC 001559. On June 10, 2019, Ms. Williams requested the Appellants provide Sync's bank statements and all the documents that the Appellant filed for the company's startup. C13 at ACC 001525. Ms. Joplin responded stating "go get yourself a lawyer if you want to go down this road with us." C13 at ACC 001530.

II. LEGAL STANDARD OF REVIEW

Arizona law provides as follows:

> After reviewing the administrative record and supplementing evidence presented at the evidentiary hearing, the court may affirm, reverse, modify or vacate and remand the agency action. The court shall affirm the agency action unless the court concludes that the agency's action is contrary to law, is not supported by substantial evidence, is arbitrary and capricious or is an abuse of discretion. In a proceeding brought by or against the regulated party, the court shall decide all questions of law, including the interpretation of a constitutional or statutory provision or a rule adopted by an agency, without deference to any previous determination that may have been made on the question by the agency. In a proceeding brought by or against the regulated party, the court shall decide all questions of fact without deference to any previous determination that may have been made on the question by the agency. Notwithstanding any other law, this subsection applies in any action for judicial review of any agency action that is authorized by law.

ARS §12-910 (F).

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).

III. DISCUSSION

The Appellants first argue that that the transaction in this case was not a public offering, and therefore exempted from the Securities Act's Registration Requirements. See A.R.S. § 44-1844 (A) (1) (sale of a security is exempt if it does not involve public offering). They argue that the four-prong test in *SEC v. Murphy*, 626 F.2d 633 (9th Cir. 1980) applies in determining whether the exemption exists in a particular case. The Appellants argued that all four *Murphy* factors demonstrate that the nonpublic offering exemption applies in this case. They argue that the Commission correctly determined that the first factor, the number of offerees, and the third factor, the size and the manner of the offering, weighed in the favor of the Appellants. They argue, however, that the Commission incorrectly determined the second factor, that the Williamses were not sophisticated investors, and the fourth factor, that the parties did not have a close relationship. The Appellants argue that the fourth factor examines the relationship to determine whether it is one that would grant the offeree access to the sort of information that registration would reveal, but not necessarily ensure that information is given. *See Murphy*, 626 F.2d at 647.

Second, the Appellants argue that the Commission erred as a matter of law by finding that Mr. Olson and Ms. Joplin committed securities fraud. They argue that the material misrepresentations found by the Commission did not constitute fraud because they were either 1) not misrepresentations, 2) harmless estimates that were not material to the Williamses' deliberations on whether to enter into the agreement, or 3) true statements that were not brought to fruition because of a State agency's error.

The Appellants argue that the purchase agreement was clearly stated and not a surprise to the Williamses. The Appellants further argue that the timing for opening the company was simply an estimate, and not a guarantee. They argue that the Arizona Department of Insurance and Financial Institutions ("AZDIFI" or "the regulating agency") improperly required an audited financial statement which delayed the opening of the company. They argue that the Agency ultimately agreed that this requirement was in error. The Appellants finally argue that the Commission erred when it ruled that Mr. Olson and Ms. Joplin had a duty to disclose that some of the Williamses' initial deposit would be spent by Mr. Olson and Ms. Joplin on personal items. They argue that the purchase price was to be paid to Mr. Olson and Ms. Joplin directly, not the company. They argue that there is no affirmative duty of disclosure with respect to accounting as long as the parties have "the sort of relationship that would afford access to that information." Appellant Brief at 52. They argue that applicable case law does not require such disclosure of accounting, and that all the items that Mr. Olson and Ms. Joplin indicated would be purchased were in fact purchased, or would have been if it weren't for the AZDIFI's error.

The Commission argues that it correctly found securities fraud. It argues that Mr. Olson told the Williamses several times that investment in Sync was "failsafe" and a "slam dunk." B2, at 70; C13 at AAC 001540. It argues that the statements were untrue. It notes that the purchase agreement itself states that "the interest is speculative and involves a high degree of risk." C6 at ACC 001377. The Commission argues that Mr. Olson's comments failed to meet their legal obligation not to mislead the Williamses. According to the Commission, if an investment did not have any, or only a small level of, risk, a reasonable investor would have been more likely to invest.

The Commission further argues that the Appellants misled the Williamses by failing to tell them how Ms. Joplin and Mr. Olson would use the investment funds. It argues that a reasonable investor would be concerned if they knew that an investment was sought to help the company grow faster, but instead a significant portion of that investment was spent on personal luxury items. It argues that the Appellants were required to disclose enough information to prevent their statements from being misleading.

The Commission goes on to argue that Mr. Olson's statement that Sync would be operational in one month was untrue. It notes that Ms. Joplin and Mr. Olson did not even file Sync's Application with the appropriate agency until April 8, 2019, over two months after the Williamses' investment. By the time the Appellants submitted the Application, Mr. Olson's claim was already false. Therefore, any error in AZDIFI's action did not cause the falsity. The Commission argues that the false statement was material because any reasonable investor would want to know how soon he or she could expect returns on investment, especially since Mr. Olson told the Williamses that they could expect returns of $6000-$7000 per month. It argues that Mr. Williams expressed this frustration in May 2019 stating that "we have 50k [that] has been doing nothing for three months now." ACC 001552.

The Commission further argues that the Appellants failed to prove the Non-Public Offering Exemption. It argues that the Exemption from Securities Registration is an affirmative defense that Appellants were required to prove. See A.R.S. § 44-2033. It argues that the applicability of the exemption is determined by whether the persons affected needed the protection of the Securities Act. *Wales v. Arizona Corporation Commission* 249 Ariz. 263, 270 ¶ ¶ 30-32 (App.2020). It argues that the *Murphy* factors are simply ways to address the ultimate question of whether the offerees could fend for themselves.

Addressing the *Murphy* factors, the Commission argues that the Appellants failed to prove that the Williamses were sophisticated investors. It argues that there is no evidence that their house flipping investments were profitable. It notes that the Williamses has lost $10,000 in earnest money on one deal that could have been saved if they had been more experienced. C13, at ACC 001513, 1515, 1517.

The Commission also argues that even if the Williamses were sophisticated house flippers, that experience did not make them sophisticated for the purpose of investing in a startup title company. The Commission notes that sophistication in one area of business does not make a person sophisticated in another investment arena. It notes that the Williamses had full control of their fix and flip properties but had no managerial control in the proposed startup. It argues that the Williamses had no experience investing in companies, especially startup companies, experience in title insurance companies, or experience with the linear integration model proposed by Mr. Olson. The Commission argues that the Williamses' actions in failing to carefully review the initial purchase agreement or revised purchase agreement, failing to negotiate the terms of those agreements, failing to discuss the revised purchase agreement with their own attorney, and failure to identify the concerns about "failsafe" claims all demonstrate the Williamses' lack of sophistication. The Commission argues that the Williamses were not accredited investors which supports that they were not sophisticated investors.

The Commission further argues that the Appellants failed to prove that the Williamses had a relationship with Ms. Joplin or Mr. Olson that afforded access to or disclosure of the sort of information that registration reveals. This information includes a disclosure of how investment funds would be used, and in what amounts, and disclosure of remuneration to be paid to company officers. The Commission notes that the Appellants provided no evidence that Sync had such documents, much less provided the Williamses with access to them. The Commission notes that the Appellants' lies to the Williamses also demonstrate that the Appellants did not provide access to the types of information that registration requires.

The Commission concludes by arguing that the Appellants failed to prove sophistication and access to information, the second and fourth factors in the *Murphy* test. Therefore, it argues that the Appellants failed to prove the exemption for a nonpublic offering.

In assessing this case, the Court concludes that substantial evidence supports the Commission's conclusion that the Appellants engaged in securities fraud. Arizona law prohibits a person, in connection with a transaction involving an offer to sell or buy securities, for a person directly or indirectly to "make any untrue statement of material fact, or omit to state 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). The Securities Act places a "heavy burden upon the offeror not to mislead potential investors in any way." See *Trimble v. American Savings Life Insurance Company*, 152 Ariz. 548, 553 (App.1986). A misleading statement or omission is material if there is a "substantial likelihood that, under all the circumstances, misstated or omitted fact would have assumed actual significance in the deliberations of a reasonable buyer." *Id*.

Substantial evidence supports that Mr. Olson's statements that investments in Sync were "fail-safe" and would be a "slam dunk" were at the very least misleading. A reasonable investor would have concluded that such statements indicated that the investment had a very low risk. Clearly, the investment into a startup company with significant regulatory requirements carried significant risk. The purchase agreement itself stated that the investment "is speculative and involves a degree of risk." C6, at ACC 001377. The Appellants' statements were also material. Mr. Olson stated that the investment would have returns of $6000-$7000 per month. Stating that this investment has a very low risk, taking into account a projected monthly return of 6-7%, would have been very important to a reasonable investor in determining whether to invest their money. See *Trimble*, 152 Ariz. at 553.

Substantial evidence also supports that the Appellants' failure to tell the Williamses how they would use the investment funds was also misleading. Mr. Olson told the Williamses that they were seeking investments to help Sync grow faster and told him that their funds would be used to secure office space, pay software subscription fees, and hire a Title Agent. Neither Ms. Joplin nor Mr. Olson told the Williamses that they would use the Williamses' money to fund other businesses or purchase luxury clothing. Knowing that investment funds were not going into the company to fuel growth as stated, but rather into other avenues that would not benefit the business, would have significance to a reasonable investor.

Finally, substantial evidence supports the conclusion that Mr. Olson's statements that Sync would be in operation within a month was misleading. B2, at 65-66. Any regulatory process takes time for approval. Ms. Joplin and Mr. Olson did not even file Sync's Application with the applicable regulatory agency until more than two months after the Williamses' investment. C14. A reasonable investor would have found the timing of opening the business significant, as demonstrated by Mr. Williams' frustrated declaration that "we have 50K [that] has been doing nothing for three months now." C13 at ACC 001552.

The Court also concludes that substantial evidence supports the Commission's finding that the Appellants violated the registration requirements of the Securities Act and failed to prove an exemption from those registration requirements. The Appellants have the burden to prove the existence of an exemption such as the Non-Public Offering Exemption. A.R.S. § 44-2033. The law requires strict compliance with the exemption statute requirements. *State v. Baumann*, 125 Ariz. 404, 411 (1980)("Because of the vital public policy underlying the registration requirement, there must be strict compliance with all the requirements of the exemption statute."). The *Murphy* case sets forth four factors to determine whether the Non-Public Offering Exemption applies. First is the number of offerees, second is the sophistication of the investors, the third factor is the size and the manner of the offering, and the fourth factor is whether the parties had a close relationship that would allow access to information relating to the investment.

Substantial evidence supports the Commission's conclusion that the Williamses were not sophisticated investors. Sophistication in one arena does not mean sophistication in another. *Andrews v. Blue*, 489 F.2d 367, 373 n. 3 (10th Cir. 1973). Even assuming the Williamses were sophisticated in house flipping, there is no evidence that they were sophisticated in startup title companies. No evidence in the record shows that they had any experience in starting up new businesses, obtaining regulatory approvals, operating title insurance companies, reviewing financial statements or balance sheets, etc.

In addition, substantial evidence supports the Commission's Conclusion that the Williamses had a close relationship with the Appellants such that they had access to the type of information needed to invest in a company without the protection of the Securities Act. See *Murphy*, 626 F.2d at 647. The number of conversations or correspondence exchanges alone is insufficient to establish that the Williamses had access to all the information necessary to make a wise investment. In fact, there is no evidence that the Appellants had even created much of the information required by the Securities Act, including a recent certified balance sheet, the disclosure of how and in what amounts investment funds would be used, and the remuneration to company officers. Therefore, because the evidence does not show that the information existed, the Appellants could not prove that the Williamses had access to that information.

IV. 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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