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SJC-11661

NESTO MONELL & others vs. BOSTON PADS, LLC, & others.

Suffolk. December 2, 2014. - June 3, 2015.

Present: Spina, Cordy, Botsford, Duffly, Lenk, & Hines, JJ.

Independent Contractor Act. Broker. License. Real Property, License to sell. Labor, Wages. Massachusetts Wage Act.

Civil action commenced in the Superior Court Department on October 17, 2011.

A motion for partial summary judgment was heard by Robert C. Cosgrove, J., and entry of final judgment was ordered by Edward P. Leibensperger, J.

The Supreme Judicial Court granted an application for direct appellate review.

Hillary Schwab (Brant Casavant with her) for the plaintiffs.

Stephen M. Perry (Robert S. Kutner with him) for the defendants.

Ian O. Russell & Nicole Horberg Decter, for Massachusetts Employment Lawyers Association & another, amici curiae, submitted a brief.

Philip S. Lapatin & Nathaniel F. Hulme, for Massachusetts Association of Realtors & another, amici curiae, submitted a brief.

HINES, J. We granted the plaintiffs' application for direct appellate review to

determine whether the independent contractor statute, G. L. c. 149, § 148B, which makes it a violation of the statute to fail "to properly classify an individual as an employee," applies to real estate salespersons licensed under, and affiliated with and working for a licensed brokerage firm pursuant to G. L. c. 112, § 87RR. A Superior Court judge concluded that the independent contractor statute did not apply in these circumstances to the salespersons in this industry. We affirm.

1. Background. We summarize the material undisputed facts. The defendants Jacob Realty, LLC (Jacob Realty); NextGen Realty, Inc. (NextGen); and RentMyUnit.Com, Inc., doing business as Boardwalk Properties (Boardwalk Properties) (collectively, business entities), are licensed Massachusetts real estate brokerage firms that are in the business of renting and selling real estate in Massachusetts. The defendants Demetrios Salpoglou and Yuan Huang are members of Jacob Realty and shareholders of NextGen and Boardwalk Properties, and are involved in the operations of these business entities. Salpoglou serves as the broker of record for the business entities.

The plaintiffs Nesto Monell, Jonathan Gibson, Rachael Butcher, and Lindsey Burnes were licensed real estate salespersons who worked for Jacob Realty under its real estate broker's license. The plaintiff Ann McGovern was a licensed real estate salesperson who worked for NextGen under its real estate broker's license. The plaintiff Benjamin Smith was a licensed real estate salesperson who worked for Boardwalk Properties under its real estate broker's license.

Throughout the course of their relationship, the defendant business entities classified the plaintiffs as independent contractors. The defendant entities required the plaintiffs to work sixty "front desk hours" during training and, thereafter, in some cases complete monthly "office hours" duty, which involved answering telephone calls from, and greeting, prospective clients. The salespersons were able to select the "office hours" that they wished to work. The business entities, however, allowed salespersons

hours" that they wished to work. The business entities, however, allowed salespersons only one shift change every two months.

At the commencement of their relationship with the business entities, the plaintiffs signed nondisclosure, nonsolicitation, and noncompete agreements and were required to undergo a training program. The business entities encouraged the plaintiffs to purchase a day planner and required them to obtain a cellular telephone with a "617" area code, to adhere to a dress code, and to submit to various disciplinary actions if they did not meet their productivity goals.

The defendant entities compensate their salespersons pursuant to a commission policy. Under the policy salespersons are paid on a "commission-only basis" and expressly will not be treated as employees "with respect to compensation for taxes or any other purpose." A commission is earned on completion by the salesperson of a rental or sales transaction involving a client's real estate. The commission due to the salesperson usually amounts to a percentage (typically fifty per cent) of a transaction's gross commission, less any applicable deductions. The business entities receive the balance as their portion of the fee charged to the client. Commissions are paid "only when a transaction is completed in its entirety" as defined by the policy. Pursuant to the policy, the business entities "will issue [a] Form 1099-MISC" to each salesperson and each salesperson "agrees to provide [the business entities] with a signed W-9 [form]." Thus, the plaintiffs were responsible for paying their own taxes.

In 2011, the plaintiffs filed a complaint against the defendants in the Superior Court. As relevant here, the plaintiffs alleged that the defendants violated the independent contractor statute by misclassifying them as independent contractors when they actually were employees. On this count of the complaint, the plaintiffs moved for partial summary judgment, which the judge denied. The judge then granted partial summary judgment in favor of the defendants. The judge determined that there is a conflict between the independent contractor and real estate licensing statutes insofar as

conflict between the independent contractor and real estate licensing statutes insofar as a real estate salesperson would not be able to satisfy all three indicia of an independent contractor relationship while simultaneously complying with the real estate licensing statute. Based on his determination that the real estate licensing statute was more recently amended and is more specific than the independent contractor statute, the judge concluded that, pursuant to statutory construction principles, the independent contractor statute did not control, meaning that the defendants did not fail properly to classify the plaintiffs as employees and therefore could not be liable for a violation of G. L. c. 149, § 148B.

2. Standard of review. Summary judgment is appropriate where there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. See Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991); Mass. R. Civ. P. 56 (c), as amended, 436 Mass. 1404 (2002). Moreover, "[w]e exercise de novo review over questions of statutory construction." Atlanticare Med. Ctr. v. Commissioner of the Div. of Med. Assistance, 439 Mass. 1, 6 (2003). Because the issue before us is one of statutory construction, we begin by providing an overview of the relevant statutes.

3. Statutory overview. a. Independent contractor statute. The Commonwealth's wage laws are set forth in provisions in G. L. c. 149 (Wage Act). Within the Wage Act is the independent contractor statute. G. L. c. 149, § 148B. Effective July 19, 2004, the Legislature amended § 148B by striking out its language and replacing it in its entirety. See St. 2004, c. 193, § 26. The statute has not since been amended.

The independent contractor statute, states, in relevant part:

"(a) For the purpose of this chapter and chapter 151 an individual performing any service, except as authorized under this chapter, shall be considered to be an employee under those chapters unless:--

"(1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of

performance of the service, both under his contract for the performance of service and in fact; and

"(2) the service is performed outside the usual course of the business of the employer; and,

"(3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

"(b) The failure to withhold federal or state income taxes . . . shall not be considered in making a determination under this section.

". . .

"(d) Whoever fails to properly classify an individual as an employee according to this section and in so doing fails to comply, in any respect, with [G. L. c. 149], or [G. L. c. 151, § 1, 1A, 1B, 2B, 15, or 19], or [G. L. c. 62B], shall be punished and shall be subject to all of the criminal and civil remedies, including debarment [from public bidding], as provided in [§ 27C] of this chapter. Whoever fails to properly classify an individual as an employee according to this section and in so doing violates [G. L. c. 152] shall be punished as provided in [G. L. c. 152, § 14,] and shall be subject to all of the civil remedies, including debarment [from public bidding], provided in [§ 27C] of this chapter. . . ."

G. L. c. 149, § 148B.

As noted above, the independent contractor statute was adopted as part of St. 2004, c. 193, which is entitled, "An Act further regulating public construction in the Commonwealth." The act's emergency preamble states the purpose of the act is "to regulate further public construction in the commonwealth." *Id.* Although the statute was part of legislation making changes to the public construction industry, the Legislature kept it in c. 149, thus leaving it applicable to a wide range of industries. See Lipsitt v. Plaud, 466 Mass. 240, 245 (2013) (since enactment of Wage Act in 1886, Legislature has broadened scope of employees covered).

We have stated that the purpose of the independent contractor statute is "to

protect workers by classifying them as employees, and thereby grant them the benefits and rights of employment, where the circumstances indicate that they are, in fact, employees." Depianti v. Jan-Pro Franchising Int'l, Inc., 465 Mass. 607, 620 (2013), quoting Taylor v. Eastern Connection Operating, Inc., 465 Mass. 191, 198 (2013). See Cumpata v. Blue Cross Blue Shield of Mass., Inc., 113 F. Supp. 2d 164, 168 (D. Mass. 2000) ("Wage Act is meant to protect employees from the dictates and whims of shrewd employers"). Indeed,

"[m]isclassification not only hurts the individual employee; it also imposes significant financial burdens on the Federal government and the Commonwealth in lost tax and insurance revenues. Moreover, it gives an employer who misclassifies employees as independent contractors an unfair competitive advantage over employers who correctly classify their employees and bear the concomitant financial burden."

Somers v. Converged Access, Inc., 454 Mass. 582, 593 (2009).

To this end, the independent contractor statute "establishes a framework for determining whether a worker is an employee or an independent contractor." Depianti, 465 Mass. at 621. The statute establishes a presumption that "an individual performing any service" is an employee. Id. See G. L. c. 149, § 148B (a) ("an individual performing any service . . . shall be considered to be an employee"). Next, the statute "lays out three indicia [or factors] of an independent contractor relationship, all three of which must be established to rebut the presumption of employment." Depianti, supra. In interpreting the statute, we have stated that, "[i]n light of the statute's broad remedial purpose, 'it would be an error to imply . . . a limitation where the statutory language does not require it.'" Id., quoting Psy-Ed Corp. v. Klein, 459 Mass. 697, 708 (2011).

b. Real estate licensing and registration scheme. General Laws c. 112, §§ 87PP through 87DDD½, and G. L. c. 112, §§ 65A through 65E, set forth the licensing and registration provisions governing real estate brokers and salespersons. A real estate "broker," for purposes here, is defined as including:

"any person who for another person and for a fee, commission or other valuable consideration, or with the intention or in the expectation or upon the promise of receiving or collecting a fee, commission or other valuable consideration, does any of the following: -- sells, exchanges, purchases, rents or leases, or negotiates, or offers, attempts or agrees to negotiate the sale, exchange, purchase, rental or leasing of any real estate, or lists or offers, attempts or agrees to list any real estate, or buys or offers to buy, sell or offers to sell . . . real estate."

G. L. c. 112, § 87PP. In contrast, a real estate "salesman" or salesperson is "an individual who performs any act or engages in any transaction included in the foregoing definition of a broker, except the completing of the negotiation of any agreement or transaction which results or is intended to result in the sale, exchange, purchase, renting or leasing of any real estate." Id. Both brokers and salespersons are required to be licensed. G. L. c. 112, § 87RR. "The examination for a [salesperson's] license shall be based upon the same general subject matter as for a broker's license, but shall be more elementary in nature." G. L. c. 112, § 87SS.

Real estate salespersons must conduct business with, or be affiliated with, a licensed broker. G. L. c. 112, § 87RR. See 254 Code Mass. Regs. § 3.00(6) (1998) ("A licensed salesperson must be engaged by a licensed broker and a licensed salesperson shall not conduct his own real estate business"). A real estate salesperson may affiliate with only one broker. G. L. c. 112, § 87VV (when real estate salesperson affiliates with broker, salesperson "shall not act as [salesperson] for any other licensed broker while so affiliated, nor accept any valuable consideration for the performance of any act as a real estate [salesperson] from any person except the broker with whom he [or she] is affiliated"). Concerning the relationship between the broker and his or her affiliated salesperson, § 87RR provides in relevant part:

"No [salesperson] may conduct or operate his [or her] own real estate business nor act except as the representative of a real estate broker who shall be responsible for the [salesperson] and who must approve the negotiation and completion by the [salesperson] of any transaction or agreement which results or

is intended to result in the sale, exchange, purchase, renting or leasing of any real estate or in a loan secured or to be secured by mortgage or other encumbrance upon real estate. No [salesperson] shall be affiliated with more than one broker at the same time nor shall any [salesperson] be entitled to any fee, commission or other valuable consideration or solicit or accept the same from any person except his [or her] licensed broker in connection with any such agreement or transaction. A [salesperson] may be affiliated with a broker either as an employee or as an independent contractor and may, by agreement, be paid as an outside salesperson on a commission-only basis, but shall be under such supervision of said broker as to ensure compliance with this section and said broker shall be responsible with the [salesperson] for any violation of [G. L. c. 112, § 87AAA,] committed by said [salesperson]."

Section 87AAA enumerates numerous grounds for the suspension, revocation, or refusal to renew the license of a broker or salesperson. These grounds include a range of conduct, the prohibition of which is intended to promote fairness and integrity in real estate transactions. Id. See 254 Code Mass. Regs. § 3.00 (2005) (setting forth professional standards of practice as well as additional grounds for discipline).

4. Discussion. In this appeal, we address the conflict between the independent contractor statute and the real estate licensing statute which, respectively, support the plaintiffs' claim that they are "employees" and the defendants' claim that the plaintiffs are or can be "independent contractors." The plaintiffs rely on the independent contractor statute insofar as it creates a presumptive employee status that, in its application, includes real estate salespersons. The defendants rely on the real estate licensing statute providing that a "[salesperson] may be affiliated with a broker either as an employee or as an independent contractor." See G. L. c. 112, § 87RR.

"The general and familiar rule is that a statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished." Lowery v. Klemm, 446 Mass. 572, 576-577 (2006), quoting Hanlon v.

Rollins, 286 Mass. 444, 447 (1934). Clear and unambiguous language in a statute is conclusive as to legislative intent. Commissioner of Correction v. Superior Court Dep't of the Trial Court for the County of Worcester, 446 Mass. 123, 124 (2006). In addition, "a remedial statute . . . should be given a broad interpretation . . . in light of its purpose . . . to 'promote the accomplishment of its beneficent design.'" Seller's Case, 452 Mass. 804, 810 (2008), quoting Neff v. Commissioner of the Dep't of Indus. Accs., 421 Mass. 70, 73 (1995). In cases "[w]here two or more statutes relate to the same subject matter, they should be construed together so as to constitute a harmonious whole consistent with the legislative purpose." Federal Nat'l Mtge. Ass'n v. Hendricks, 463 Mass. 635, 641 (2012), quoting Board of Educ. v. Assessor of Worcester, 368 Mass. 511, 513-514 (1975).

As an initial matter, there is no question that the independent contractor statute is a remedial statute. See Depianti, 465 Mass. at 621. It thus should be given a construction that furthers, not defeats, its purpose. See id. The difficulty in seeking to construe it in harmony with the real estate licensing statute, however, is that the real estate licensing statute makes it impossible for a real estate salesperson to satisfy the three factors required to achieve independent contractor status, all of which must be satisfied to defeat the presumption of employee status. For instance, under the second factor of the independent contractor statute, the employer must prove that "the service [of the worker] is performed outside the usual course of the business of the employer." G. L. c. 149, § 148B (a) (2). Because under G. L. c. 112, § 87RR, "[n]o [salesperson] may conduct or operate his [or her] own real estate business nor act except as the representative of a real estate broker," an employer can never prove that the service is performed outside the usual course of the employer's business. Under the express language of § 87RR, a salesperson is prohibited from performing any services other than as the broker's representative and as part of the broker's business. Under the third factor of the independent contractor statute, the employer must prove that the worker "is

factor of the independent contractor statute, the employer must prove that the worker "is customarily engaged in an independently established" business in the real estate industry. See G. L. c. 149, § 148B (a) (3). General Laws c. 112, § 87RR, however, prohibits a real estate salesperson from operating his or her own real estate business. Thus, compliance with this third factor also is not possible.

The exclusion of real estate salespersons from independent contractor status clearly was not intended by the Legislature. While § 87RR expressly authorizes a real estate salesperson to affiliate with a broker as an employee, it also expressly authorizes an association as an independent contractor. See *id.* ("A [salesperson] may be affiliated with a broker either as an employee or as an independent contractor . . ." [emphasis added]). We cannot view this express language as superfluous. See *Casa Loma, Inc. v. Alcoholic Beverages Control Comm'n*, 377 Mass. 231, 234 (1979) ("It is a common tenet of statutory construction, that, wherever possible, no provision of a legislative enactment should be treated as superfluous").

Unlike the judge, we do not view the 2010 amendment to § 87RR to be instructive in resolving the conflict. The 2010 amendment to § 87RR added language authorizing brokers and salespersons to enter into agreements whereby a real estate salesperson could be paid on a commission-only basis. See St. 2010, c. 307, § 1 (as applying to salespersons, adding in second paragraph, in third sentence, "and may, by agreement, be paid as an outside salesperson on a commission-only basis"). The judge concluded that, by virtue of this amendment and, in contrast, of the independent contractor statute being left intact, the Legislature intended that real estate salespersons qualify as independent contractors despite the inherent level of control brokers must exercise over them. Although this interpretation is reasonable, it is not dispositive of the issue before us because when enacting St. 2010, c. 307, § 1, the Legislature could have deleted the reference in § 87RR that permits a real estate salesperson to be affiliated with a broker either as an employee or an independent

salesperson to be affiliated with a broker either as an employee or an independent contractor. The Legislature took no action regarding the nature of this affiliation. Thus, the amendment does not reflect an affirmation that a real estate salesperson is an independent contractor. It reflects an affirmation that the salesperson may be an independent contractor, but he or she also may be an employee. Where the Legislature left the reference in place regarding the nature of the affiliation, we conclude that the 2010 amendment simply was intended to address how a real estate salesperson, whether an employee or an independent contractor, could be paid, authorizing payment in the form of commissions only. The amendment cannot be said to speak to the nature of the affiliation between the broker and salesperson other than confirming the fact that the affiliation may be either as an employee or as an independent contractor.

The judge's reliance on the familiar canon of construction providing that a specific statute, in this case § 87RR, controls over the provisions of a general statute, such as the independent contract statute, however, is appropriate here. See TBI, Inc. v. Board of Health of N. Andover, 431 Mass. 9, 18 (2000); Doe v. Attorney Gen. (No. 1), 425 Mass. 210, 215 (1997). As outlined earlier, real estate brokers are responsible for their affiliated salespersons' compliance with a broad range of statutory provisions and regulations. No doubt this supervision and control has been required due in part to the difference in training and testing that is required of real estate brokers in comparison to salespersons. It also necessarily is in place to protect the public, namely the consumers who are selling, purchasing, leasing, or renting real estate in a highly regulated field. Despite that level of supervision and control mandated by law, § 87RR nevertheless expressly preserves a salesperson's ability to be affiliated with a broker as either an employee or an independent contractor. Thus, it is § 87RR that controls in this instance, not the more general independent contractor statute. Were we to conclude otherwise, we would be subjecting real estate brokerage firms to potential criminal penalties for misclassifying its real estate salespersons in a manner expressly

penalties for misclassifying its real estate salespersons in a manner expressly authorized by the real estate licensing statute. See G. L. c. 149, § 148B (d) (failure to properly classify individual as employee and to comply with other provisions of Wage Act or Fair Minimum Wage Law subjects employer to criminal penalties).

That being said, we underscore the limited nature of our holding. The plaintiffs' complaint alleged four counts: the first for misclassification under the independent contractor statute, G. L. c. 149, § 148B; the second for failing to make timely payment of wages and taking improper deductions, under G. L. c. 149, § 148; the third for failure to pay the State statutory minimum wage for all hours worked, in violation of G. L. c. 151, §§ 1 et seq.; the fourth for failure to pay time and one-half for hours worked in excess of forty hours per week, in violation of G. L. c. 151, § 1A. See note 10, *supra*. The judge granted summary judgment to the defendants only on the first count. Following the judge's decision, the plaintiffs dismissed the remaining counts without prejudice in order to pursue this appeal.

Because we agree with the Superior Court judge that the independent contractor statute does not apply to real estate salespersons, we conclude that the judge properly granted summary judgment on the first count: the plaintiffs cannot prevail on a claim based on a statute that does not apply to them. In reaching that conclusion, however, we take no position on whether the plaintiffs in fact are employees or independent contractors, or on how, in the absence of the framework established by the independent contractor statute, it may be determined whether a real estate salesperson is properly classified as an independent contractor or employee. Earlier proposed legislation specifically provided that "a [salesperson] or broker may be affiliated with a broker either as an employee or as an independent contractor, as determined by their written agreement and customary work practices." St. 2008, c. 304, § 8. The Governor, however, disapproved this language, concluding that it "would allow real estate sales persons and brokers to rely on written agreements to avoid the classification rules for

persons and brokers to rely on written agreements to avoid the classification rules for independent contractors." See 2008 House Doc. No. 5075. The statute ultimately enacted expressly stated that a commission-only compensation structure may be established "by agreement." G. L. c. 112, § 87RR. It does not, however, indicate how a broker and real estate salesperson may create an independent contractor relationship, rather than an employment relationship.

Because the plaintiffs based their argument on appeal on the contention that they are employees under the framework set forth in the independent contractor statute, they did not address how the court should determine the nature of their relationship if the court determines, as we have, that the framework does not apply. In light of the potential impact of that issue on the real estate industry as a whole and its significant ramifications for real estate salespersons' access to the rights and benefits of employment, we think it prudent to leave that issue's resolution to another day, when it has been fully briefed and argued. Should the Legislature be so inclined, it may wish to clarify how a real estate salesperson may gain employee status under the real estate licensing statute.

5. Conclusion. For the foregoing reasons, we affirm the judge's order denying the plaintiffs' motion for partial summary judgment and granting partial summary judgment to the defendants.

So ordered.

General Information

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