Sharon L. Zappia,
Petitioner,

and

New Jersey Realtors ®,
Intervenor

v.

New Jersey Department of Labor and Workforce Development,
Respondent.

STATE OF NEW JERSEY
DEPARTMENT OF LABOR
AND WORKFORCE DEVELOPMENT

FINAL ADMINISTRATIVE ACTION
OF THE
COMMISSIONER

OAL DKT. NO LID 01132-23
AGENCY DKT. NO. DOL 19-005

ON REMAND
(OAL DKT. NO. LID 01524-22;
OAL DKT. NO. LID 01737-19)

Issued: September 19, 2024

Pursuant to N.J.S.A. 43:21-14(c), the New Jersey Department of Labor and Workforce Development (the Department or respondent) assessed Sharon L. Zappia, d/b/a Anjus Real Estate (Zappia or petitioner) for unpaid contributions to the unemployment compensation and State disability benefits funds for the period from 2014 through 2017 (the audit period). Petitioner requested a hearing with regard to the Department's assessment. The matter was transmitted to the Office of Administrative Law (OAL), where it was scheduled for a hearing before Administrative Law Judge (ALJ) Kathleen M. Calemmo. New Jersey REALTORS® (Intervenor or NJR) filed a motion with the ALJ to intervene, which the ALJ granted.

The issue to be decided is whether Diane DeSabatino, who received payment from Zappia for the preparation of "broker price opinions" (BPOs), was an employee of Zappia and, therefore,

whether Zappia was responsible under N.J.S.A. 43:21-7 for making contributions to the unemployment compensation fund and the State disability benefits fund with respect to Ms. DeSabatino. A BPO is an estimate prepared by a real estate professional as to the probable value of a property. Ms. DeSabatino, a licensed real estate salesperson, prepared BPOs for third parties, for which the third parties were charged a flat fee. All payments for Ms. DeSabatino's services in the preparation of BPOs were made directly to Zappia, a licensed real estate broker, who in turn paid Ms. DeSabatino 90 percent of the flat fee, while retaining 10 percent of the fee for herself.

Under N.J.S.A. 43:21-1 et seq. (the Unemployment Compensation Law or UCL), the term "employment" is defined broadly to include any service performed for remuneration or under any contract of hire, written or oral, express or implied. N.J.S.A. 43:21-19(1)(A). Once it is established that a service has been performed for remuneration, that service is deemed to be employment subject to the UCL, unless and until it is shown to the satisfaction of the Department either that the service is exempt from UCL coverage under N.J.S.A. 43:21-19(i)(7), (i)9 or (i)10, which contain 27 separate specialized exemptions from UCL coverage, including one at N.J.S.A. 43:21-19(i)(7(K) for "[s]ervices performed by real estate salesmen or brokers who are compensated wholly on a commission basis," or that the service and the individual performing the service meet the statutory test for independent contractor status found at N.J.S.A. 43:21-19(i)(6)(A), (B) and (C), commonly referred to as the "ABC test." Under the ABC test, a putative employer who seeks to assert exemption from UCL coverage for the services of an individual who it claims to be an independent contractor, has the burden to establish the following with regard to the services and the individual performing those services:

> (A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and
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> (B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
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> (C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.
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> N.J.S.A. 43:21-19(i)(6).

Prior to a hearing, NJR filed a motion before the ALJ, pursuant to N.J.A.C. 1:1-12.5, for summary decision. Shortly thereafter, petitioner also filed a motion for summary decision in which it incorporated by reference the motion filed by NJR. Within its supporting brief, NJR asserted that the services performed by Ms. DeSabatino fall within the exemption from UCL coverage at N.J.S.A. 43:21-19(i)(7)(K) for "services performed by real estate salesmen or brokers who are compensated wholly on a commission basis." In response to NJR's and petitioner's motions for summary decision, the Department asserted, among other things, that although the services performed by Ms. DeSabatino were, in fact, services performed by a real estate salesperson, Ms. DeSabatino was not compensated for the performance of those services "wholly on a commission basis." The ALJ granted NJR's and petitioner's motions for summary decision concluding that

the payments for the preparation of BPOs by Ms. DeSabatino "fit within the requirement that compensation must be made on a wholly commission basis," and therefore, those services were exempt from UCL coverage under N.J.S.A. 43:21-19(i)(7)(K). I, however, rejected the ALJ's grant of summary decision and ordered that the matter be remanded to the ALJ so that she could conduct a full evidentiary hearing to determine whether petitioner was able to satisfy its burden of meeting each one of the three criteria of the ABC test relative to Ms. DeSabatino, explaining as follows:

> "I agree with respondent that the arrangement described above does not constitute compensation "wholly on a commission basis." In my view, compensation "wholly on a commission basis" has certain defining characteristics. First, when one is paid wholly on a commission basis, the amount of his or her compensation is, as respondent asserts, based on a percentage of a sales price. Second, there is a risk associated with being compensated wholly on a commission basis that if the salesperson's efforts fail to result in the sale of a property, then the salesperson will earn nothing. See Yi v. Sterling Collision Ctrs., Inc., 480 F.3d 505, 508 (7th Cir. 2007) ("The essence of a commission is that it bases compensation on sales, for example a percentage of the sales price, as when a real estate broker receives as his compensation a percentage of the price at which the property he brokers is sold," adding, "[i]n one week business may be slow; he may make no sales and thus have no income for that week."). Neither of these factors is present in the manner that Ms. DeSabatino was compensated by Zappia during the audit period for the preparation of BPOs; which is to say, Ms. DeSabatino and Zappia split each BPO flat fee - 90 percent of the fee going to Ms. DeSabatino and 10 percent of the flat fee going to Zappia. The amount that Ms. DeSabatino earns for her efforts has no connection to a property's sale price and the arrangement carries with it no risk of non-payment if the sale of the evaluated property does not occur. In sum, I agree with respondent that the arrangement between Zappia and Ms. DeSabatino is one of fee-splitting, rather than payment on a commission basis; I agree that this is a distinction with difference; and consequently, I agree that petitioner is not entitled to assert an exemption from UCL coverage under N.J.S.A. 43:21-19(i)(7)(K) for the services performed by Ms. DeSabatino during the audit period."

Prior to the hearing on remand, petitioner and NJR again filed motions for summary decision, this time based on new legislation – P.L. 2021, c. 486, which amended N.J.S.A. 45:15-1 et seq. (The Real Estate Brokers Act). Petitioner and NJR maintained that the purpose of the legislation was "to give retroactive effect to N.J.S.A. 45:15-3.2(b), which allows the written employment agreement to control the relationship between a broker and salesperson, notwithstanding any other law to the contrary." Consequently, according to the moving parties, "petitioner was no longer required to satisfy the three prongs of the ABC test to determine independent contractor status." The ALJ granted NJR's and petitioner's motions for summary decision concluding that the new legislation "not only authorized independent contractor relationships [concerning brokers and salespersons] but also did so notwithstanding any law to the contrary," adding that the new legislation made clear that a written independent contractor agreement could be accepted as conclusive proof of an independent contractor relationship. I,

however, rejected the ALJ's grant of summary decision and ordered that the matter be remanded to the ALJ so that she could conduct a full evidentiary hearing to determine whether petitioner was able to satisfy its burden of meeting each one of the three criteria of the ABC test relative to Ms. DeSabatino, explaining as follows:

> "The ALJ has put excessive interpretive weight on the "notwithstanding" clause, and not enough weight on the heart of the measure: that under the Real Estate Brokers Act, as amended, a business affiliation between a broker and a salesperson **may** be that of an independent contractor. The Real Estate Brokers Act does not say that the Department is prohibited from analyzing the relationship between a broker and salesperson under the ABC test for the purpose of determining contribution liability under that the UCL."

In accordance with my remand decision, the ALJ conducted a full evidentiary hearing. Following that hearing, the ALJ concluded that based upon her consideration of the testimonial and documentary evidence presented at the hearing and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, she must agree with respondent that petitioner has failed to satisfy its burden under the ABC test relative to the services performed by Ms. DeSabatino for Zappia. However, the ALJ found that, "the employment status of Ms. DeSabatino and her putative employer's liability for contributions must be analyzed consistently with the recent New Jersey Supreme Court decision in Kennedy v. Weichert Co., 257 N.J. 290 (2024)." In that regard, the ALJ found the following:

> "In Kennedy, the New Jersey Supreme Court stated that the plain language of the [Real Estate] Brokers Act required a real estate broker and a salesperson execute a written agreement defining the nature of the relationship. N.J.S.A. 45:15-3.2(b). If the agreement is to affiliate in an independent contractor relationship, then the affiliation controls "[n]otwithstanding any provision of R.S. 45:15-1 et seq. or any other law, rule, or regulation to the contrary." Id., at 310.
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> . . .
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> Consequently, the independent contractor agreement between Zappia and DeSabatino is determinative of their business affiliation as an independent contractor relationship, not whether they can satisfy the criteria of the ABC test."
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> (Initial Decision, Page 10)

Based on the foregoing, the ALJ concluded that Ms. DeSabatino had been an independent contractor, rather than an employees of Zappia, "because the existence of a written independent contractor agreement between DeSabatino, a licensed real estate agent, and Zappia, a licensed real estate broker,…defined their business affiliation in accordance with N.J.S.A. 45:15-3.2 and the New Jersey Supreme Court decision in Kennedy." Therefore, the ALJ reversed the Department's assessment against Zappia for unpaid contributions to the unemployment compensation and State disability benefits funds. Respondent filed exceptions. Petitioner filed a reply to exceptions.

In its exceptions, respondent asserts that in Kennedy, supra, the Court addressed the relationship between Kennedy and Weichert under the New Jersey Wage Payment Law (WPL), not the UCL, adding:

> "The Kennedy decision should not alter the ABC analysis under the UCL. Because of the differences in the WPL and the UCL, two different outcomes can be had. Under the WPL, the real estate relationship had no option to be excluded. The UCL, however, has a mechanism to exclude these services, N.J.S.A. 43:21-19(i)(7)(K). Because of this, the relationship between the parties can have two different outcomes…."
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> [Internal citation omitted]

Respondent also maintains that because a specific statute controls over a general one without regard to priority of enactment[1], "[t]he 'notwithstanding' clause of the decision[2] holds no weight in this case either." According to respondent, the UCL "is a specific statute," whereas the Real Estate Brokers Act is "a law specific only to the real estate industry and general in its application." Therefore, argues respondent, the opinion in Kennedy, supra, should not impact the outcome in the instant matter.

In its reply to exceptions, petitioner dismisses as "without basis in the law," respondent's assertion that it was improper for the ALJ to consider the opinion in Kennedy, supra., adding, "[t]he ALJ was not, and the [Commissioner] is not, at liberty to ignore the relevant, controlling and dispositive decision in Kennedy." Petitioner quotes at length from the opinion in Kennedy, supra, including the following:

> "The plain language of the Brokers Act addresses the question raised by this appeal. A real estate broker and a broker-salesperson or salesperson seeking to conduct real estate activities must execute a written agreement defining 'the nature of the business affiliation' between the parties as either an employment relationship or an independent contractor relationship. N.J.S.A. 45:15-3.2(a), (b). The statute expresses no preference between the two options; that question is for the parties to resolve N.J.S.A. 45:15-3, -3.2; -14 to -20.
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> . . .
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> The Brokers Act expressly defines the consequences of that choice; it provides that brokers and broker-salespersons or salespersons may affiliate in an independent contractor relationship, '[n]otwithstanding any provision of' the Brokers Act 'or any other law, rule, or regulation to the contrary.' N.J.S.A. 45:15-3.2(b). The

[1] Citing Bulova Watch Co. v. United States, 365 U.S. 753 (1961).

[2] Respondent is presumably referring here to the "notwithstanding" clause of N.J.S.A. 45:15-3.2(b), within the Real Estate Brokers Act, which is central to the Court's opinion in Kennedy, supra.

Legislature's use of the word 'notwithstanding' is significant; '[i]n construing statutes, the use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section.' Cisneros v. Alpine Ridge Grp., 509 U.S. 10, 18 (1993). Thus, in the Brokers Act, the Legislature clearly intended that if the parties' business affiliation agreement under N.J.S.A. 45:15-3.2 conflicts with another law, rule or regulation, the agreement will prevail."

Kennedy, supra, at 312.

"Under the Brokers Act, the parties' agreement to an independent contractor affiliation is not merely one of several factors in the analysis, as the Appellate Division viewed it to be. See Kennedy, 474 N.J. Super. at 551. To the contrary, if the parties have agreed in writing to a business affiliation in compliance with the Brokers Act, that agreement is dispositive. N.J.S.A. 45:15-3.2(b). If a written agreement entered into pursuant to N.J.S.A. 45:15-3.2 states that the broker-salesperson or salesperson is an independent contractor, a court must enforce its terms.

Kennedy, who agreed in writing to affiliate with Weichert as an independent contractor, must accordingly be treated as an independent contractor 'notwithstanding…any other law, rule or regulation to the contrary,' including the WPL. Ibid. For the period during which he worked as a Weichert real estate salesperson, Kennedy was not subject to the ABC test that governs employee classification disputes under the WPL pursuant to Hargrove, 220 N.J. at 312-16, or to any other classification standard set forth in statutes, regulations or case law."

Id., at 312-13.

CONCLUSION

Upon *de novo* review of the record, and after consideration of the ALJ's Initial Decision, as well as the exceptions filed by respondent and petitioner's reply, I hereby accept the ALJ's recommended order reversing the Department's assessment against Zappia for unpaid contributions to the unemployment compensation fund and the State disability benefits fund. That is, I agree with the ALJ that the New Jersey Supreme Court opinion in Kennedy, supra, is both controlling and dispositive. The Court in Kennedy found that "in the [Real Estate] Brokers Act, the Legislature clearly intended that if the parties' business affiliation agreement under N.J.S.A. 45:15-3.2 conflicts with another law, rule or regulation, the agreement will prevail," adding, "Kennedy, who agreed in writing to affiliate with Weichert as an independent contractor, must accordingly be treated as an independent contractor 'notwithstanding…**any other law, rule, or regulation to the contrary**," and "[f]or the period during which he worked as a Weichert real estate salesperson, Kennedy **was not subject to the ABC test** that governs employee classification disputes under the WPL…**or to any other classification standard set forth in statutes, regulations, or case law**." Kennedy, supra, at 310-312. (emphasis added).

In light of the foregoing, and as it is undisputed that Zappia, a real estate broker, and Ms. DeSabatino, a real estate salesperson, were, in fact, signatories to an agreement which defined their business affiliation as an independent contractor relationship,[3] I have no choice but to find, in accordance with N.J.S.A. 45:15-3.2; P.L. 2021, c. 486; and the holding in Kennedy, supra., that during the audit period Ms. DeSabatino was an independent contractor, rather than an employee of Zappia.

ORDER

Therefore, it is hereby ordered that the Department's assessment against Zappia for unpaid contributions to the unemployment compensation fund and State disability benefits fund for the audit period 2014 through 2017 is reversed.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY
THE COMMISSIONER, DEPARTMENT
OF LABOR AND WORKFORCE DEVELOPMENT

Robert Asaro-Angelo, Commissioner
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[3] The agreement between Zappia and Ms. DeSabatino was signed prior to the original effective date of P.L. 2018, c. 71, Section 3, which amended the Real Estate Brokers Act to allow salespersons and broker-salespersons to be independent contractors. However, P.L. 2021, c. 486, states that Section 3 of P.L. 2018, c. 71, "shall take effect immediately **and shall apply retroactively** to enforce but not change any written agreement between a broker-salesperson or salesperson and a broker where the written agreement defines, sets forth, identifies or provides that the broker-salesperson or salesperson is or was an independent contractor" (emphasis added).