OAH 60-1005-31793

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF COMMERCE

In the Matter of Lisa Lang and Larry Tucker

ORDER DENYING RESPONDENTS' MOTION FOR SUMMARY DISPOSITION OR IN THE ALTERNATIVE FOR UNREDACTED DISCOVERY

This matter came before Administrative Law Judge James E. LaFave upon Respondents' Lisa Lang and Larry Tucker's Motion for Summary Disposition or in the Alternative for Unredacted Discovery. Respondents' Motion was filed on March 20, 2015. The Department of Commerce filed a Memorandum in Opposition to Respondents' Motion on April 2, 2015. A Hearing on Respondent's Motion was held on April 8, 2015.

Michael J. Tostengard, Assistant Attorney General, appeared on behalf of the Minnesota Department of Commerce (Department). Edward F. Kautzer, Ruvelson & Kautzer, LTD, appeared on behalf of Lisa Lang and Larry Tucker (Respondents).

NOW, THEREFORE, based upon the file, record, and proceedings herein, and for the reasons set forth in the accompanying Memorandum,

IT IS HEREBY ORDERED:

1. The Respondents' Motion for Summary Disposition or in the Alternative for Unredacted Discovery is **DENIED.**

2. This matter will proceed to hearing as originally scheduled on June 10, 2015, and continuing if necessary on June 11, 2015.

3. All other terms and conditions contained in the First Prehearing Order (December 10, 2014) remain in full force and effect.

Dated: May 8, 2015

s/James E. LaFave

JAMES E. LAFAVE
Administrative Law Judge

MEMORANDUM

Factual Background

Respondents are licensed by the Department as real estate appraisers.[1] Around May 7, 2012, Jerry and Dolores Stendhal hired Respondents to perform an appraisal of property located at 19964 Hornsby Street Northeast, Wyoming, Minnesota 55092.[2] The purpose of the appraisal was to help determine the value of the property for a potential sale to the Minnesota Department of Natural Resources (DNR).[3] The intended users of the appraisal were the owners, advisors, and the DNR.[4] Respondents issued their appraiser report on September 4, 2012.[5]

The Stendahls provided a copy of Respondents' appraiser report to the DNR.[6] The DNR then sent the report to Wendy Walker, a real estate appraiser, for review.[7] Ms. Walker was critical, among other things, of the methodology used by Respondents in their report.[8] Ms. Walker filed a complaint against the Respondents with the Department.[9]

The Department, based on Ms. Walker's complaint, investigated Respondents and initiated this proceeding.[10]

Issues and Summary of Conclusions

A third party, a person for whom the appraisal was not intended, filed a complaint with the Department against Respondents. If a complaint comes to the Department from such a source, are Respondents entitled to an Order granting their Motion for Summary Disposition?

Documents provided by the third party complainant to the Department were redacted. In the alternative, are Respondents entitled to an Order requiring the Department to provide them with unredacted copies of the documents?

Because the Respondents are licensed by the Department and because the Department is required to enforce the laws and rules governing real estate appraisers, it does not matter from where the complaint against the Respondents arose, the Respondents' Motion is therefore denied. Further, a party is only required to produce

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[1] Notice and Order for Hearing, Order for Prehearing Conference, Order to Show Cause and Statement of Charges (Notice and Order for Hearing) at p. 2. (October 22, 2014).
[2] Lang Aff. ¶ 3 (March 18, 2015).
[3] *Id.* at ¶ 6. *See* Lang Aff. Ex. 2.
[4] *Id.*
[5] Respondents' Memorandum of Law in Support of Motion to Dismiss Or in the Alternative for Unredacted Discovery (Respondents' Memorandum of Law) at p. 2 (March 20, 2015).
[66] Lang Aff. ¶ 8.
[7] Respondents' Memorandum of Law at p. 3.
[8] *Id.*
[9] *Id.* at Ex. 1.
[10] *Id.*

the relevant documents in its possession. Because, the Department does not have the unredacted documents in its possession, custody, or control, it cannot be forced to produce them. Respondents' request for unredacted copies of the documents from the Department is denied.

The Position of the Parties on the Summary Disposition Motion

The Respondents argue that the Department cannot establish that Ms. Walker was an intended user of the appraisal or that the DNR relied on Respondents' appraisal to buy the property. Lacking that proof, Respondents claim the complaint should be dismissed as a matter of law.

The Department counters that this is a disciplinary action brought by a regulatory agency, not a private party action. Because the Respondents are licensed real estate appraisers, they are subject to disciplinary action from the Department for any violations of law in connection with the appraiser report.

Summary Disposition

Summary disposition is the administrative equivalent of summary judgment.[11] In ruling on motions where the Administrative Procedures Act is silent, the ALJ shall apply the Rules of Civil Procedure for District Courts for Minnesota.[12] Summary judgment is to be granted "if the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law."[13] A genuine issue is one that is not sham or frivolous. A material fact is one that is substantial and will affect the result or outcome of the proceeding.[14] Yet, the nonmoving party may not merely rest upon allegations or denials in its pleadings, but must set forth specific facts, by affidavits or otherwise, showing that there is a genuine issue for trial.[15] Reasonable inferences drawn from the facts in the record must be viewed in favor of the nonmoving party.[16] Lastly, it is left to the party "asserting subject matter jurisdiction [to] prove by a preponderance of the evidence that [jurisdiction] exists."[17]

Discussion of the Summary Disposition Motion

The duties and responsibilities of real estate appraisers are governed by Minnesota law.[18] The Minnesota Legislature granted broad powers to the Commissioner

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[11] *Tombers v. City of Brooklyn Center,* 611 N.W. 2d 24, 26 (Minn. App. 2000).
[12] Minn. R. 1400.6600 (2013).
[13] *Sauter v. Sauter,* 70 N.W.2d 351, 353, (Minn. 1955); Minn. R. Civ. P. 56.03.
[14] *Highland Chateau, Inc. v. Minnesota Dept of Public Welfare,* 356 N.W.2d 804, 808 (Minn. App. 1984), *rev. denied.* (Minn. 1985).
[15] Minn. R. Civ. P. 56.05.
[16] *Vette Co. v. Aetna Cas. & Sur. Corp,* 612 F. 2d 1076, 1077 (8th Cir. 1980).
[17] *Hamm v. United States,* 483 F.3d 135, 137 (2d Cir. 2007).
[18] *See* Minn. Stat. Ch. 82B (2014).

of the Department to carry out and enforce those laws.[19] Those powers include the ability to impose disciplinary sanctions on real estate appraisers who violate the law. The Commissioner is empowered to:

- conduct investigations;[20]
- deny, revoke and suspend licenses;[21] and
- take other actions necessary to carry out the purposes of this chapter.[22]

The Respondents argue that because Ms. Walker was not an intended recipient of the appraiser report and because the DNR did not rely on the report, the complaint in this matter should be dismissed. Respondents, however, failed to cite any authority in support of their position. The Respondents point to *Soderberg v. McKinney.*[23] In *Soderberg* an individual attempted to sue appraisers who were hired by the bank for financial purposes, claiming he relied on the appraisal report. The appraisal was intended for the bank. The court ruled that the maker of the representation must intend it to reach a particular person or persons known to him not the broader class of people who might reasonably be expected to sooner or later have access to the information and take some action on it.[24]

The situation in *Soderberg* is markedly different from this case. Here we are dealing with a regulatory enforcement action, not a private claim for damages. The Department is charged with enforcing the laws governing real estate appraisers.[25] Those laws do not limit the sources from which complaints can be received. In this case the Department received a complaint regarding the Respondents; the Department investigated the complaint and initiated disciplinary action against Respondents. The Respondents have failed to allege a legal basis for dismissing the complaint.

For the foregoing reasons the Respondents' Motion for Summary Disposition is denied.

The request for unredacted documents

Ms. Walker, the complainant, provided documents that were heavily redacted to the Department.[26] The Respondents seek unredacted copies of those documents.

Discovery is permitted in contested cases conducted by the Office of Administrative Hearings under Minnesota Statutes chapter 14 (2014).[27] Any means of

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[19] *See* Minn. Stat. § 82B.07.
[20] Minn. Stat. § 82B.07(6).
[21] Minn. Stat. § 82B.07(7).
[22] Minn. Stat. § 82B.07(8).
[23] *Soderberg v. McKinney,* 44 Cal.App.4th 1760 (1996).
[24] *Id.* at 1769.
[25] *See* Minn. Stat. § 82B.07.
[26] *See* Respondents' Memorandum of Law at Ex. 7.
[27] *See* Minn. R. 1400.6700 (2013).

discovery available pursuant to the Rules of Civil Procedure for the District Court of Minnesota is allowed.[28] Minn. R. Civ. P. 34 allows for the production of documents. The rule, however, specifically limits the production of documents to those which "are in the possession, custody or control of the party upon whom the request is served."[29]

The documents provided by Ms. Walker to the Department were redacted.[30] The Department has produced all the documents from Ms. Walker in its possession.[31] The unredacted copies of the documents in question are not in the Department's possession, custody, or control. Respondents' request in the alternative to have the Department produce unredacted copies of the documents provided by Ms. Walker is therefore denied.[32]

J. E. L.

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[28] Minn. R. 1400.6700, subp. 2.
[29] Minn. R. Civ. P. 34.01.
[30] Commerce Department's Memorandum in Opposition to Respondents' Motion to Dismiss at p. 2.
[31] *Id.*
[32] Respondents may, of course, submit a subpoena request pursuant to Minn. R. 1400.7000 (2013) to compel Ms. Walker to produce unredacted copies of the documents in question.