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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001842-MR

TZRA HOMES OF KENTUCKY, LLC

APPELLANT

v. APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE ROBERT OVERSTREET, JUDGE
ACTION NO. 08-CI-00003

SABRINA MURPHY AND
VIP REALTY, INC.

APPELLEES

OPINION REVERSING AND REMANDING

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; DIXON, JUDGE; HENRY,¹ SENIOR
JUDGE.

HENRY, SENIOR JUDGE: Sabrina Murphy and VIP Realty, Inc., were granted
summary judgment after TZRA Homes of Kentucky, LLC, filed an action seeking
damages. Summary judgment was granted because the trial court found the action

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

was barred by the statute of limitations. TZRA argues that the decision of the trial court was based upon the wrong statute of limitations and the action should be allowed to proceed. We agree, and accordingly reverse the judgment of the Boyle Circuit Court.

TZRA engaged the services of VIP Realty and its employee Sabrina Murphy in 2006 for the purpose of securing parcels of real estate in Boyle County. TZRA planned to improve the parcels with single family home units and then re-sell the property. Murphy suggested Colonial Heights Subdivision to TZRA as a potential site. TZRA requested a copy of any building restrictions applicable to Colonial Heights and Murphy complied. TZRA then purchased one lot in the subdivision on March 24, 2006 and a second lot on July 5, 2006. The company applied for and received a building permit for one of the lots and placed a manufactured or modular home on the parcel. The version of the subdivision restrictions provided by Murphy to TZRA did not prohibit these types of structures.

In fact, the restrictions as recorded in the Boyle County Circuit Clerk's office specifically prohibited modular or manufactured homes. An action was filed on August 18, 2006 against TZRA for being in violation of the restrictions of Colonial Heights Subdivision. When advised of the contents of the recorded version of the restrictions, TZRA removed the offending structure and entered into an agreed order of October 6, 2006 indicating it would not violate those restrictions again.

On January 3, 2008, TZRA filed this action against VIP and Murphy seeking damages caused by negligence and a breach of fiduciary duty. The action was dismissed on a motion for summary judgment when the trial court determined TZRA's claims were barred by the statute of limitations. This appeal followed.

Murphy and VIP sought the protection of the one-year statute of limitations found at KRS 413.245 for those who render professional services, which provides in pertinent part as follows:

[A] civil action, whether brought in tort or contract, arising out of any act or omission in rendering or failing to render, professional services for another shall be brought within one (1) year from the date of the occurrence or from the date when the cause of action was, or reasonably should have been, discovered by the party injured.

Murphy and VIP contend that because they are licensed and regulated by statutes and administrative regulations, they are professionals in the sense contemplated by KRS 413.245. Because we find that existing case law controls the question, we must disagree.

The question before us is the definition of "professional services" as it relates to the services provided by VIP Realty and Murphy. KRS 413.243 provides:

As used in KRS 413.245 "professional services" means any service rendered in a profession required to be licensed, administered and regulated as professions in the Commonwealth of Kentucky, except those professions governed by KRS 413.140.

Standing alone the language appears to have broad coverage, but this is not the first time our Court has examined the statute. In *Plaza Bottle Shop, Inc., v. Al Torstrick Ins. Agency, Inc.*, 712 S.W.2d 349 (Ky. App. 1986), our Court considered whether or not an insurance agent is a “professional” as contemplated by the statute. Noting at page 350 that “historically, the word ‘profession’ was applied only to law, medicine, and theology or divinity” Judge McDonald reasoned that

[t]he mere fact that one is licensed or regulated by the state does not make his services “professional” within the purview of this statute. The appellee's assertion that a broad interpretation be given this statute to include all who are licensed would result in the inclusion of embalmers, *realtors* and beauticians, a result we believe unreasonable, absurd and clearly not reflective of the intent of our legislators.

Id at 350-351 (emphasis added).

The clear holding of *Plaza Bottle Shop* is that the work-related actions of certain occupations including realtors are not within the protection of KRS 413.245. *Plaza Bottle Shop* is the law in Kentucky, and under its authority the circuit court should have held that the one-year statute of limitations established by KRS 413.245 does not apply, and the case should have been allowed to proceed. The appellees urge us to find that the holding of *Plaza Bottle Shop* was limited only to insurance agents, and that the language referring to realtors quoted above was mere dicta, which we should ignore. They support their position by directing our attention to the wealth of regulations and statutes that have been passed since

Plaza Bottle Shop was decided governing the conduct of real estate sales. In their view this constitutes evidence of a shift in the law’s understanding of what constitutes a “profession.” Although cases have gradually expanded the coverage of KRS 413.245 in the last two decades, this expansion was expected by, and is comfortably within the holding of *Plaza Bottle Shop*. *See id* at 351. The appellees’ reading of *Plaza Bottle Shop* is too restrictive.

We certainly do not by our ruling intend to disparage the occupation of realtors or any other vocation. But in the twenty-four years since *Plaza Bottle Shop* has been controlling law its holding has not been disturbed by our Supreme Court. Neither has the General Assembly seen fit to amend KRS 413.243 even though it has had numerous opportunities to do so if our decision did not reflect that body’s intent.

The judgment of the Boyle Circuit Court is reversed and this action is remanded to that court for actions consistent with this opinion.

ALL CONCUR.

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