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CONTINENTAL BANK REAL ESTATE DEPARTMENT,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF COMMUNITY AFFAIRS, BUREAU OF HOUSING INSPECTION,
Respondent.

CAF 12040-95 BHP-104-95-5/NH-63-94

Community Affairs

97 N.J.A.R.2d(CAF) 100; 1997 N.J. AGEN LEXIS 402

June 18, 1997, Initial Decision July 8, 1997, Final Agency Decision

COUNSEL: [*1]

James M. Hirschhorn, Esq., and Joseph L. Buckley, Esq., for petitioner (Sills, Cummis, Zuckerman, Radin, Tischman Epstein & Gross, P.A.)

Keith A. Costill, Deputy Attorney General, for respondent (Peter Verniero, Attorney General of New Jersey, attorney)

FINAL DECISION BY: GERSON, ALJ KENNY, Commissioner

FINAL AGENCY DECISION

Having reviewed the Initial Decision of the Administrative Law Judge, together with any exceptions and replies submitted, I hereby adopt the Initial Decision as the Commissioner's Final Decision.

While I agree with the conclusion of the Administrative Law Judge that the petitioner is not required to register as a new home builder, I wish at the same time to make clear the applicability of N.J.A.C. 5:25-2.5(b)(5), which provides that any applicant for registration as a new home builder may be denied such registration on the grounds that it has as a partner any person (including a corporation) who served as a partner of a builder that was unregistered or had its certificate of registration revoked, as well as that of N.J.A.C. 5:25-5.4(b)(10), which concerns attribution of the claims record of one builder to another where there are common partners or stockholders.

INITIAL DECISION: BACKGROUND [*2]

Between 1988 and 1990, Continental Bank (Bank) lent nearly 16 million dollars to the "Coastal Group" for the purpose of real estate development and new home construction. The Coastal Group became insolvent and reorganized as a limited partnership in 1992 under the name of "Westholme Partners." The Bank, in what was ostensibly an effort to better position itself for repayment, agreed to become a limited partner in the new venture. Based on the Bank's interest in the partnership, the Bureau of Homeowner Protection contends that the Bank should have registered as a builder with the Bureau. Its failure to do so, according to the Bureau, renders the Bank liable for a $ 96,000 penalty. The Bureau charged the Bank with violating provisions of the Administrative Code which require those who are "engaging in the business of construction" to register with the Department of Community Affairs. N.J.A.C. 5:25-2.1 (a) and (c). This duty is found also in statute N.J.S.A. 46:3B-3. The Bank disagrees with the Bureau's basis for the charge and moved for summary decision.

ISSUE

The facts are largely undisputed. What is at issue is: (i) whether a builder's duty to register automatically extends to that [*3] builder's limited partners; and (ii) whether the act of financing a construction project constitutes "engaging in the business of construction."

The registration requirement, hinges on the meaning of the phrase "engaging in the business of construction."

WHETHER LIMITED PARTNERS MUST REGISTER

The Administrative Code attempts to outline what one must do in order to "engage in the business of construction" for purposes of the registration requirement found at N.J.A.C. 5:25-2.1(a):

For the purpose of these regulations the term "engaging in the business of construction of new homes" shall mean and include constructing any new home for sale, acting as prime contractor to construct any new home on behalf of oneself or another person or advertising or holding oneself out as constructing or being available to construct a new home or homes. The term shall also mean and include the sale or transfer of title to a parcel of land to any person and the subsequent participation in the construction of a new home or any part of a new home by the seller or transferor. The term shall also include a person who contracts with a general contractor or with sub-contractors for the construction of a new [*4] home for the purpose of sale to a purchaser. N.J.A.C. 5:25-2.1(c) (emphasis added).

The Code's definition is problematic insofar as the drafters of the provision focused on the concept of "engage" rather than what it means "to construct." The provision repeatedly uses the verb "to construct" and the noun "construction" when the word "construction" appears in the very phrase the Code is attempting to define. However, the Code's definition makes it clear that one's actions and not one's form of business organization trigger the registration requirement. Thus, the Code speaks of (i) "constructing," (ii) "acting as a prime contractor to construct," (iii) "advertising or holding oneself out as constructing," and (iv) "the sale or transfer of title to a parcel of land to any person and the subsequent participation in the construction . . ." Id. Nowhere does the Code require as a function of ownership status or form of business organization the registration of limited partners, general partners, or stockholders of closely held corporations.

An examination of other provisions dealing with registration reveals that it is unlikely that the Code's registration provisions were ever intended [*5] to reach limited partners or stockholders in closely held corporations. For example, the Code requires that corporations and partnerships list a "builder designee" on their registration with the Department. N.J.A.C. 5:25-2.1(b). A "builder designee" is defined as "the partner, officer, or director designated as such in the builder's application for registration and is the individual responsible for on-site building activity." N.J.A.C. 5:25-1.3. If all individual partners were required to register, as maintained by Bureau of Homeowner Protection, then it would be unnecessary to then identify one of those partners as a "builder designee." Thus, the construction of the Code urged by the Bureau renders the designee requirement redundant.

N.J.A.C. 5:25-5.3(b)(10) also implies that partners need not register. This Code section describes how builder's premiums are determined through experience rating, i.e., based on their claim and payment record. In particular, subsection (b)(10) enumerates instances in which the risk associated with one partnership can be attributed to that of another if the two partnerships are composed of the same individual partners.

(b) The contribution percentage [*6] to be paid for each new home by a builder not participating in an approved private plan shall be determined as follows:

. . .

(10) . . . If a builder is a . . . partnership . . . having the same . . . partners with at least a ten percent ownership interest, as another builder, the claim and payment record of the one builder shall be attributable to the other for purposes of this subsection. N.J.A.C. 5:25-5.3(b)(10) (emphasis added).

This subsection refers to "the claim and payment record" of the "one builder" and not the payment record of that builder's individual partners. Thus, it is presupposed that it is the partnership the "builder" and not the individual partners who must be registered and make premium payments ("warranty contributions") pursuant to N.J.A.C. 5:25-5.3 and -5.4 (certainly an individual partner may qualify as engaging in the business of construction and be required to register in addition to the partnership, but that is a function of a partner's actions as distinct from partner's status as an equity holder). If all individual partners were required to register as maintained by the Bureau, then the Code would require the claims records of those partners to be the [*7] subject of risk attribution as well. The Code, however, makes no such requirement.

Similarly, N.J.A.C. 5:25-5.3(b)(8) also deals with the attribution of risk. It addresses situations in which one builder is either currently or formerly a partner, stockholder, or builder designee for another registered builder. Like subsection (10), it makes no mention of the former claim records of partners, implying that a partner is not a "builder entity" and, therefore, not required to register:

(8) Whenever a builder is or has been a builder designee, officer, or stockholder or partner with at least a 10 percent ownership interest, of any builder entity, the claim and payment record of that other entity, shall, if less favorable than that of the builder individually, be attributable to the builder for purposes of this subsection. N.J.A.C. 5:25-5.4(b)(8) (emphasis added).

If individual partners were responsible for paying premiums, then it would be their experience rating and not that of the "builder entity" which would be the focus of the attribution of risk under subsection (8).

THE BANK, BY LENDING MONEY, HAS NOT ENGAGED IN THE BUSINESS OF CONSTRUCTION

Although the Bank is not required [*8] to register merely because it held a partnership interest in a builder entity, the question remains as to whether the bank is nevertheless required to register as a builder by having "engaged in the business of construction." N.J.A.C. 5:25-2.1 (a) and (c). The Administrative Code lists several examples of when an entity may qualify as a builder: acting as a prime contractor, holding oneself out as a builder, and participating in the construction of a home on land that one use to own. Id. The Code, however, does not list the act of lending as one of the types of conduct that constitutes "engaging in the business of construction."

The Code does not give a definition of the term "construct," but common usage of the verb suggests it means simply "to build." Webster's II New Riverside University Dictionary (1988) ("To put together by assembling parts: Build"); The Random House College Dictionary (1982) ("To form by putting together parts; build; devise."); Webster's Ninth New Collegiate Dictionary (1985) ("to make or form by combining or arranging parts or elements: Build; . . . . "). The Bank is a lender, not a builder and therefore should not be required to register. Indeed, it would [*9] be odd if the act of lending funds to a construction company resulted in the lender being considered a "builder" under the Code. Such a policy would render most banks subject to the Code's registration provisions.

The Bureau states that "the Residential Warranty Corporation, which issued the new home warranty policies on the Sayreville home, indicated that it had contact with a representative of petitioner concerning homeowner complaints about construction defects." Letter Brief for Petitioner at 3. This assertion, even if true, raises no material facts. Homeowner complaints arise after construction. Whether one is a builder, within the contemplation of the Code, depends upon participation in construction. The fact that the Bank may have filed complaints is after-the-fact and, therefore, irrelevant to an inquiry of which party was required to register for the warranty program. The Bureau also notes that "the counsel to Coastal Group, Inc., the initial developer, identified the Bank as a responsible party of the Winding River development. Here again, these documents raise factual issues which must be heard to determine the extent of respondent's participation in the project . . . [*10] " Id. at 4. The letter to which the Bureau refers, however, concerns a contractual assumption of liabilities by the Westholme Partnership (of which the Bank is a partner). Included in that assumption of liabilities are obligations that may arise under warranty claims. Thus, the assertion that the Westholme partnership is a "responsible party" goes to the issue of contractual duties and not whether Westholme or the Bank have "participated" in construction within the meaning of the Code and should therefore be considered builders (as it turns out, Westholme held itself out as a builder, was required to register, and did in fact register).

The word "builder" is defined by the Code. There is no provision that allows one, by sheer virtue of a merger or acquisition, to be transmogrified into a builder, or, in the alternative, to shed one's responsibilities as a builder once one has registered pursuant to the New Home Warranty Act. Therefore, the Bureau, in the instant matter, has set forth no facts militating in favor of a determination that respondent is a "builder."

CONCLUSION

The Administrative Code does not require that the individual partners of a building entity register under the [*11] New Home Warranty and Builder's Registration Act. Furthermore, the Bank, as a lender, has not engaged "in the business of construction." Therefore, the Bank is not required to register.

ORDER

Summary judgment in favor of Continental Bank is granted. Continental Bank need not register as a builder and owes no fee to the warranty program.

I hereby FILE my initial decision with the COMMISSIONER OF THE DEPARTMENT OF COMMUNITY AFFAIRS for consideration.

This recommended decision may be adopted, modified or rejected by the COMMISSIONER OF THE DEPARTMENT OF COMMUNITY AFFAIRS, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Community Affairs does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the COMMISSIONER OF THE DEPARTMENT OF COMMUNITY AFFAIRS, South Broad and Front Streets, CN 800, Trenton, New Jersey 08625, marked [*12] "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingRule Application & InterpretationGeneral OverviewBusiness & Corporate LawLimited PartnershipsManagement Duties & LiabilitiesReal Property LawConstruction LawGeneral Overview