

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2017-000498-001 DT

08/20/2018

HONORABLE PATRICIA ANN STARR

CLERK OF THE COURT

C. Avena

Deputy

JUSTIN C BILLINGSLEY
HEATHER BILLINGSLEY

TIMOTHY J SABO

v.

ARIZONA CORPORATION COMMISSION
(001)

PAUL SEHMAN KITCHIN

JUDGE STARR
OFFICE OF ADMINISTRATIVE
HEARINGS
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Appellants Justin C. Billingsley and Heather Billingsley seek reversal of the November 7, 2017 Decision of the Arizona Corporation Commission which entered a cease and desist order against Justin Billingsley, ordered the Billingsleys, joint and severally with the other defendants, to pay restitution in the amount of \$250,000, and pay administrative penalties in the amount of \$15,000. For the following reasons, this Court affirms that Decision.

I. FACTS AND PROCEDURAL BACKGROUND

The Securities Division of the Commission (“the Commission”) filed a Notice of Opportunity for Hearing Regarding Proposed Order to Cease and Desist, for Restitution, for Administrative Penalties, and for Other Affirmative Action against LoanGo Corporation (“LoanGo”), the Billingsleys, Jeffrey Scott Peterson and John Keith Ayers and Jennifer Ann Brinkman-Ayers (collectively “Respondents”) alleging violations of the Arizona Securities Act.

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The Commission joined Heather Billingsley solely for the purpose of determining the liability of the marital community, pursuant to A.R.S. § 44-20131(C).

An Administrative Law Judge (“ALJ”) held a three-day evidentiary hearing. At that hearing, Patricia Rowley testified that she contacted Justin Billingsley when she had \$45,000 she needed to invest; he told her he had “just the right place for it.” (Reporter’s Transcript of Proceedings, September 26, 2016 (“RT 9/26/16”) at 24-25.) According to Rowley, “he knew that we didn’t want it to be risky.” (RT 9/26/16 at 25.) Rowley told Billingsley she did not want an investment that was “too risky,” as her husband had Alzheimer’s and she couldn’t afford to lose her investment. (*Id.* at 46.)

Rowley trusted Billingsley, who didn’t tell her “much at all” about LoanGo. (*Id.* at 25-26.) According to Rowley, she sent a check to Billingsley, but received “no information.” (*Id.* at 26.) When she eventually did receive information, she “could not believe it, that it was so risky.” (*Id.* at 26-27.)

Billingsley did not tell Rowley that her money would be used to pay commissions or to repay loans. (*Id.* at 27.) At the time she invested, Rowley’s net worth was less than one million dollars, and her annual household income was less than \$300,000. (*Id.* at 28.) According to Rowley, although the subscription agreement had a box checked indicating that her net worth was over a million dollars, that was not true. (*Id.* at 31.)

Jerry Lowe, an investigator for the Commission, contacted Donald Smeltzer, who had invested \$50,000 in LoanGo. (*Id.* at 59-60.) According to Smeltzer, Billingsley informed him about an investment opportunity with LoanGo, which Billingsley repeatedly said was “low risk.” (*Id.* at 60-61.) Before investing, Smeltzer received no documentation regarding LoanGo. (*Id.* at 62.) At the time, Smeltzer’s net worth was less than one million dollars, and his annual household income was less than \$300,000. (*Id.* at 61.)

Richard Goble invested \$25,000 in LoanGo. (*Id.* at 62.) At the time, he was not worth more than one million dollars and did not have an annual household income over \$300,000. (*Id.* at 64.)

Robin Erickson invested \$30,000 in LoanGo. (*Id.* at 64.) Billingsley told Erickson the investment was low risk; he did not tell her money would be used to pay commissions or repay loans. (*Id.* at 65.) Erickson’s net worth was less than one million dollars and her annual household income was less than \$300,000. (*Id.* at 66.)

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John Jordan invested \$100,000 in LoanGo. (*Id.* at 103.) Billingsley did not tell him that LoanGo had defaulted on anyone else's investments, nor did he tell Jordan that his money would be used for commissions or loan repayments. (*Id.* at 102.) At the time he invested, Jordan's net worth was less than one million dollars and his annual household income was less than \$300,000. (*Id.* at 106.) Billingsley never asked Jordan for that information. (*Id.*)

Records indicated that Billingsley received a \$15,000 commission payment from LoanGo. (*Id.* at 157.) He denied receiving a commission. (Reporter's Transcript of Proceedings, September 27, 2017 ("RT 9/27/17") at 359.)

According to Billingsley, he never knew the net worth of the Rowleys, or any of the other investors. (RT 9/27/17 at 342; 348.)

The ALJ issued a Recommended Opinion and Order on October 10, 2017. The Billingsleys filed Exceptions to the Recommended Order on October 20, 2017. On November 7, 2017, the Commission issued its final Opinion and Order.

The Commission found the following facts to be undisputed:

- LoanGo is an expired Utah corporation whose place of business was Chandler, Arizona.
- LoanGo was never registered by the Commission as a securities salesman or dealer.
- Billingsley, Peterson, and Ayers created LoanGo as an online payday lending company.
- Billingsley, Peterson, and Ayers were the only Directors of LoanGo; they owned equal shares of the company.
- Billingsley, Peterson, and Ayers are not registered by the Commission as securities salesmen or dealers.
- In September of 2011, Billingsley, Peterson, and Ayers approved a corporate resolution authorizing the Directors to raise \$3,000,000 in capital.

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(Decision, November 7, 2017, at 8-9.)

The Commission found the LoanGo notes were securities, and none were exempt from registration requirements. (Decision at 19.) The Commission found that LoanGo, Billingsley and Peterson violated A.R.S. § 44-1841 (unlawful to sell or offer to sell unregistered securities) and A.R.S. § 44-1842 (unlawful to sell or offer to sell securities unless dealer or salesman is registered). (*Id.* at 19-20.)

The Commission found LoanGo and Billingsley violated A.R.S. § 44-1991(A) (fraudulent practices) by misrepresenting the level of risk of investing in LoanGo. (*Id.* at 20-21.) The Commission found that Billingsley and LoanGo violated A.R.S. § 44-1991(A) by failing to inform investors that their investment would be used to repay the personal loans made by Billingsley and Peterson. (*Id.* at 22.) The Commission found that LoanGo and Billingsley further violated A.R.S. § 44-1991(A) by failing to inform investors that their investment would be used to pay commissions to Billingsley, and by failing to inform investor Jordan of prior defaults on prior notes. (*Id.* at 24.)

The Commission determined that the Billingsleys did not contest the liability of the marital community, and thus failed to rebut the presumption that debts incurred during marriage are community debts. (*Id.* at 30-31.) The Commission ordered Respondents to cease and desist. (*Id.* at 36.) The Commission also found the Billingsleys liable for restitution in the amount of \$250,000. (*Id.* at 36.) Finally, the Commission imposed penalties in the amount of \$15,000. (*Id.* at 37.)

The Billingsleys sought rehearing, and the Commission denied the request.

This appeal followed. This Court has jurisdiction pursuant to A.R.S. §§ 12-124(A) 12-905(A), and 44-1981.

II. STANDARD OF REVIEW

A reviewing court shall affirm the action of an agency unless, after reviewing the record, the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion. A.R.S. § 13-910(E).

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This Court must determine “whether the administrative action was either illegal, arbitrary, capricious, or was an abuse of discretion.” *Smith v. Arizona Long Term Care Sys.*, 207 Ariz. 217, 220, ¶ 14 (App. 2004).

III. ISSUES

This appeal raises the following issues:

1. Did the Commission act contrary to law when it found the Billingsleys’ marital community liable?
2. Did the Commission correctly determine that the promissory notes were not exempt from registration?
3. Does substantial evidence support the Commission’s finding that Justin Billingsley committed securities fraud?
4. Did the Commission err by failing to consider affirmative defenses raised only after the evidentiary hearing?

IV. LEGAL ANALYSIS

1. Did the Commission act contrary to law when it assessed liability against Heather Billingsley on a community property theory?

Under Arizona law, “[t]he commission may join the spouse in any action authorized by this chapter to determine the liability of the marital community.” A.R.S. § 44-2031. Here, the Commission joined Heather Billingsley as Justin Billingsley’s spouse, in order to determine whether the marital community was liable. The Billingsleys argue that because they moved to Connecticut, a non-community property state, in September of 2011, the Commission wrongly found there was a marital community against which it could assess liability.

But they did not make this argument at the hearing, instead waiting until after the hearing to submit a Declaration claiming that Justin Billingsley moved to Connecticut in September of 2011. This statement contradicted both an admission in the Billingsleys’ Answer, and his own hearing testimony.

The Commission’s finding that Justin Billingsley resided in Arizona at all relevant times is supported by the record. Moreover, “[g]enerally, all debts incurred during marriage are

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presumed to be community obligations unless there is clear and convincing evidence to the contrary.” *Schlaefter v. Fin. Mgmt. Serv., Inc.*, 196 Ariz. 336, 339, ¶ 10 (App. 2000).

The Billingsleys also argue that the Commission lacks both personal and subject matter jurisdiction over Heather Billingsley. But lack of personal jurisdiction is an affirmative defense, one not raised in their Answer or in the proceedings before the Commission. And because the community itself had sufficient contact with Arizona, the Commission could exercise jurisdiction over Heather Billingsley. *Rollins v. Vidmar*, 147 Ariz. 494, 496 (App. 1985).

Finally, because the Securities Act specifically authorizes the Commission to join a non-divorced spouse to determine the liability of the marital community, the Commission had subject matter jurisdiction over Heather Billingsley for acts committed by Justin Billingsley. A.R.S. § 44-2031(C).

2. *Were the five promissory notes exempt offerings?*

Next, the Billingsleys argue that the securities sold by Justin Billingsley were exempt from registration requirements. The burden to prove an exemption was on the Billingsleys. A.R.S. § 44-2033; *State v. Goodman*, 110 Ariz. 524 (1974).

The Commission found that the Billingsleys did not assert “the applicability of any exemption.” (Decision at 19.) But even if the Billingsleys had timely raised this defense, the evidence does not support any of their claimed exemptions.

First, the Billingsleys did not prove that the investors were accredited investors. An “accredited investor” includes, as relevant here:

...

e. Any natural person whose individual net worth, or joint net worth with that person's spouse, at the time of that person's purchase exceeds \$1,000,000;

f. Any natural person who had an individual income in excess of \$200,000 in each of the two most recent years or joint income with that person's spouse in excess of \$300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year;

...

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A.A.C R14-4-126(B).

The Commission found that none of the Investors qualified as accredited investors at the time of the investments; substantial evidence supports that finding. For example, Billingsley admitted that he did not know the Investors' income or net worth. Other evidence established that each Investor had a net worth less than \$1,000,000 at the time of the investment. Although the questionnaires filled out by some of the Investors contradicted the other evidence of net worth, the Commission was entitled to find that information less credible than the contradictory evidence.

The Billingsleys also failed to prove that they complied with federal Regulation D exemptions and the corresponding Arizona exemptions. The evidence showed that at least four investors received no documents describing LoanGo before investing. Thus, the Billingsleys could not have complied with Regulation D and the Arizona regulations because they did not provide an audited balance sheet. See 17 C.F.R. §§ 230.502, 230.505 & 230.506; A.A.C. R14-4-126.

Nor did the Billingsleys prove that they complied with the non-public offering exemption. Instead, the evidence shows that at least four Investors received no documents describing LoanGo before they invested in the company. The Investors lacked basic information about the investments, because Justin Billingsley did not offer it.

Thus, even if the Commission had found the defenses to be timely raised, the Billingsleys would not have prevailed, because they did not meet their burden of proof to establish the defenses.

3. Does substantial evidence support the Commission's finding that Justin Billingsley committed securities fraud?

The Billingsleys next argue that substantial evidence does not support the Commission's findings that Justin Billingsley committed securities fraud. The Court disagrees.

First, evidence established that Billingsley misrepresented the investment to two Investors by characterizing LoanGo as a low-risk investment opportunity, and thus violated A.R.S. § 44-1991(A)(2). While the Billingsleys now argue that this evidence was hearsay, they did not object to its admission during the hearing, and thus have waived any objection.

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The Commission's conclusion that Justin Billingsley also violated the statute by not telling four Investors how their funds would be used is also supported by substantial evidence. The statements made by Billingsley did not inform Investors that their funds would be used to pay a commission and repay personal loans, as opposed to being used fund the company. And the Commission's finding that the \$15,000 payment to Billingsley was a commission, not a loan, is also supported by evidence in the record. Even if there is competing evidence, the Commission was entitled to determine which evidence it found most credible. This Court will not reweigh the evidence on appeal.

The Commission also found that Justin Billingsley violated A.R.S. § 44-1991(A)(2) by not telling an Investor that LoanGo had defaulted on earlier Investor notes. The evidence supports that finding. Although the Billingsleys argue that Justin Billingsley did not know about the defaults, lack of knowledge is no defense. *Aaron v. Fromkin*, 196 Ariz. 224, 227, ¶¶ 13, 15 (App. 2000). For purposes of further appellate review, the Billingsleys argue that *Aaron* should be overruled. They appropriately recognize that this Court must follow appellate court precedent, however.

In sum, substantial evidence supports the Commission's finding that Justin Billingsley violated Arizona securities laws.

4. Did the Commission err by failing to adequately address exceptions raised by the Billingsleys?

Finally, the Billingsleys argue that the Commission did not adequately address the exceptions they raised to the ALJ's Recommended Order, specifically exemption from registration defenses, their defense to the liability of the marital community, and factual issues regarding the findings that Billingsley committed fraud.

As to the defenses, they were waived because they were not previously raised. Moreover, the findings of fact made by the Commission addressed the substance of the defenses.

As to the fraud findings, the Commission adequately considered all the evidence, and made findings that addressed the issues raised by the Billingsleys. The Commission made "factual findings that are sufficiently comprehensive and explicit for a reviewing court to glean the basis for" its conclusions. *Douglas Auto & Equip. v. Indus. Comm'n of Ariz.*, 202 Ariz. 345, 347, ¶ 9 (2002). It needed to do no more.

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V. CONCLUSION

Based on the foregoing, this Court concludes there is substantial evidence to support the Commission's Decision, and that Decision was not contrary to law, was not arbitrary or capricious, and was not an abuse of discretion.

If any party wishes to appeal this decision, that party must do so pursuant to A.R.S. § 12-913 and Rule 9(a), Ariz. R. Civ. App. Proc.

IT IS THEREFORE ORDERED affirming the November 7, 2017 Decision of the Securities Division of the Arizona Corporation Commission.

IT IS FURTHER ORDERED that this is a final judgment for purposes of appeal, as no further matters remain pending. See Rule 54(c), Ariz.R.Civ.P.

IT IS FURTHER ORDERED signing this minute entry as a formal order of the Court.

/s/Patricia A. Starr
THE HON. PATRICIA A. STARR
JUDGE OF THE SUPERIOR COURT

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