Summer
2015

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MONROE MCDONOUGH BRENT & MORALES, PLLC
2500 N. Tucson Blvd., Suite 140 Tucson, Arizona 85716 ♦ 520-292-2500
www.mmbmazlaw.com

SOUTHERN ARIZONA'S REAL ESTATE LAW FIRM

The Impact of an Inactive Real Estate License

By: Heidi Rib Brent

hbrent@mmbmazlaw.com

A real estate agent, practicing with an inactive license, can negatively impact not only the agent, but also his/her broker, cooperating brokers sharing real estate commissions with the inactive licensee and also the escrow holder for the transaction. Thus, one person's blunder in conforming to the Rules of the Arizona Department of Real Estate (ADRE) may have consequences well beyond the person who made the error.

How does this happen? To engage in real estate activity, the agent must maintain an "*active"* real estate license. A license can become inactive if an agent is severed or not hired by a real estate broker or if an agent has not paid the renewal fees. Another cause for an inactive license is late renewal of a license, combined with failure to submit an Unlawful License Activity Statement Form to the ADRE. This form requires disclosure of unlawful license activity as defined by the Arizona Administrative Code Section R4-28-306, including any real estate activities (1) conducted while the license was expired or inactive, (2) conducted for any broker other than the one who holds the agents' license and (3) if any of those activities resulted in offers or contracts. Completing and submitting this form before conducting real estate activity would be the simplest resolution.

The Agent. The consequences of conducting real estate activity with an inactive license can be quite severe, including criminal sanctions, civil fines and discipline to affected licenses.

A.R.S. §32-2165(A), entitled "Unlicensed activities, violation, classification" provides:

> "A person who acts as a broker or salesperson within the meaning of this chapter, or who advertises in a manner that indicates that the person is licensed as a broker or salesperson, without being licensed as prescribed by this chapter is guilty of a class 6 felony."

Conviction of a class 6 felony results in a prison sentence ranging from 1/3 year to 2 years. This applies only to the violating broker or salesperson and may be in addition to the civil fines and discipline to the real estate license.

The Violating Agent's Broker is impacted as well. Arizona Administrative Code R4-28-306 also defines unlawful license activity to include "a broker's employment of a person as a salesperson or broker if the person does not hold a current and active license issued to the person under that employment." Thus, an agent's real estate activity without an active license results in unlawful license activity to his/her brokers, which may result in civil penalties and ADRE discipline. In past situations, such an offending broker was directed by ADRE to contact each consumer who paid commissions while the licensee was inactive and offer refunds of the entire commission. The broker could be refunding significant funds, including funds already shared with cooperating brokers.

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Cooperating Brokers and Escrow Holders. A.R.S. §32-2155, entitled "Restriction on employment or compensation of person as broker or salesperson," section B provides:

> "It is unlawful for a person, firm or corporation, whether obligor, escrow holder or otherwise, to pay or deliver to anyone compensation for performing any of the acts specified by this chapter, as a broker, who is not licensed at the time the service is rendered. An identification card or certificate of license issued by the state real estate department showing that the person, firm or corporation holds a license for the year in which the payment is made or earned shall be sufficient proof to relieve from any penalty for a violation of this section the obligor, escrow holder or other person who relied in good faith on the card or certificate."

This statute provides potential violations and liability to cooperating brokers and escrow companies, but provides a "safe harbor" if they saw a card or certificate that the unlicensed broker held an ADRE license for the year in which the commission was earned or paid. Presumably, other means of verifying a real estate license, such as on the ADRE website, also would provide relief; however, relying on another entity to conduct the verification will not be sufficient to relieve the cooperating brokers or escrow affiliates of their statutory duty to check.

The penalties for violation of the duty to verify that the broker or entity receiving a commission had an active license include those identified in A.R.S. §32-2153, entitled "Grounds for denial, suspension or revocation of licenses; letters of concern; provisional license; retention of jurisdiction by commissioner; definitions," with the range of penalties identified in the title, as well as civil penalties authorized by A.R.S. §32-2160.01 for assessments up to $1,000.00 per incident of violation.

In response to an inquiry, the ***ADRE enforcement staff advised that they do not pursue penalties against cooperating brokers unless*** there is an allegation that the cooperating broker knew the agent/other broker lacked an active license, yet concluded the transaction. It is recommended that the cooperating broker report such a situation as soon as it is discovered for the most lenient treatment.

In summary, the real estate community needs to be vigilant in verifying the active license status of agents and brokers with whom they share commissions. Each broker or escrow holder should establish procedures to ensure the agents are properly licensed.

Leases for Medical Marijuana Dispensaries: A Cautionary Tale

By: Anne Terry Morales
amorales@mmbmazlaw.com

John Doe purchased his first rental property – a quaint historic building located in the heart of downtown Tucson. After placing an internet ad, John received an offer to lease the property from HighWays, LLC, a licensed Arizona medical marijuana dispensary owned by Rich and Tom. Using an internet lease form, they entered into a lease specifying the nature of HighWays' business, the lease term, and the payment terms. For three years there were no problems. Rich and Tom paid each lease payment on time and in full. John was a happy landlord.

In the fourth year, however, Rich and Tom began to make late, partial payments and eventually stopped paying altogether. John hired his friend, Nu Bee, a recent law school graduate, to file a breach of contract suit to enforce the terms of the lease. John asked the court to evict HighWays, LLC, collect damages, and recover attorneys' fees. HighWays, LLC, Rich and Tom never even filed a response. John's lawyer moved for entry of a default judgment. Nu Bee assured John that judgment would be entered in John's favor. Nu Bee was wrong. The court ruled against John stating that the lease was void and that John was entitled to absolutely nothing. The court reasoned that although the stated purpose of the lease (the sale of medical marijuana) is legal under Arizona law, it is illegal under the United States' Controlled Substances Act. The court further stated that, since regulation of marijuana falls within authority of the federal government by virtue of the Commerce Clause of the United States Constitution, the Controlled Substances Act preempts any Arizona law. Therefore the sale of marijuana, even for medicinal purposes, was illegal. Finally, the court found that, since Arizona law renders any agreement to perform illegal acts unenforceable, John's lease was null and void.

After the ruling, Tom and Rich happily moved to greener pastures in Colorado; Nu Bee was investigated for engaging in unprofessional conduct, and John sold the building vowing never again to use an internet form or an inexperienced attorney.

August Events in Tucson

Space Wars - Gaslight Theater - Through August, 2015

Arizona Biennial 2015 - Tucson Museum of Art – Through August, 2015

Comedy in Action - The Fox Theatre – August 16, 2015

Tucson's Birthday Celebration - The Presidio San Agustin del Tucson – August 20, 2015

Salsa and Tequila Challenge - 2905 E. Skyline Drive, Tucson – August 22, 2015

Dia de los Muertos - Tohono Chul – August 28 – November 8

Home Loans to Family Members or Employees

By: Heidi Rib Brent
hbrent@mmbmazlaw.com

YES, you can still make home loans to family members or employees! In the wake of the Dodd Frank Act, there has been a concern as to the requirements for making such home loans. The federal Secure and Fair Enforcement for Mortgage Licensing Act ("SAFE Act") directs States to define exemptions from the requirement for use of licensed loan originators. Arizona's statute has exemptions from the requirement of using a licensed loan originator for loans with immediate family members (A.R.S. § 6-991.01(8)), defined as "spouse, child, sibling, parent, grandparent, grandchild, stepparent, stepchild or stepsibling whether related by adoption or blood." A.R.S. § 6-991(7). So you still can loan your children or grandchildren the funds to buy their house, secured by a note and deed of trust to protect your loan and protect the house from other first position liens, all without using a licensed loan originator for the transaction.

Similarly, employers may continue making home loans to employees -- a wonderful employee benefit – without the use of a licensed loan originator. (A.R.S. § 6-991(12)(b)(vi)).

But wait: you still must comply with the Ability to Repay rules for the lender to get the protections of a Qualified Mortgage. However, lenders on most family loans and some employee loans will qualify as a small creditor, with less than 500 loans per year and less than $2 billion in assets for more flexibility of terms, and will have a presumptively Qualified Mortgage, as long as the interest rate does not exceed 1.5% over the Average Prime Offer Rate (APOR) for first liens and 3.5% above the APOR for subordinate liens.

For anyone preparing to issue a home loan to a family member or employee, for the best protection of both parties, seek assistance in preparing the transaction.

MMB&M supports our local youth at a recent swim meet.

SQUATTERS ON THE PREMISES – WHAT NOW?

By: Anne Terry Morales
amorales@mmbmazlaw.com

In recent years, property owners throughout Arizona have found themselves in the unenviable position of discovering unauthorized people, a.k.a. "squatters", residing in their vacant or rental properties. Often the squatters have changed the locks, put the utilities in their own names, and even created written "lease agreements." When the owner calls the police or sheriff to remove the squatters, the squatters produce their keys, the utility bills and the "lease" making it virtually impossible for the police or sheriff to remove them without further authorization. In addition, since the Great Recession and the accompanying rise in the number of vacant properties due to foreclosures, an increasing number of squatters are claiming that they are not merely legitimate tenants of the property, but that they are actually entitled to possession of the property under the doctrine of adverse possession. When faced with either of these situations, what steps must the property owner take to legally remove the squatters and prevent them from gaining rights to the property?

Unfortunately, Arizona does not have any laws dealing specifically with squatters. Therefore, notwithstanding the lack of a lease or a landlord/tenant relationship, the owner must strictly follow the eviction procedures set forth in the Arizona Residential Landlord and Tenant Act in order to legally remove the squatters from the property. First, at least five days before filing an eviction action, the owner must give the "tenant" written notice of the owner's intent to terminate the "tenancy" for failure to pay rent. Five days after delivery of the notice, the eviction complaint, including any claims for damages and attorney's fees, can be filed with the Court and the summons served upon the "tenant." Next, a hearing will be held and the owner should be prepared to: (1) provide evidence that proper notice was given to the "tenant," (2) establish the owner's valid title to the property, (3) substantiate any claims for damages to the property, (4) provide support for any claim for reimbursement of legal fees, and (5) prove the invalidity of any "lease" produced by the "tenant." If these steps are followed and the squatters are unable to provide evidence of their rights to the premises, the Court will order the squatters to vacate the premises and return full possession of the property to the owner. (Lamentably, even if the Court awards damages and attorney's fees, actually collecting those amounts is as likely as an August snowstorm in Tucson.)

As stated above, squatters may assert as a claim or defense that they have acquired rights to the property by virtue of adverse possession. Under Arizona Revised Statutes § 12-521.A.1, adverse possession is defined as "actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another." Arizona courts require that a party claiming adverse possession must demonstrate that their possession of the property has been: (1) "exclusive" –evidencing dominion over the property; (2) "open and notorious" - obvious to and unconcealed from neighbors, people passing by; etc., (3) "adverse/hostile" – without permission from the owner or any tenant or agent of the owner; and (4) "continuous" – without long periods of absence from the property.

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A property owner trying to prevent the establishment of another's rights by adverse possession must bring an action to recover such property or challenge such right within the applicable statutory periods. Each statutory period begins on the date the party whose rights are being challenged (the party claiming adverse possession) came into possession of the property. Those periods are:

1. Two years if both the parties are claiming rights to the property solely by right of possession (neither has a deed or evidence of title) – A.R.S. §12-522;
2. Three years if the party claiming adverse possession claims to have title but there is a defect such as an unrecorded deed) – A.R.S. §12-523;
3. Five years if the property is located in a city or town and the party claiming adverse possession has: (a) a recorded deed for the property, (b) claimed ownership of the property, (c) paid the taxes thereon for at least 5 consecutive years – A.R.S. §12-524; or under A.R.S. §12-525 if the property is not in a city or town, the possessor must also have been in possession of and used the property for at least 5 years;
4. Ten years if the party claiming adverse possession has peaceably and adversely possessed, cultivated, used or enjoyed the property for at least 10 years (does not require a deed or the payment of taxes) – A.R.S. §12-526.

While other states, such as Alaska and New York, have adopted laws that prohibit a person who knows he is trespassing from making an adverse possession claim, Arizona has not. Until such time, in order to protect against squatters and preserve the title to their properties, an owner of property located in Arizona should: (1) regularly inspect each of their properties for evidence of squatters, (2) strictly follow the Arizona Residential Landlord and Tenant Act to remove any squatters, and (3) bring any action to remove any squatters and recover the property before the expiration of the applicable statutory period as set forth in A.R.S. §§12-521 through 12-526.

PLEASE NOTE: The legal actions necessary to remove squatters from a property and the time period within which to do so can vary based on the facts involved. You are advised to consult your legal advisor any time you are faced with a situation involving squatters.