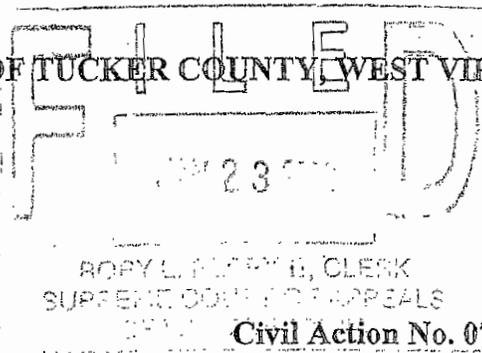


IN THE CIRCUIT COURT OF TUCKER COUNTY, WEST VIRGINIA

TIMBERLINE FOUR SEASONS
RESORT MANAGEMENT CO., INC.,
and LONG RUN REALTY, INC.,
Petitioners,



v.

Civil Action No. 07-C-44
Judge Andrew N. Frye, Jr.

PAT J. HERLAN, individually,
TIMBERLINE REALTY, INC., and
TIMBERLINE RESORT REALTY, INC.,
Respondents.

ORDER DENYING PETITIONERS' MOTION FOR NEW TRIAL

Now comes this Court, the Honorable Andrew N. Frye, Jr. presiding, after reviewing the Petitioners' Motion for New Trial and would DENY said Motion for the following reasons:

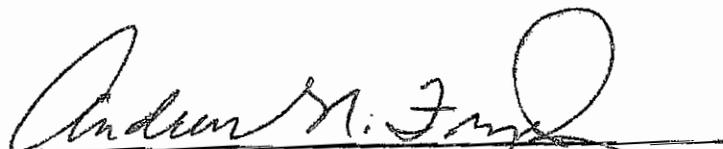
1. With respect to the first ground raised by the Petitioners, the Court did consider the entirety of the evidence presented and found the Petitioners to be unpersuasive on this point.
2. With respect to the second ground raised by the Petitioners, the Court applied existing real estate law that governs the specific type of relationships a broker is allowed to have with an employer and ruled accordingly. Therefore, this ground is also without merit.
3. Finally, with respect to other objections, those objections were saved on the record and preserved for appeal.

ACCORDINGLY, it is hereby ORDERED:

1. No basis for granting a new trial being found, the *Petition for New Trial* is hereby DENIED.
2. The Circuit Clerk shall provide a copy of this Order to all Counsel of record.

3. This action is accordingly DISMISSED. The Circuit Clerk shall remove this matter from the docket and place it among the matters ended.

ENTERED this 31st day of July 2007.


JUDGE

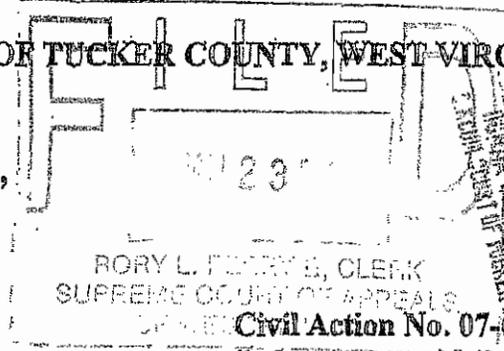
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Judge Andrew N. Frye, Jr.

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FINAL ORDER

On the 3rd day of July 2007, this matter came on before the Court, the Honorable Andrew N. Frye, Jr. presiding, the Court sitting this date at the Grant County Courthouse, Petersburg, West Virginia, upon the request of the parties. The Petitioners were present by their representatives – Dr. Frederick Reichle for Timberline Four Seasons Resort Management Co., Inc.; Tom Blanzky for Long Run Realty, Inc. - and by counsel Joseph A. Wallace and John J. Wallace IV. The Respondent was present in person and by her counsel Stephen G. Jory.

The Petitioners called Dr. Frederick Reichle and Tom Blanzky, both of whom were duly sworn and subject to cross-examination. The Petitioners then rested. The Respondent testified on her own behalf, under oath, and subject to cross-examination. Respondents then rested.

The Court then requested both parties submit proposed findings of fact and conclusions of law by Friday, July 6, 2007.

After due consideration of the pleadings, the testimony, and exhibits presented and after review of the applicable law in this matter, the Court makes the following FINDINGS OF FACT and CONCLUSIONS OF LAW:

1. In 1991, Pat Herlan entered into a business relationship with Timberline Four Seasons Resort Management Co., Inc. whereby she was employed to operate a real estate business for the Timberland Resort. Timberline Four Seasons Resort Management Co. was not a real estate business under the laws of the State of West Virginia because it did not have a Broker as is required. Timberline Four Seasons Resort Management Co. believed that it could use Pat Herlan in this capacity. However, Pat Herlan could only be a broker for a business she either owned or was a corporate officer in. Accordingly, Pat Herlan formed Timberline Resort Realty as a partnership between herself and her business associate Murray Dearborn and obtained a Brokerage license therefore for herself and Mr. Dearborn was an Associate Broker.

2. Pat Herlan was never a corporate officer of Timberline Four Seasons Resort Management Co. or Long Run Realty, Inc.

3. Timberline Four Seasons Resort Management Co. and/or Long Run Realty, Inc. never held an ownership interest in Pat Herlan, dba Timberline Resort Realty or Timberline Resort Realty, Inc.

4. In 1995 and 1996, Pat Herlan had a formal employment contract with Timberline Four Seasons Resort Management Co. whereby she was employed exclusively by Timberline Four Seasons Resort Management Co. and was compensated therefore under the contractual agreement. These formal agreements terminated on December 31, 1996. No additional contracts were ever signed.

5. Given the financial situation of the ownership of Timberline Four Seasons Resort Management Co., Pat Herlan obtained telephone service for Timberline Resort Realty in her name and social security number, becoming personally liable for payment thereof.

6. Pat Herlan utilized the Roundhouse located on the Resort property as her real estate office until being provided a notice of termination of her occupancy of same by letter dated May 24, 2007 and sent by Frederick Rechle, President of Timberline Four Seasons Resort. She paid rent for the use of this office facility.

7. Because of the symbiotic relationship between Timberline Four Seasons Resort and Timberline Resort Realty, and the benefits derived to each from having Timberline Resort Realty's rental management service provide housing for Timberline Four Seasons Resort skiing customers, there were numerous accounting trade offs between the two entities such as ski passes, complimentary housing, cleaning services, etc., all of which were balanced for payment on an annual basis.

8. Pat Herlan continued, after 1996, to receive W-2 income from Timberline Four Seasons Resort Management Co. in an undisclosed amount (see Petitioners exhibit 1), for her role as a promoter of the Timberline Ski Resort.

9. The W-2 income received by Pat Herlan from Timberline Four Seasons Resort Management Co., Inc., was not attributed as partnership income because it did not originate or relate to the business of her partnership, Timberline Resort Realty. Her income was paid for her services to the Timberline Four Seasons Resort Management Co., Inc. in promotion of the Ski Resort and public/community relations undertaken on behalf of the Ski Resort.

10. In the fall of 2006, Thomas Blanzky, General Manager of Timberline Ski Resort, and its affiliated entities, could not meet the obligations of Timberline Four Seasons Resort Management Co., Inc. for services rendered to the Resort by Thrasher engineering. At this time he requested and received a loan in the amount of \$20,000.00 from Pat Herlan. This loan was a personal loan from Ms. Herlan and did not come from the Timberline Resort Realty business.

The parties recognized that Timberline Four Seasons Resort Management Co., Inc. had no authority over the separate accounts of Timberline Resort Realty.

11. On January 3, 2007, Dr. Reichle, as president of Timberline Four Seasons Resort Management Co, Inc. sent a letter to Pat Herlan advising her that his company had sold its real estate business to Long Run Realty, Inc. Neither entity – Timberline Four Seasons nor Long Run Realty were real estate businesses under laws of the State of West Virginia.

12. Timberline Four Seasons Resort Management Co., Inc., gave no exclusive real estate sales listings to Pat Herlan, broker, dba Timberline Resort Realty.

13. Timberline Four Seasons Resort Management Co., Inc. did not receive any portion of the commissions earned by Pat Herlan, broker, dba Timberline Resort Realty.

14. Timberline Four Seasons Resort Management Co., Inc. never had a licensed real estate broker as an owner or officer of the corporation. Furthermore, Timberland Four Seasons Resort Management Co., Inc. is not now nor has it ever been licensed to conduct a real estate business under the laws of the State of West Virginia.

15. All rental management contracts held by Timberline Resort Realty, were executed by and between the rental unit owners and Pat Herlan as broker. Timberline Four Seasons Resort Management Co., Inc. was not a party to these contracts.

16. Any sales listings presently held by Pat Herlan, Broker, dba Timberline Resort Realty are the property of Pat Herlan inasmuch as Timberline Four Seasons Resort Management Co., Inc. is not in privity of contract with these individuals.

17. The trust accounts maintained by Timberline Resort Realty contain monies that are held in trust by Pat Herlan as a licensed real estate broker and for which she has a fiduciary

responsibility to the rightful owners of the monies contained therein. Timberland Four Seasons Resort Management Co., Inc. does not have any ownership interest in these accounts.

18. Timberline Resort Realty expends approximately \$250,000.00 annually in advertising. It receives no advertising money from Timberline Four Seasons Management Co., Inc.

19. On June 30, 2007, Timberline Resort Realty vacated the Roundhouse – its leased office space on the property of Timberline Four Seasons Resort Management Co., Inc. Other than the records which are related solely to the brokerage business, i.e. sales listing agreements, rental management contracts, and trust accounts, all other business records maintained by Pat Herlan were left at the Roundhouse. Additionally, as part of the removal of these records, the Property Plus software that was utilized by Timberline Resort Realty to manage their property contracts and listings was removed from the Roundhouse location. The software was replaced with another version of the Property Plus software without the information belonging to Timberline Resort Realty at a cost to Timberline Resort Realty of \$20,000.00.

20. Furthermore, Timberline Resort Realty has turned over the mailing addresses for direct mail advertising contacts that were not listed with Timberline Resort Realty but were obtained by Timberland Resort Realty prior to its vacation of the Roundhouse location. These contacts total approximately 18,660 individuals.

21. The West Virginia Supreme Court of Appeals has held that “[t]here are four general factors which bear upon whether a master-servant relationship exists ... (1) Selection and engagement of the servant; (2) Payment of compensation; (3) Power of dismissal; and (4) Power of control. The first three factors are not essential to the existence of the relationship; the fourth,

the power of control, is determinative. Syl. Pt. 5, in part, Paxton v. Crabtree, 184 W.Va. 237, 400 S.E.2d 245 (1990).

22. The evidence shows that Timberline Resort Realty was not owned by nor controlled by Timberline Four Seasons Resort Management Co., Inc. Timberline Resort Realty was therefore not an agent under the exclusive control of the Timberline Four Seasons Resort Management Co., Inc. with respect to the real estate functions performed by Pat Herlan dba Timberline Resort Realty.

23. West Virginia Law with respect to the operation of a real estate practice is very clear. At the time the parties initially began an association with one another, W.Va. Code § 41-12-1 and § 41-12-4 applied to the requirements for a real estate brokerage as follows:

§47-12-1. Title of article; broker's or salesman's license required.

This article shall be known, and may be cited, as the Real Estate Brokers License Act of One Thousand Nine Hundred Fifty-Nine, and from and after the effective date of this article [July 1, 1959] it shall be unlawful for any person, partnership, association or corporation to engage in or carry on, directly or indirectly, or to advertise or hold himself, itself or themselves out as engaging in or carrying on the business or act in the capacity of a real estate broker or a real estate salesman within this State, without first obtaining a license as a real estate broker or real estate salesman as provided for in this article.

(1937, c. 127, § 3; 1959, c. 147.)

§47-12-4. Qualifications for licenses.

(1) Licenses shall be granted only to persons who are trustworthy, of good character and competent to transact the business of a real estate broker or real estate salesman in such manner as to safeguard the interests of the public. Every applicant for a license as a real estate broker shall be of the age of eighteen years or over, a citizen of the United States and shall have served a bona fide apprenticeship as a licensed real estate salesman for two years or shall produce to the real estate commission satisfactory evidence of real estate experience. No broker's license shall be issued to a partnership, association or corporation unless each member or officer thereof who will actively engage in the real estate business be licensed as a real estate salesman or associate broker, when and after said broker shall have been granted a broker's license.

(2) A broker's or salesperson's license may be issued to any person who is either a high school graduate or the holder of a certificate of high school equivalency.

(3) Applicants for a broker's license shall show evidence satisfactory to the commission that they have completed at least one hundred eighty clock-hours (twelve credit hours) of formal instruction in a real estate course or courses approved by the commission. Such courses must cover real estate principles, real estate law, real estate appraising, and real estate finance and such other topics approved by the commission. The applicant shall satisfactorily pass an examination or examinations covering the material taught in each such course.

(4) Applicants for a salesperson's license shall show evidence satisfactory to the commission that they have completed at least ninety clock-hours (six credit hours) of formal instruction in a real estate course or courses approved by the commission. Such courses must cover real estate principles, real estate law, real estate appraising, and real estate finance, and such other topics approved by the commission. The applicant shall satisfactorily pass an examination covering the material taught in each such course.

(5) Subsections (3) and (4) of this section do not apply to any applicant who holds a valid broker's or salesperson's license issued prior to the first day of July, one thousand nine hundred eighty. Each such applicant shall complete at least ninety clock-hours (six credit hours) of instruction as specified in subsection (3) of this section if he has not completed the broker's examination required under section seven [§ 47-12-7] of this article by the first day of July, one thousand nine hundred eighty-two.

(6) The commission, pursuant to this section, shall publish a list of real estate courses which are approved and shall update such list yearly. Additionally, the commission shall, on request of any person, evaluate a specific course or courses which are not on the approved list and approve or disapprove such course or courses promptly and in writing.

(1959, c. 147; 1972, c. 61; 1980, c. 116.)

In 2002, the statute was recodified and the current effective version of the above rules is as follows:

§ 30-40-12. Qualifications for broker's license

(a) An applicant for a broker's license shall:

(1) Have served an apprenticeship as a licensed salesperson for two years or shall produce evidence satisfactory to the commission, in its sole discretion, of real estate experience equivalent to two years full-time experience as a licensed salesperson;

(2) Submit satisfactory evidence of having completed the required education course as provided for in section fourteen of this article;

(3) Successfully pass the examination or examinations provided by the commission.

(b) No broker's license shall be issued in the name of a corporation, association or partnership except through one of its members or officers.

(c) No broker's license shall be issued in the name of a corporation, association or partnership unless each member or officer, who will engage in the real estate business, obtains a license as a real estate salesperson or associate broker.

Acts 2002, c. 245, eff. March 5, 2002.

24. The termination language contained on Page 6 of the 1995 contract entered into between Timberline Four Seasons Resort Co., Inc. and Pat Herlan indicates that the contract was terminable without cause by either party. This contract naturally expired on December 31, 1995. The 1996 addendum contract expressly incorporated the 1995 contract by reference. Both parties admitted that they did not have a contract after December 31, 1996.

25. The resulting employment relationship was an at-will arrangement as is the preference under West Virginia Law.

26. Furthermore, the 1995 Contract and 1996 addendum was a legal impossibility inasmuch as it related to Pat Herlan being an agent of Timberline Four Seasons Resort Management Co., Inc. because under W.Va. Code §47-12-1 & 4 (Now §30-40-12 (b)(c)) for Pat Herlan to serve as an employee in this capacity because she was not an owner or officer of Timberline Four Seasons Resort Management Co., Inc.

27. Timberline Resort Realty is a general partnership organized under the laws of the State of West Virginia with Pat Herlan and Murray Dearborn as partners. The *West Virginia Uniform Partnership Act* defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit." W.Va. Code §47B-1-1. Timberline Resort Realty is an entity wholly separate and apart from the Timberline Ski Resort and/or its affiliated entities, Timberline Four Seasons Management Co., Inc. or Herz, Herz, and Reichle, Inc.

4. This action is accordingly DISMISSED. The Circuit Clerk shall remove this matter from the docket and place it among the matters ended.

ENTERED this 6th day of July 2007.

Richard M. Foy
JUDGE

ATTEST COPY:

ATTEST: S/DONNA JEAN BAVA, CLERK
CIRCUIT COURT OF TUCKER COUNTY, WV

BY *Donna Helms* DEPUTY