

FACTS

Landform Engineering Company, Inc. originated as a Minnesota corporation on October 12, 1994. Darren B. Lazan is identified as the Chief Executive Officer and its principal executive office is Suite 513, 105 5th Avenue South, Minneapolis, MN 55403. Landform Professional Services, LLC is a Minnesota limited liability company, formed on October 26, 2009. Its principal office is at the same location as Landform Engineering Company.

Darren Lazan identifies himself as a mechanical engineer on a variety of business search engines, including Manta, PowerProfiles, Yellow Explorer, Bixwiki, corporationwiki and Bizvotes. These websites identify Mr. Lazan's address as 1320 153rd Lane N.W., Anoka, MN 55304-2587. Majon, a web social service directory, identifies Mr. Lazan as primarily engaged in "Heavy Construction Engineering Services."

In 2007, Mr. Lazan filed an application to do business with the Secretary of State in the state of Florida. The application described the purpose of the company: "Landform is a civil site design firm, looking to do projects in Florida."

The 2009 Annual Report filed with the Florida Secretary of State is signed by Mr. Lazan as the Chief Executive Officer of the Corporation, with an address of 800C Butler Sq., 100 N. 6th St. Minneapolis, MN. 55403. The Vice President of the Company is identified as Christine Moss. The Company is identified as having been formed in Minnesota on October 24, 1994. Manta also lists Landform as being located as 105 5th Avenue. Suite 513, Minneapolis, MN.

The Landform website is at www.landform.net. The company describes itself as a:

"multi-disciplinary consulting firm that offers a full range of integrated site design services including civil engineering, landscape architecture, planning, infrastructure, land surveying and water resources design and management."

The Company states on its website that its clients are architects, builders, property owners and developers. The website identifies the owners as Mr. Lazan and Robert Schunicht. Kendra Lindahl is identified as a principal of the company. The website refers to its principal discipline as being urban design, retail and commercial design and residential design.

Nowhere on the website is the Company identified as having a real estate license. None of the above named individuals, the only people described on the website or government applications, are identified as having real estate licenses.

In April of 2009, Landform was awarded a contract to manage the mixed use development of the Ramsey Town Center. Heidi Nelson, an employee of Ramsey, states that Landform was retained because of its relationship to Greely, Inc, an Illinois developer and CronkRe, also of Illinois.¹ Under this contract Landform was paid a \$15,000 monthly fee plus a \$10,000 monthly "incentive advancement." The "incentive advancement" was an advance fee against a 2% commission Landform was to be paid on any parcel it sold in the Ramsey Town Center, later to be named the COR development district. The 2% commission was not based on the sale price of the land; rather, it was based on the total cost of the end use of the parcel. In many cases this means the commission was far in excess of the standard real estate commission paid on the sale of a commercial parcel.

On March 22, 2011, the Ramsey HRA approved a new two year contract with Landform, with the \$15,000 fixed fee continuing to be paid and the \$10,000 per month incentive fee being capped at the end of the first year of the renewed contract.² As noted above, the 2% commission was paid not only on the acquisition price of the land being sold by the Ramsey HRA but also on the cost of any improvement being constructed on the site. The contract staged the payment of the commission, with a percentage paid at the time of the purchase agreement, a percentage at the closing, and a percentage when there is occupancy of the site.

In January of 2012, the contract between Landform and Ramsey HRA was amended.³ Under the contract, Landform continued to be paid \$15,000 per month. The payment of the 2% commission was deferred, however, with half the 2% commission paid at the time a purchase agreement is signed and half at the time and public financing on the project is repaid by the developer.

It is not believed that Landform was involved in any real estate transaction involving the COR from 2009 through 2011. Accordingly, while Landform was paid approximately \$15,000 per month, or \$469,761.59 for services from August of 2009 to March, 2011, it does not appear any commission was earned by the Company, although it had received the advance incentive fee. Mr. Lazan, the President of the Company, told ABC Newspapers that fifteen people at Landform put in 3,300 hours of work during the period up to March of 2011, receiving approximately \$140 per hour.⁴

In October of 2012 Ramsey HRA approved the sale of a 1.36 acre parcel to McDonald's Corporation for \$470,000.⁵ Under the terms of the transaction, the HRA will pay McDonald's realtor a fee of \$30,000. It will also pay \$51,441 in fees to Landform. Therefore, on a straight commission basis, the transactional fees amount to \$81,441, or 17 ½ % of the sale price, all shouldered by the seller. This does not include the \$15,000 monthly fee paid to Landform.

¹ Sakry, "Landform Works to Grow the COR in Ramsey," ABC Newspaper, December 16, 2010.

² Sakry, "Ramsey HRA Approves New Landform Contract," ABC Newspapers, March 24, 2011.

³ Sakry, "Ramsey HRA Amends Landform Contract," ABC Newspapers, January 7, 2012.

⁴ Sakry, "Ramsey HRA Considers the Money Spent on The COR," March 23, 2011

⁵ Sakry, "Ramsey HRA Approves McDonalds Sale, Landform Fee." October 31, 2012.

In addition, SuperAmerica acquired two different parcels of property, and Landform is reported to receive \$53,725 fees connected to the sale of one parcel and \$57,913 in fees connected to the sale for the other.⁶ Landform is to be paid 20% of the fee with the signed purchase agreement, 60% at closing, and 20% at occupancy. The newspaper article identifies the total project cost of the SuperAmerica service stations. It does not, however, identify the price paid by SuperAmerica for the parcels of land. Accordingly, the transactional fee is not calculated on a percentage basis.

Landform has also sought commissions of \$25,000 on work to *purchase* a liquor store that is not located in the COR District and a \$4,000 for work on a realignment of property for Sophia Ramsey, LLC. It appears that these fees were not approved by the HRA.

Landform has also sought commissions relative to the sale of parcels to Flaherty & Collins for the development of the Residence Luxury Apartment complex. Flaherty & Collins paid the HRA \$250,000 for 3.03 acres of COR property.⁷ I did not find the amount of the commission being paid to Landform, and accordingly I did not calculate the percentage of the commission.

Landform's contract with the City makes it clear that the commission it earns is for the sale of commercial real estate. Indeed, while I have not seen the contract, newspaper reports indicate that it follows the custom and use of the real estate industry as to when a commission is earned, in this case being earned on any closing which occurs less than 15 months after the Landform contract is terminated if Landform performed certain benchmark services, such as having significant discussion with the purchaser and physically showing the premises to the purchaser. The contract also provides for a termination fee of \$60,000 if the contract is terminated before March of 2013.

Landform is not identified as a real estate licensee in the directory of the Minnesota Department of Commerce. Neither Mr. Lazan nor the associates identified above are listed as real estate licenses in the directory.

LAW AND DISCUSSION

The City of Ramsey's contract with Landform, in which it is required to pay Landform commission for managed services, is unenforceable because Darren Lazan, the individual acting on behalf of Landform, does not hold a required license to manage the sale of land in the development area.

In Minnesota, a license is required for anyone who "for another and for commission, fee, or other valuable consideration . . . lists, sells, exchanges, buys or rents, manages, or offers or attempts to negotiate a sale, option, exchange, purchase or rental of an interest or estate in real estate[.]" Minn. Stat. § 82.55, subd. 19(a) (2012). This licensure

⁶ Id.

⁷ Sakry, "Ramsey Council Gives Approvals for 250 Unit Luxury Apartment Complex" December 2, 2010.

requirement is extremely broad. Two Minnesota appellate cases have made it clear that the activities for which a broker's license is required are much broader than traditional brokerage services.

In *PEMS Co. Int'l, Inc. v. Temp-Air, Inc.*, the Minnesota Court of Appeals held that a license is required for a "finder," which is described as:

an intermediary who brings together parties for a business opportunity, and differs from a broker because the finder merely brings two parties together to make their own contract; a finder locates, introduces, and brings parties to a transaction together, while a broker does more, attempting to bring the parties to agreement.

PEMS Co. Int'l, Inc. v. Temp-Air, Inc., No. A10-834, 2011 WL 69098, at *4 (Minn. Ct. App. Jan. 11, 2011) (quoting 12 Am. Jur. 2d Brokers § 3 (West 2010)). In that case, a consulting company, PEMS, was hired to act as a "finder," or to identify and vet possible buyers of a company. *Id.* at *5. It also acted as a gate keeper between the owner and potential buyer. *Id.* The court held that, even though PEMS did not negotiate the actual sale of the business—as a traditional broker would do—PEMS's services still fell within the "broad range of conduct" for which a license is required. *Id.* at *6.

Likewise, in *Bridgeplace Associates, L.L.C. v. Lazniarz*, the Minnesota Court of Appeals concluded that a license is also required for a developer who is being compensated for using his "good will" in a relationship to help effect a sale of land from one owner to another. *Bridgeplace Associates, L.L.C. v. Lazniarz*, No. A04-2218, 2005 WL 1869657, at *3 (Minn. Ct. App. Aug. 9, 2005). In that case, Lazniarz, a developer, was offered compensation for using his pre-existing relationship with a landowner to help effect a sale between the landowner and another developer. *Id.* at *3. Lazniarz had been negotiating a sale of land for his own development. *Id.* at *2. But when he was unable to find an investor, he ultimately entered into an agreement with another developer—the developer would pay Lazniarz if Lazniarz could convince the owner of the land to sell the land and the neighboring parking lot to the developer. *Id.* The court agreed with the district court that "[t]here is no doubt that [Lazniarz] was trying to effect a sale of the property . . . so that [he] would realize the anticipated . . . compensation." *Id.* at *13. It therefore concluded that Lazniarz was required to have a license. *Id.*

Here, at a minimum, Lazan acted as a finder in exchange for promised commission. Lazan agreed to "solicit the interest of various prospective end-users[,] . . . coordinate the efforts of all team members to provide a uniform front to the development community, and assist in the evaluation, consideration, negotiations, and deal structuring on any disposition of land within the development area." In exchange for these services, Landform was promised 2% of the "total capital cost of the end use of the parcel or property sold or developed." In other words, Lazan engaged in the exact same services as PEMS and Lazniarz, and like PEMS and Lazniarz, it was required to have a license to do so. See *PEMS*, 2011 WL 69098; *Lazniarz*, 2005 WL 1869657.

Although there are some exceptions to the licensure requirement, none apply to Lazan. *See* Minn. Stat. § 82.55 (2012). Among them is an exception for small real estate developers who engage in fewer than 25 transactions a year and who keep a trust account in accordance with Minnesota Statutes section 82.75. It would be Lazan's burden to prove that he qualifies for that exception. *See Douglas v. Schuette*, 607 N.W.2d 142, 147 (Minn. Ct. App. 2000). Lazan would have difficulty proving that he qualifies for that exception because it does not appear that he has ever acquired, built, and then resold property. It also does not appear that Landform is development company. Rather, in reviewing the dates of formation of Landform Engineering Company, Inc. and Landform Professional Services, LLC, it appears that its employees were employees solely by Landform Engineering Company, Inc., until it landed the Ramsey HRA contract in 2009, at which point they formed Landform Professional Services, LLC. Moreover, neither Landform nor Lazan appear to maintain a trust account that is reportable and on file with the Department of Commerce. The trust account requirements are very strict. *See* Minn. Stat. § 82.75. Accordingly, Lazan does not meet this exception and should be licensed.

Because Lazan is not licensed, Landform is not entitled to compensation for any of Lazan's services. Minnesota Statutes section 82.85, subdivision 1 (2010) states:

No person shall bring or maintain any action in the courts of this state for the collection of compensation for the performance of any of the acts for which a license is required under this chapter without alleging and proving that the person was a duly licensed real estate broker, salesperson, or closing agent at the time the alleged cause of action arose.

"This section is penal in nature and will defeat a claim for commissions if a plaintiff fails to allege and prove that they were duly licensed." *Ike v. Anderson*, 369 N.W.2d 321, 322 (Minn. Ct. App. 1985) (*citing Relocation Realty Services Corp. v. Carlson Companies, Inc.*, 264 N.W.2d 643, 645 (Minn.1978); *Albers v. Fitschen*, 274 Minn. 375, 376-77, 143 N.W.2d 841, 843 (1966)). The section was enacted as "part of a legislative scheme to protect the public against unqualified brokers." *Relocation Realty Services Corp.*, 264 N.W.2d at 645.

There are no exceptions to the section 82.85's complete bar on compensation for unlicensed brokerage services. Courts apply it universally. *See PEMS*, 2011 WL 69098, at *3-4 (applying bar); *Bridgeplace Associates*, 2005 WL 1869657, at *13 (same); *Ike*, 369 N.W.2d at 322 (same); *Relocation Realty Servs. Corp.*, 264 N.W.2d at 645 (same).

In the sixties, the Minnesota Supreme Court attempted to carve out an exception for sophisticated parties, *see Paske v. Liberty Equities Corp.*, 283 Minn. 167, 170, 167 N.W.2d 30, 32 (1969), but the "isolated real estate transaction" exception upon which the sophisticated-parties exception was based was repealed by the legislature in 1967, *see Gahagan v. Patterson*, 316 F. Supp. 1099, 1102 n.2 (D. Minn. 1970). No court has applied the *Paske* exception.

Given that the 2% compensation to Landform is not enforceable, the question then becomes whether the City of Ramsey should pay it anyway. There are at least two reasons why the City should not pay it. First, public policy, as demonstrated by the continued force of section 82.85, does not support compensating unlicensed brokers for their services. *See PEMS*, 2011 WL 69098, at *3-4 (observing that unlicensed broker “forfeits his right to collect compensation for his services”). Second, and perhaps more importantly, the City of Ramsey charter provides:

The proceeds of any sale of such property shall be used as far as possible to retire any outstanding indebtedness incurred by the city in the purchase, construction, or improvement of this or other property used for the same public purpose. If there is no such outstanding indebtedness, the council may by resolution designate some other public use for the proceeds.

Ramsey City Charter § 12.5.⁸ This provision prioritizes how the City should use its funds from the sale of land; paying Landform compensation based on an unenforceable contract is not the priority. *See id.*

CONCLUSION

Landform is not entitled to compensation for its role in selling land in the City of Ramsey because Lazan, the person acting on behalf of Landform, is not a licensed broker. The City has no obligation to pay Landform and public policy and the City’s Charter weigh against compensation.

⁸ The Ramsey City Charter is publicly available at <http://www.ci.ramsey.mn.us/sites/default/files/documents/AboutUs/Charter2010.pdf>

In this case there is no doubt that Landform is trying to effect a sale of the COR property so that it will realize the anticipated compensation. The Courts have been firm that the key word in the licensure statute is "negotiate." *Bridgeplace Associates, LLC v. Henry J. Lazniarz*, Mn. Ct. Appeals (2005).

There are exemptions in the statute for certain professions. For instance, a real estate developer might be exempt under the following provision:

The term real estate broker does not include...any person who acquires real estate for the purpose of engaging in and does engage in or who is engaged in the business of constructing residential, commercial or industrial buildings for the purpose of resale if no more than 25 such transactions occur in an 12 month period and the person complies with Section §82.75."

Minn. Stat. §82.56 (i). The courts have held that, even if a developer has bought, built and resold less than 25 parcels in a year, it is still not exempt unless it has maintained a trust account in compliance with Minn. Stat. §82.75. *Bridgeplace Associates, LLC v. Henry K. Lazniarz*, MN. Ct. App. (2005); *Douglas v. Shuette*, 607 N.W.2d 142, 147 (Minn. App. 2000)

It is problematic whether Landform is a developer. It does not appear it has ever acquired, built and then resold property. Rather, in reviewing the dates of formation of Landform Engineering Company, Inc. and Landform Professional Services, LLC, it appears that its employees were employees solely by Landform Engineering Company, Inc., until it landed the Ramsey HRA contract in 2009, at which point they formed Landform Professional Services, LLC. Regardless of the name of the company, it does

not qualify for the developer exemption because: 1.) It does not improve the property it acquires for resale, and 2.) It does not maintain a trust account which is reportable and on file with the Department of Commerce. The trust account requirements are very strict, with the account being so identified by the financial institution, deposits being made directly into the account, separate ledgers being maintained for the account, and proper reporting being made to the Commissioner of Commerce. Minn. Stat §82.75.

Minnesota law makes it clear that an unlicensed broker may not maintain any action in the courts for collection of compensation. Specifically, the statutes provide as follows:

“No person shall bring or maintain any action in the courts of this state for the collection of compensation for the performance of any of the acts for which a license is required under this chapter without alleging and proving that the person was a duly licensed real estate broker, salesperson, or closing agent at the time the alleges cause of action arose.”

Minn. Stat. §82.85, subd. 1. . The Courts have uniformly held that this statute is penal in nature and will defeat a claim for commissions if a plaintiff fails to allege and prove that he or she is licensed. *Ike v. Anderson*, 369 N.W. 2d. 321, 322 (Mn. App. 1985); *Albers v. Fitschen*, 274 Minn. 375, 143 N.W. 2d 841, 843 (1966) The Courts have uniformly been so strict on this issue that it prohibited an unlicensed broker from bringing a lawsuit to claim unjust enrichment. *Relocation Realty Services Corp. v. Carlson Companies, Inc.*, 264 N.W. 2d 643 (Minn 1978) To do otherwise, the Court reasoned, would “decrease the risks of doing business by unlicensed brokers and dilute the protections provided to the public.” *Id.*

In the sixties, the Minnesota Supreme Court tried to carve out an exemption in a situation where the parties were both sophisticated and where all parties knew that the broker was unlicensed. *Peske v. Liberty Equities Corp*, 283 Minn. 167, 167 N.W. 2d 30 (1969) After the *Peske* decision was rendered, the legislature amended the law to make it clear that the court can not look at the equities of the arrangement. Rather, the Courts must solely look to whether the activity was that of a licensed broker and, if so, whether the broker was licensed. *Gahagan v. Patterson*, 316 F. Supp. 1099 (D. Minn. 1970); *Dellwood Enterprises v. Pac. Am. Real Estate Fund*, 505, F. Supp 187 (1981) Absent the required license, a broker may not use the courts to enforce any compensation arrangement required such activity.

The above case law makes it clear that, unless Landform is licensed as a real estate broker or is exempt from licensure, it may not file any action in court to collect on any fees relating to brokerage activity, which includes the activity involving the McDonalds Restaurants, the SuperAmerica service stations, and the Flaherty & Collins project.

The statutes also provide that any person who violates any provision of the real estate code is guilty of a gross misdemeanor. Minn. Stat. §82.83.

A municipality must adhere to the strictest standards of the law. It may not make payments to vendors that are illegal or unauthorized under the law. It is misuse of public funds to make a payment to a vendor that is not enforceable under the law. The Landform contract, providing for unlicensed brokerage activity, may constitute an ultra vires contract which is in whole or in part void under the law. See *Dunnell's Minnesota Digest*, "Municipal Corporations," Section 12.01.

Under the above facts and law, it does not appear that the Ramsey HRA may pay compensation to Landform for brokerage work involving McDonalds, SuperAmerica and Flaherty & Collins. Indeed, depending on the terms of the contract, the entire contract may be construed to be ultra vires and be subject rescission.