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Seventh Circuit Affirms: Attorney Personally Liable for Aiding and Abetting Mortgage Fraud Scheme

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Fifth Third Mortgage Co. v. Kaufman, No. 18-3295 (7th Cir. Aug. 9, 2019)

Brief Summary

The Seventh Circuit affirmed a ruling that an attorney was personally liable for aiding and abetting a mortgage fraud scheme. The attorney was found to have individually participated in mortgage closings as counsel for the seller and personally directed his own limited liability title company's employees to conceal the fraud at issue.

Complete Summary

The mortgage fraud at issue in this case began with the co-owners of a condo building at 4725 S. Michigan Avenue in Chicago. One of the co-owners made false statements and omissions in loan applications and obtained the proceeds of 35 mortgage loans. The co-owner of the building recruited individuals to pose as buyers for the units at the building. The "straw buyers" submitted fraudulent loan applications to various lenders, one of which was Fifth Third. After the loan proceeds were disbursed, the participants split the funds and made no payments on the loans. Nine different borrowers purchased 26 of the units of the condo building. Among other misleading and false statements, the applications included statements that the units were going to be the primary residences of the buyers.

The seller of all the units was 4725 S. Michigan, LLC. Defendant Kaufman was the attorney for the seller for each of the closings. The closings took place at Kaufman's office and were also conducted by a title company, Traditional Title Company, LLC ("Traditional Title"), which was owned by Kaufman.

Fifth Third instructed Traditional Title to notify the bank immediately if it discovered any misstatements at closing that would affect the transaction, and to suspend the transaction if it had reason to believe that the borrower was not intending to occupy the property. Kaufman was said to have violated both criteria by concealing the buyers' misrepresentations and instructing agents to complete closings even when buyers were purchasing multiple units in the same property.

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Kaufman continued to participate as the seller's attorney in the fraud scheme involving sales of units in other buildings, which also included loans from Fifth Third. At trial, Kaufman testified he was not aware of the scheme, and he "didn't really look at the people." He claimed it was not his responsibility as the seller's attorney to review Fifth Third's closing instructions or the buyer's loan applications. However, the co-owner of 4725 S. Michigan, LLC testified that Kaufman knew that the buyers were part of a scheme, and two closing agents testified they informed Kaufman about the discrepancies in the loan applications.

Fifth Third then sued Kaufman, in his individual capacity, alleging seven counts of fraud. After a bench trial before the district court (Judge Matthew Kennelly), the court entered judgment against Kaufman. Kaufman appealed and argued the district court erred in finding him personally liable for aiding and abetting the fraud in his capacity as both an owner of Traditional Title and as an attorney for the seller, because (1) he should have been shielded from tort liability as a member of the LLC and (2) there can be no conspiracy between an agent and principal under Illinois law.

Despite the LLC's liability structure, the Seventh Circuit found that it was proper to allow the judgment against Kaufman personally, because he participated individually in each of the closings as counsel for the seller and personally directed his employees to conceal facts, and because the district court's judgment was not derived solely from Traditional Title's liability.

Next, the Seventh Circuit also concluded there was no support for Kaufman's argument that there could be no conspiracy between an agent and principal, citing to *Thornwood, Inc. v. Jenner & Block*, 344 Ill.App.3d 15, 28-29 (2003), where the court stated:

[W]e see no reason to impose a per se bar that prevents imposing liability upon attorneys who knowingly and substantially assist their clients in causing another party's injury. As we have recognized, one may not use his license to practice law as a shield to protect himself from the consequences of his participation in an unlawful or illegal conspiracy. The same policy should prevent an attorney from escaping liability for knowingly and substantially assisting a client in the commission of a tort.

The Seventh Circuit thus affirmed the district court's finding that Kaufman was personally liable for knowingly and substantially assisting in the fraud. The fact that Kaufman reviewed the closing statements, hosted fraudulent closings at his firm, and attended the closings despite knowing of the "straw buyers," all could have led a court to conclude that he was substantially involved in the scheme.

Significance of Decision

Attorneys should understand their responsibilities for avoiding liability for participating in a client's wrongful conduct. Resorting to a limited liability business structure—an LLC—will not necessarily preclude personal liability.

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