

BEFORE THE MARYLAND REAL ESTATE COMMISSION

MARYLAND REAL ESTATE COMMISSION *

v. *

FREDERICK MAKINDE
Respondent

* CASE NO. 2012-RE-091

* OAH NO. DLR-REC-22-13-08527

*

* * * * *

PROPOSED ORDER

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated August 12, 2013, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 11th day of October, 2013,

ORDERED,

A. That the Findings of Fact in the recommended decision be, and hereby are, AFFIRMED;

B. That the Conclusions of Law in the recommended decision be, and hereby are, AMENDED as follows:

(1) The Respondent did not perform real estate services without a license in violation of §§ 17-301 and 17-601(b) of the Bus. Occ. and Prof. Art., Ann. Code of Md.;

(2) The Respondent did not misrepresent himself as a licensed associate real estate broker in violation of § 17-602(b) of the Bus. Occ. and Prof. Art., Ann. Code of Md.;

(3) The Respondent failed to exercise reasonable care and

diligence in his dealings with the Complainant in violation of §§ 17-532(c)(1)(vi) and 17-322(b)(32) of the Bus. Occ. and Prof. Art., Ann. Code of Md.;

(4) The Respondent failed to obtain an executed buyer broker agreement from the Complainant in violation of §§17-533(g) and 17-322(b)(32) of the Bus. Occ. and Prof. Art., Ann. Code of Md., and COMAR 09.11.02.01H;

(5) The Respondent forced the Complainant to use a specific mortgage lender as a condition for settlement in violation of §§ 17-607(a)(4) and 17-322(b)(29) of the Bus. Occ. and Prof. Art., Ann. Code of Md.;

(6) The Respondent falsely advised the Complainant that he could not find his own loan servicer and had to use the one provided by the Respondent in order to complete the sale in violation of § 17-322(b)(3), Bus. Occ. and Prof. Art., Ann. Code of Md.;

(7) The Respondent's actions in failing to obtain a buyer broker agreement, failing to provide the listing agent with the release agreement, and falsely advising the Complainant about selection of a loan servicer demonstrate incompetence in violation of § 17-322(b)(25), Bus. Occ. and Prof. Art., Ann. Code of Md., and COMAR 09.11.02.02A.

C. That the Recommended Order be, and hereby is, AMENDED as follows:

ORDERED that the Respondent Frederick Makinde violated Md. Bus. Occ. and Prof. Art. §17-322(b)(3), (25), (29), (32), and (33);

§ 17-532(c)(1)(vi); § 17-533(g); § 17-607(a)(4);and COMAR 09.11.02.01H, and 09.11.02.02A; and that the Respondent did not violate §§17-301, 17-601(b), and 17-602(b);

ORDERED that all real estate licenses held by the Respondent Frederick Makinde be and hereby are SUSPENDED for thirty days;

ORDERED that the Respondent Frederick Makinde be assessed a civil penalty in the amount of \$5,000.00, which shall be paid within thirty (30) days of the date of this Proposed Order;

ORDERED that all real estate licenses held by the Respondent Frederick Makinde shall be suspended if the civil penalty is not paid in full within the 30-day time period, and that this suspension is in addition to, and not in lieu of, the disciplinary suspension.

ORDERED that the records and publications of the Maryland Real Estate Commission reflect this decision.

D. Pursuant to §10-220 of the State Government Article, the Commission finds that the Recommended Decision of the Administrative Law Judge ("ALJ") had to be modified because the ALJ omitted the provision that the civil penalty be paid within a specified time period and that all real estate licenses held by the Respondent would be suspended if he does not pay the full amount of the civil penalty within that time period. The Conclusions of Law had to be amended to include the sections of § 17-322(b) that support the other statutory violations, and to include § 17-322(b)(3) and (25), which the ALJ cited in his sanction analysis, but failed to include in the Conclusions of Law. The facts that

underlie the violation of § 17-322(b)(3) and (25) are the same as those that underlie other statutory violations. For this reason, the penalty remains the same as that recommended by the ALJ; the additional statutory citations did not cause it to be increased.

E. Pursuant to Code of Maryland Regulations (COMAR) 09.01.03.08 those parties adversely affected by this Proposed Order shall have 20 days from the postmark date of the Order to file exceptions and to request to present arguments on the proposed decision before this Commission. The exceptions should be sent to the Executive Director, Maryland Real Estate Commission, 3rd Floor, 500 North Calvert Street, Baltimore, MD 21202.

SIGNATURE ON FILE

Maryland Real Estate Commission

MARYLAND REAL ESTATE
COMMISSION

v.

FREDERICK MAKINDE,
License #527701

RESPONDENT

* BEFORE ZUBERI BAKARI WILLIAMS,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH CASE No.: DLR-REC-22-13-08527
* MREC COMPLAINT No. : 12-RE-091

* * * * *

RECOMMENDED DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On March 26, 2012, the Maryland Real Estate Commission (MREC) issued a Statement of Charges against Frederick Makinde, a licensed real estate salesperson (Respondent), alleging that the Respondent violated sections 17-301; 17-322b(3), (25), (32), and (33); 17-532(c)(1)(vi); 17-533(g); 17-601(b); 17-602(b); 17-607(a)(4); and 17-613(C) of the Business Occupations and Professions Article of the Maryland Annotated Code (2010), as well as Code of Maryland Regulations (COMAR) 09.11.02.01H and 09.11.02.02A. On April 16, 2013, the REC forwarded the Statement of Charges to the Office of Administrative Hearings (OAH) for a hearing.

I held a hearing on May 14, 2013, at the Largo Government Center, in Prince George's County Maryland. Md. Code Ann., Bus. Occ. & Prof. § 17-408 (2010). The Respondent appeared and represented himself. Peter Martin, Assistant Attorney General, represented the MREC.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department of Labor, Licensing and Regulation (DLLR), and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2012); Code of Maryland Regulations (COMAR) 09.01.03 and 28.02.01.

ISSUES

1. Did the Respondent perform real estate services without a license?
2. Did the Respondent misrepresent himself as a licensed associate real estate broker?
3. Did the Respondent fail to obtain an executed buyer agreement from Tarjudeen Olaniyan (Complainant)?
4. Did the Respondent fail to exercise reasonable care and diligence to his client in the provision of real estate services?
5. Did the Respondent force the Complainant to use a specific mortgage lender as a condition for settlement?
6. If so, what is the appropriate sanction?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits offered by the MREC:

MREC Ex. #1 – Notice of Hearing, dated March 18, 2013

MREC Ex. #2 – Amended Statement of Charges, dated April 16, 2013

MREC Ex. #3 – Custodian of Records Certification, dated May 9, 2013

MREC Ex. #4 – Investigation Report, dated closed August 22, 2012

MREC Ex. #5 – Form Letter Sent to Agents

MREC Ex. #6 – Email to Trevlyn Otts from Steve Long, dated December 22, 2010

MREC Ex. #7 – Licensing History Certification for Trevelyn C. Otts,
dated April 22, 2013

MREC Ex. #8 – Licensing Certification for Housing Consultants Real Estate

MREC Ex. #9 – Licensing History Certification of Thomas Holdman,
dated April 22, 2013

MREC Ex. #10 – Licensing History Certification of John Thomas, dated April 22, 2013

MREC Ex. #11 – Licensing dated April 22, 2013 with Certification of Lou Issacs,
dated May 9, 2013

I admitted the following exhibits offered by the Respondent:

Resp. Ex. #1 – Pre-Approval from Bank of America

Resp. Ex. #2 – Buyer Notification of Representation

Resp. Ex. #3 – Loan Company – Flagship Mortgage

Resp. Ex. #4 – Email from Robert Hall to Respondent, dated April 3, 2012

Testimony

The Respondent testified on his own behalf.

The Fund presented the testimony of the following individuals:

- Tarjudeen Olaniyan, Complainant
- Charlene Faison, Licensing Supervisor, DLLR
- Robert Hall, DLLR Investigator
- Helen Zrihen, Listing Agent at Prudential

FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. The Respondent was licensed by the MREC as a Real Estate Salesperson (License #05-527701) with Housing Consultants LLC (Housing Consultants), from August 7, 2009 until December 22, 2010.¹

¹ For the purpose of his hearing, I find that Housing Consultants LLC and Housing Consultants Real Estate Company refer to the same entity.

2. The Respondent is currently licensed by the MREC and affiliated with a different firm.

Real Estate License Status

3. On December 22, 2010, the Respondent's affiliation with Housing Consultants was terminated and he was not associated with any other real estate company at that time.

4. The Respondent never received a notice of termination of his affiliation with Housing Consultants from the DLLR and continued to act as a Real Estate Salesperson affiliated with Housing Consultants.

Contract To Purchase The House

5. In late December 2010, the Complainant met the Respondent through a mutual friend. The Complainant was looking to purchase a house quickly and the Respondent stated that he could assist him.

6. On or about January 5, 2011, the Respondent showed the Complainant a house located at 6602 Stanton Road, Hyattsville, MD 20784 (the Property). The Complainant liked the house and instructed the Respondent to draft an offer to the seller right away.

7. On January 8, 2011, the Respondent gave the Complainant a Residential Sale Contract for the Property (the Contract). The Contract stated the purchase price as \$90,000.00. The Seller was Bank of America. The offer was made and accepted.

8. The Contract stated that Housing Consultants would hold "all deposits in escrow," and the settlement date was set for February 28, 2011.

9. On or about January 8, 2011, the Complainant paid the Respondent \$1,000.00, as a down payment. The down payment was sent to Housing Consultants.

10. On January 25, 2011, the Contract was ratified by the Complainant.

11. On or about January 25, 2011, the Complainant signed a Real Estate Purchase Addendum and paid an additional earnest money down payment of \$2,000.00. The down payment was given to Housing Consultants. When the house purchase fell through, the \$2,000.00 was returned to the Complainant.

Role Representations Made By Respondent

12. The Contract listed Housing Consultants as the Broker and Respondent as the Buyer's Agent.

13. The Contract also contained a section entitled "Understanding Whom Real Estate Agents Represent." This section listed Housing Consultants and the Respondent as the Buyer's Agent.

14. The Respondent did not execute a buyer/broker agreement.

15. The Respondent did not provide the listing agent with a release agreement necessary to proceed to settlement on the property.

Securing Loan Financing

16. On or about January 25, 2011, the Respondent told the Complainant that he had to use the loan servicer provided by Respondent.

17. As settlement approached, the Respondent dissuaded the Complainant from contacting the loan servicer.

18. The Complainant was not told the identity of the loan servicer.

19. The Respondent has no prior complaints against him with the REC.

DISCUSSION

A. Violations

§ 17-301(a) of the Business Occupations & Professions Article states in part:²

License required:

(1) Except as otherwise provided in this title, an individual shall be licensed by the Commission as a real estate broker before the individual may provide real estate brokerage services in the State.

(2) Except as otherwise provided in this title, an individual shall be licensed by the Commission as an associate real estate broker or a real estate salesperson before the individual, while acting on behalf of a real estate broker, may provide real estate brokerage services in the State.

§ 17-532(c) of the Business Occupations & Professions Article states in part:

Duties to client:

(1) A licensee shall:

...

(vi) exercise reasonable care and diligence;

§ 17-533(g) of the Business Occupations & Professions Article states in part:

Presumed buyer's or lessee's agency relationship

(g) Brokerage agreement. -- Before the licensee may present an offer to purchase or lease or negotiate the purchase or lease of real estate, the presumed buyer's or lessee's agency must be terminated and the buyer or lessee and the licensee shall enter into a brokerage agreement for that licensee to act as an exclusive buyer's or lessee's agent or as an intra-company agent for the buyer or lessee.

§ 17-601(b) of the Business Occupations & Professions Article states in part:

Providing real estate brokerage services without license

(b) Associate real estate broker and real estate salesperson. -- Except as otherwise provided in this title, a person may not, on behalf of a real estate broker, provide, attempt to provide, or offer to provide real estate brokerage services unless licensed by the Commission as an associate real estate broker or a real estate salesperson to provide real estate brokerage services for that real estate broker.

² Unless noted otherwise, the statutes refer to the Business Occupations & Professions Article of the Maryland Annotated Code.

§ 17-602(b) of the Business Occupations & Professions Article states in part:

Misrepresentation

(b) Associate real estate broker and real estate salesperson. -- Unless authorized under this title to provide real estate brokerage services on behalf of a real estate broker, a person may not represent to the public, by use of the titles "licensed associate real estate broker" or "licensed real estate salesperson", by other title, by description of services, methods, or procedures, or otherwise, that the person is authorized to provide real estate brokerage services in the State on behalf of that real estate broker.

§ 17-607(a)(4) of the Business Occupations & Professions Article states in part:

Designation of title insurance, settlement, or escrow company, mortgage lender, financial institution, or title lawyer

(a) In general. -- Except as otherwise provided in subsection (b) of this section, in a real estate transaction involving a single-family dwelling, a real estate broker, an associate real estate broker, a real estate salesperson, or a lawyer acting as a real estate broker may not require a buyer, as a condition of settlement, to employ a particular:

...

(4) mortgage lender, or financial institution as defined in the Financial Institutions Article; or

COMAR 09.11.02.01H states:

Relations to Public.

For the protection of all parties with whom the licensee deals, the licensee shall see to it that financial obligations and commitments regarding real estate transactions are in writing, expressing the exact agreement of the parties, and that copies of these agreements are placed in the hands of all parties involved within a reasonable time after the agreements are executed.

COMAR 09.11.02.02A states:

Relations to the Client

A. In accepting employment as an agent, the licensee shall protect and promote the interests of the client. This obligation of absolute fidelity to the client's interest is primary, but it does not relieve the licensee from the statutory obligations towards the other parties to the transaction.

Here, the MREC charged the Respondent with violating the above listed statutes and provisions of COMAR. I address them in turn below.

1. Respondent Was Not An Unlicensed Real Estate Salesperson

The MREC argued that the Respondent violated sections 17-301 (License Required), 17-601 (Providing Brokerage Services without a license), and 17-602 (Misrepresentation as a Licensed Real Estate Salesperson) because he did not have a real estate license during the time he worked with the Complainant. In support of its argument, the MREC submitted documents showing that on December 22, 2010, the Respondent's license affiliation with his broker company Housing Consultants was terminated and he was not associated with any other real estate company. Because of a computer data storage problem at DLLR, the MREC lost agency records showing that a notification was actually mailed to the Respondent. Instead, the MREC presented the testimony of Charlene Faison, DLLR Licensing Supervisor, who testified that it was the practice of DLLR to send out notices to real estate salespersons when they are no longer associated with a brokerage company and, as such, were unlicensed. Ms. Faison could not testify that such a notice was sent out in this case but that they are normally sent out.

On the other hand, the Respondent testified that he never received any notice from DLLR stating that he was no longer licensed or that Housing Consultants' license was terminated. He further testified that he was never told by Housing Consultants about the license termination. Last, he argued that he did not knowingly perform services for the Complainant without a license and, as such, should not be penalized.

I agree with the Respondent. The MREC failed to adduce credible evidence that the DLLR's letter was actually sent to the Respondent. I find that Ms. Faison's testimony regarding DLLR's general practice insufficient to show that a notice letter was actually sent to the Respondent in this case, especially when coupled with the Respondent's testimony that he never received anything from DLLR. Without more evidence, I believe it is unfair to find that the Respondent acted as an unlicensed real estate sales person, or misrepresented he was a real estate

sales person to the Complainant in violation of the above statutes. The MREC simply has not substantiated those charges.

2. Respondent Failed to Exercise Reasonable Care and Diligence

The Respondent failed to exercise reasonable care and diligence in his dealings with the Complainant, as required by section 17-532(c), in two main ways. First, he failed to have the Complainant execute a buyer broker agreement, as required by law. The MREC submitted the Respondent's answers to its investigator, Robert Hall, into evidence. The Respondent did not object to the contents of Mr. Hall's investigation or contest its accuracy. The investigation report stated the following colloquy:

Question: Did you have a "Buyer Agent Agreement" with the Complainant?

Answer: No! I never thought I needed it things were going so fast.

See MREC Ex. #4 at 4.

Second, the Respondent failed to provide the listing agent, Helen Zrihen, with the release agreement necessary to proceed to settlement. Ms. Zrihen testified that she contacted the Respondent several times to obtain the release agreement in order to proceed to settlement, but to no avail. She further testified that she got so frustrated with the Respondent's inaction that she called the mortgage lending company herself to figure out what was going on. She testified that is when she learned for the first time that Complainant was not even aware who was servicing his loan.

I am persuaded by this evidence that the Respondent was careless in his dealings with the Complainant and failed to exercise reasonable care.

3. The Respondent Failed to Obtain a Buyer Broker Agreement

As stated above, the Respondent admitted to Investigator Hall that he did not have the Complainant execute a buyer broker agreement, as required by section 17-533, because he did not think it was necessary. *See MREC Ex. #4 at 4.*

4. The Respondent Forced the Complainant to Use a Specific Mortgage Lender

The MREC argued that the Respondent improperly forced the Complainant to use a specific mortgage lender. In support of its argument, the MREC presented the testimony of the Complainant. The Complainant testified that on or about January 25, 2011, the Respondent told him that he could not find his own loan servicer and that he had to use the one provided by Respondent to complete the sale. I find the Complainant's testimony credible because it is consistent with Ms. Zrihen's testimony that when she contacted the mortgage lender she was told that the Complainant did not even know he had a loan with them.

Based on this evidence, I find that the Respondent forced the Complainant to use a specific mortgage lender in order to proceed to settlement.

B. Sanctions

§ 17-322 of the Business Occupations & Professions Article states in part:

Denials, reprimands, suspensions, revocations, and penalties – Grounds

(b) Grounds. -- Subject to the hearing provisions of § 17-324 of this subtitle, the Commission may deny a license to any applicant, reprimand any licensee, or suspend or revoke a license if the applicant or licensee:

...
(3) directly or through another person willfully makes a misrepresentation or knowingly makes a false promise;

...
(25) engages in conduct that demonstrates bad faith, incompetency, or untrustworthiness or that constitutes dishonest, fraudulent, or improper dealings;

...
(32) violates any other provision of this title;

(33) violates any regulation adopted under this title or any provision of the code of ethics;

§ 17-613(c) of the Business Occupations & Professions Article states in part:

Penalty; factors

(1) The Commission may impose on a person who violates any provision of this title a penalty not exceeding:

- (i) \$ 5,000 for a first violation;
- (ii) \$ 15,000 for a second violation; and
- (iii) \$ 25,000 for a third or subsequent violation.

(2) In setting the amount of the penalty, the Board shall consider:

- (i) the seriousness of the violation;
- (ii) the harm caused by the violation;
- (iii) the good faith of the violator;
- (iv) any history of previous violations by the violator; and
- (v) any other relevant factors.

(3) The Board shall pay any penalty collected under this subsection into the General Fund of the State.

The Respondent has no prior complaints against him with the MREC. At the hearing, the MREC requested a thirty day suspension of the Respondent's real estate license and a \$5,000.00 fine based on the above factors. I agree that both are appropriate in this case based on the above actions by the Respondent.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law the following:

(1) the Respondent did not perform real estate services without a license; 17-301 and 17-601(b) of the Business Occupations and Professions Article of the Maryland Annotated Code (2010);

(2) the Respondent did not misrepresent himself as a licensed associate real estate broker; 17-602(b) of the Business Occupations and Professions Article of the Maryland Annotated Code (2010);

(3) the Respondent failed to exercise reasonable care and diligence in his dealings with the Complainant; 17-532(c)(1)(vi) of the Business Occupations and Professions Article of the Maryland Annotated Code (2010);

(4) the Respondent failed to obtain an executed buyer agreement from the Complainant; 17-533(g) of the Business Occupations and Professions Article of the Maryland Annotated Code (2010);

(5) the Respondent forced the Complainant to use a specific mortgage lender as a condition for settlement; 17-607(a)(4) of the Business Occupations and Professions Article of the Maryland Annotated Code (2010);
as well as COMAR 09.11.02.01H and 09.11.02.02A.

I further conclude that the appropriate sanction is a thirty day suspension of the Respondent's real estate license and a \$5,000.00 fine. Md. Code Ann., Bus. Occ. & Prof. §17-322(c) and 17-322b(3), (25), (32), and (33).

RECOMMENDED ORDER

I **RECOMMEND** that the Maryland Real Estate Commission suspend the Respondent's real estate license for a period of thirty days.

I **RECOMMEND** that the Maryland Real Estate Commission fine the Respondent \$5,000.00.

I further **RECOMMEND** that the Maryland Real Estate Commission's records reflect its final decision.

August 12, 2013
Date Decision Mailed

ZBW/emh
#144383

SIGNATURE ON FILE

Zuberi Bakari Williams
Administrative Law Judge

MARYLAND REAL ESTATE
COMMISSION

v.

FREDERICK MAKINDE,

License #527701

RESPONDENT

* BEFORE ZUBERI BAKARI WILLIAMS,
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