

BEFORE THE MARYLAND REAL ESTATE COMMISSION

MARYLAND REAL ESTATE COMMISSION *

v. *

CAREY G. HAYES
Respondent

* CASE NO. 2010-RE-252

* OAH NO. DLR-REC-21-10-26138

*

* * * * *

PROPOSED ORDER

The Findings of Fact, Conclusions of Law, and Recommended Order of the Administrative Law Judge dated March 23, 2011, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 7th day of June, 2011

ORDERED,

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

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

The Respondent violated Md. Bus. Occ. and Prof. Art. §§17-322(b)(22), (25), (31), and (33), 17-502(a), and COMAR 09.11.02.01C and 09.11.02.02A.

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

ORDERED that the Respondent Carey G. Hayes violated Md. Bus. Occ. and Prof. Art. §§17-322(b)(22), (25), (31), and (33); 17-502(a):

and COMAR 09.11.02.01C and 09.11.02.02A;

ORDERED that all real estate licenses held by the Respondent Carey G. Hayes be, and hereby are, SUSPENDED for a period of ninety (90) days;

ORDERED that the Respondent Carey G. Hayes pay a civil penalty in the amount of \$2,000.00 to the Maryland Real Estate Commission within thirty (30) days of the date of this Order;

ORDERED that the ninety (90) day license suspension and the \$2,000.00 civil penalty shall be concurrent with the ninety (90) day suspension and \$2,000.00 civil penalty imposed on the Respondent Carey G. Hayes in Case No. 2010-RE-215/216;

ORDERED that, if the Respondent Carey G. Hayes fails to pay the full amount of the civil penalty within the thirty (30) day time period, all real estate licenses held by him shall be suspended until it is paid, and this suspension is in addition to, and not in lieu of, the ninety (90) day 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 Order of the Administrative Law Judge had to be modified to provide that the civil penalty be paid within a thirty-day time period, and that the ninety-day license suspension and \$2,000.00 civil penalty be current with the suspension and penalty imposed on the Respondent in another case. The Recommended Order also had to be amended because it omitted the findings of violation that should be

included in the Order. The Conclusions of Law had to be amended because the sections of the law that were cited were not the sections charged, or the sections that the Judge found had been violated in his discussion of the case.

The caption of the case had to be amended as the Judge had included the name of a real estate company with which the Respondent was not affiliated.

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.

CAREY G. HAYES,
t/a EXECUHOME REALTY
RESPONDENT

* BEFORE D. HARRISON PRATT,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE OF
* ADMINISTRATIVE HEARINGS
* OAH CASE NO.: DLR-REC-21-10-26138
* REC COMPLAINT NO: 10-REC-252¹

* * * * *

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 December 4, 2010, George Evans (Complainant) filed a complaint with the Maryland Real Estate Commission (Commission or REC), an administrative unit of the Department of Labor, Licensing and Regulation (DLLR), against Carey G. Hayes (Respondent), a licensed real estate sales person. On July 14, 2010, the REC issued a Statement of Charges and Order for Hearing against the Respondent. On November 15, 2010, the REC issued an Amended Statement of Charges and Order for Hearing.

On January 7, 2011, I conducted a hearing at the Office of Administrative Hearings (OAH) in Hunt Valley, Maryland. Md. Code Ann., Bus. Occ. & Prof. § 17-324 (2010) (Business

¹ On November 12, 2009, Paul Cooper filed two complaints against the Respondent. Those complaints arose out of the same transactions as in the instant matter and the REC charges were identical in both cases. Both cases were heard together. See 2008-REC-215/216 and OAH case #DLR-HIC-21-10-26140 .

Occupations Article). Jessica Kaufman, Assistant Attorney General, represented the Commission. Neither the Respondent nor anyone authorized to represent him appeared.²

Procedure in this case is governed by the Administrative Procedure Act, the procedures for Administrative Hearings of the Office of the Secretary of the DLLR, the procedures for Hearings of the Commission, and the OAH Rules of Procedure. Md. Code Ann., State Gov't §§10-201 through 10-226 (2009 & Supp. 2010); Code of Maryland Regulations (COMAR) 09.01.02, 09.01.03, 09.11.03, and 28.02.01.

ISSUES

The issues are whether the Respondent violated the real estate law and, if so, whether the REC may suspend the Respondent's license and impose a civil penalty.

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on behalf of the Commission:³

REC Ex. #1 Notice of Hearing, October 1, 2010, for RE case # 10-REC-215/216

REC Ex. #2 Memorandum from DLLR to Sandra Sykes, Docket Specialist at OAH, with Amended Statement of Charges and Order for Hearing in REC case # 10-REC-216/216 attached, November 16, 2010

REC Ex. #3 Notice of Hearing, October 1, 2010, for RE case # 10-REC-252

REC Ex. #4 Memorandum from DLLR to Sandra Sykes, Docket Specialist at OAH, with Amended Statement of Charges and Order for Hearing in REC case # 10-REC-252 attached, November 16, 2010

REC Ex. #5 Certified mail receipt with copy of letter to the Respondent attached

REC Ex. #6 Respondent's licensing history

REC Ex. #7 REC Report of Investigation for REC case # 10-REC-215/216, March 9, 2010, for the complaint filed by Paul Cooper

² See Discussion, below.

³ These exhibits were admitted for both this case and the companion case: REC case #10-REC-215/216 and OAH case #DLR-REC-21-10-26140.

REC Ex. #8 REC Report of Investigation for REC case # 10-REC-252,
March 15, 2010, for the complaint filed by George Evans

The Respondent was not present at the hearing and therefore did not offer any exhibits.

Testimony

The following witnesses testified on behalf of the Commission:

1. Paul Cooper of Alex Cooper Auctioneers
2. Brenda Iman, Investigator for the REC

FINDINGS OF FACT

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

1. In the summer of 2009, the Respondent worked for Alex Cooper Auctions (Cooper) as a real estate agent/sales person. The Respondent was an independent contractor and Cooper was his broker.
2. In June 2009, the Respondent was acting as the buyer's agent for the purchase of two pieces of real estate. The properties were located at 2548 and 2550 Druid Park Drive in Baltimore, Maryland. The seller of both properties was Evans Realty, LLC (Evans or the seller). The buyer for both properties was New World Real Estate (New World or the buyer)⁴. The contract price for 2548 Druid Park Drive was \$60,000.00. The contract price for 2550 Druid Park Drive was \$47,500.00.
3. The parties executed a separate contract for each property. Each contract required the buyer to make an initial deposit of \$1,000.00. However, only one deposit of \$1,000.00 was made. That deposit was made by the buyer's issuing a check on June 25, 2009 for \$1,000.00 made out to Cooper, the Respondent's broker.

⁴ Stuart Dorsey is the owner of New World. At times, the "buyer" is referred to as "Dorsey."

4. On June 25, 2009, Finger Lakes Funding confirmed that the buyer was approved, and had good and available funds up to \$107,500.00 for the purchase of the two pieces of real estate.

5. The sale of the two pieces of real estate never went to settlement and the seller demanded that deposit money be remitted to it.

6. Cooper has a policy that all contracts and deposit money be turned in within 48 hours. Deposits must be placed in escrow within seven days.

7. In October 2009, Evans contacted Cooper seeking payment of the deposit money. This was the first Cooper was aware of the transactions. Cooper then contacted the Respondent who agreed to forward the contracts and deposit money.

8. The Respondent never turned in the contracts or the deposit check from the buyer.

DISCUSSION

The Respondent's Failure to Appear

Section 17-324 of the Business Occupations Article provides that before the Commission can take any final action against an individual, the individual must be personally served with a hearing notice or the hearing notice must be sent by certified mail at least ten days prior to the hearing to the individual's last known business address. Md. Code Ann., Bus. Occ. & Prof. § 17-324(d) (2010). If the individual, after receiving proper notice of the hearing, fails or refuses to appear, the Commission may hear and determine the matter despite the individual's absence. Md. Code Ann., Bus. Occ. & Prof. § 17-324(f) (2010).

The documents of record show that the OAH sent a Notice of Hearing to the Respondent by certified mail, return receipt requested, and by first class mail. These notices were mailed to the Respondent on November 16, 2010 at his address on record with the Commission. The notices advised the Respondent that a hearing would take place at 10:00 a.m. on January 7, 2011

at the OAH, 11101 Gilroy Road in Hunt Valley, Maryland. The mail receipt was signed by one Lisa Chamberlin. The Notice sent by first class mail was not returned by the post office.

Additionally, the Respondent initially answered correspondence and the complaint sent to him by the REC at his address of record. I find therefore that the Respondent was properly served with the Notice of Hearing and failed to appear; the Commission was entitled to proceed in the Respondent's absence. Md. Code Ann., Bus. Occ. & Prof. § 17-324(d), (f) (2010).

Statutory and Regulatory Charges

The Commission has charged the Respondent with violating sections 17-322(b)(22), (25), (31), and (33), 17-502(a) of the Business Occupations and Professions Article, as well as COMAR 09.11.02.01C and 09.11.02.02A. These statutes and regulations provide as follows:

§ 17-322. 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:

...

(22) fails to account for or to remit promptly any money that comes into the possession of the licensee but belongs to another person;

...

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

...

(31) violates any provision of Subtitle 5 of this title that relates to trust money;

...

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

§ 17-502. Handling of trust money.

(a) *Submission to brokers by associate brokers and salespersons.*- An associate real estate broker or a real estate salesperson who obtains trust money while providing real estate brokerage services promptly shall submit the trust money to the real estate broker

on whose behalf the associate real estate broker or the real estate salesperson provided the real estate brokerage services.

COMAR 09.11.02.01 - Relations to the Public

...

C. The licensee shall protect the public against fraud, misrepresentation, or unethical practices in the real estate field. The licensee shall endeavor to eliminate in the community any practices which could be damaging to the public or to the dignity and integrity of the real estate profession. The licensee shall assist the commission charged with regulating the practices of brokers, associate brokers, and salespersons in this State.

COMAR 09.11.02.02 - 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.

The Merits

As mentioned, the Respondent chose not to defend his actions at the hearing before me. He did, however, respond in writing to the complaint and he spoke to the REC Investigator, Ms. Iman. In his written response, the Respondent confirmed that there were two contracts of sale but that the transaction was negotiated as "one purchase." He alleged that the agreement between the parties called for a total deposit of \$1,000.00 and not \$1,000.00 for each contract. He also claimed, initially, that the deposit check was forwarded to Cooper. Later in his response, he claimed that "... it is likely that the check was inadvertently not submitted" because of the length of time that had elapsed. He stated further that, according to the law, the contracts did not have to be turned into Cooper because they had not been ratified. He also claimed that the buyer's funding fell through and that was the reason the sale was not completed. He indicated that the buyer initially refused to release any deposit money but then stated that the buyer would turn in the deposit check by December 15, 2009.

When interviewed by Ms. Imam, the REC investigator, the Respondent essentially reiterated what he had stated in his written response to the complaint. He added however, that the buyer had offered to pay the \$1,000.00 deposit to the seller Evans, but that Evans had refused the offer.

Paul Cooper of Alex Cooper Auctioneers, the Respondent's broker, testified that he first learned of the transactions between Evans and New World when, on October 27, 2009, he received an email message from Evans requesting the payment of the deposits. Cooper's policy requires agents to submit contracts within 48 hours of execution along with any deposit moneys. Deposit money's must be deposited into escrow within seven days. Cooper then contacted the Respondent who indicated that he was "working on it." He also stated, initially, that the buyer would not release any deposit money. He was uncertain as to the location of the deposit check from the buyer. Neither the contracts nor deposit money was ever turned into Cooper.

On October 29, 2009, Marc Butler, a partner in New World, called Paul Cooper indicating that the buyer would not release any deposit money. Butler also indicated that regardless of what was contained in the contracts, the agreement between buyer and seller called for a deposit of \$1,000.00 total, \$500.00 for each property. Butler offered to bring a copy of the cancelled deposit check to Cooper but never did. Cooper then filed a complaint with the REC claiming that the Respondent submitted contracts to the seller under false pretenses, *i.e.* deposit money being held in Cooper's escrow account in the amount of \$1,000.00.

On December 4, 2009, Evans filed a complaint with the REC against both Hayes and Cooper alleging that they failed to ensure that deposit money was escrowed and that the seller

had not received any deposit money. Evans also filed a claim against the REC Guaranty Fund for \$2,000.00, the amount of deposits called for in the contracts of sale.⁵

As mentioned, this case concerns only regulatory charges against the Respondent. In spite of the Respondent's protestations that the buyer and seller agreed that there would be a deposit of only \$1,000.00 to cover both transactions, the contracts clearly call for \$1,000.00 deposits for both contracts. Regardless of the amount of deposit required, the evidence before me shows that neither the contracts nor any deposits were forwarded to Cooper. The Respondent all but acknowledged as much when he indicated that ". . . it is likely that the check was inadvertently not submitted," referring to the deposit check from the buyer.

The Respondent has given various explanations concerning the deposits. First he indicated that the agreement between the parties was for one deposit of only \$1,000.000. Even assuming that to be the case, the handling of the transactions was at best sloppy in that the alleged verbal agreement was not in accord with the written contracts. By failing to fully clarify the deposit agreement in writing, the Respondent failed to protect his client. Additionally, he initially claimed that the contracts and deposit check were forwarded to his broker but then acknowledged that perhaps this did not occur. At best, this demonstrates incompetence in the handling of his affairs, actions which also ill served his client as well as his broker. Clearly the Respondent failed to account for and remit the deposit made by the buyer.

I find therefore, that the Respondent has violated the following statutes or regulations:

1. Md. Code Ann., Bus. Occ. & Prof. § 17-322(b)(22) because he failed to account for and remit to his broker the deposit money from the buyer.

⁵ The REC informed Evans that the claim for the deposits could not be resolved by the REC Guaranty Fund because it did "not have any authority to determine which party to the contract (buyer or seller) is entitled to the good faith deposit." Therefore, the claim against the Guaranty Fund is not before me. Additionally, the complaint filed against Cooper by Evans is not before me.

2. Md. Code Ann., Bus. Occ. & Prof. § 17-322(b)(25) because his actions or lack thereof demonstrate incompetence in that he failed to have the actual agreement properly memorialized in the contracts.

3. Md. Code Ann., Bus. Occ. & Prof. § 17-322(b)(31) because he failed to “promptly” submit trust money as required pursuant to Md. Code Ann., Bus. Occ. & Prof. § 17-502(a).

4. Md. Code Ann., Bus. Occ. & Prof. § 17-502(a), as indicated in #3 above.

5. COMAR 09.11.02.01C - Relations to the Public. This regulation addresses “fraud, misrepresentation, or unethical practices in the real estate field.” Although the REC claims that the Respondent was untruthful when he said he had turned in the contracts and deposit check, the evidence before me is insufficient to show fraud or intentional misrepresentation. The evidence does show sloppy business practices, ignorance as to reporting practices and the law and incompetence. However, this regulation also addresses “practices which could be damaging to the public or to the dignity and integrity of the real estate profession.” Because the Respondent’s actions could be damaging to the dignity of the profession, I find that he has violated this regulation.

6. COMAR 09.11.02.02A – Relations to the Client. This regulation concerns the Respondent’s obligation to “protect and promote the interests of the client.” By failing to make clear in the written contract the exact nature of the agreement concerning earnest money deposits, the Respondent failed to protect his client.⁶

Sanctions

Business Occupations Article § 17-322(c) (2010) governs the imposition of monetary penalties and provides, in pertinent part, as follows:

⁶ I note that Evans did not appear at the hearing. Nevertheless, the evidence presented demonstrates violations by the Respondent involving both Cooper and Evans.

(c) *Penalty.* – (1) Instead of or in addition to reprimanding a licensee or suspending or revoking a license under this section, the Commission may impose a penalty not exceeding \$5,000 for each violation.

(2) To determine the amount of the penalty imposed, the Commission shall consider:

- (i) the seriousness of the violation;
- (ii) the harm caused by the violation;
- (iii) the good faith of the licensee; and
- (iv) any history of previous violations by the licensee....

The statute is designed to protect the public from professional wrongdoing. The requirements to treat all parties to a transaction honestly and fairly, to properly supervise those acting on the agent's behalf, and to handle deposit monies properly, are not a matter of judgment; these mandates are imposed upon a real estate agent/sales person by statute and regulation. These requirements go to the essence of what the public rightly expects from real estate licensees. At the hearing, the REC argued that the Respondent's actions were serious and that they caused harm to the Complainant. In addition, the Respondent has refused to participate in these proceedings, thereby demonstrating bad faith.

Accordingly, a civil penalty is warranted. The Commission recommended a 90 day license suspension in the instant matter and in the companion case, REC case # 10-REC-252 and OAH case # DLR-REC-21-10-26140, the suspension to be concurrent, i.e. a total of 90 days suspension. The REC also recommended a civil penalty of \$2000.00 for this matter and the companion case combined, *i.e.* a total penalty of \$2000.00.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Respondent violated Business Occupations Article §§ 17-322(b); 17-502(b); 17-530(c) and (d); and the Real Estate Commission Code of Ethics, COMAR 09.11.05.02A.

I further conclude as a matter of law that the Maryland Real Estate Commission may suspend the Respondent's license for ninety days and impose on him a monetary penalty of \$2,000.00. Md. Code Ann., Bus. Occ. & Prof. §§17-322(b)(25), (27), (30),(31) and (33) and 17-322(c) (2010). **RECOMMENDED ORDER**

Therefore, I **RECOMMEND** that the Maryland Real Estate Commission:

ORDER that Respondent Carey G. Hayes' license be suspended for ninety days and that he be required to pay a \$2,000.00 civil penalty for violating the provisions of the Business Occupations Article; and, I further

RECOMMEND that the Maryland Real Estate Commission **ORDER** that the records and publications of the Maryland Real Estate Commission reflect its final decision.

March 23, 2011
Date Decision Mailed

SIGNATURE ON FILE

D. Harrison Pratt
Administrative Law Judge

#121299

MARYLAND REAL ESTATE

*** BEFORE D. HARRISON PRATT,**

COMMISSION

*** AN ADMINISTRATIVE LAW JUDGE**

v.

*** OF THE MARYLAND OFFICE OF**

CAREY G. HAYES,

*** ADMINISTRATIVE HEARINGS**

t/a EXECUHOME REALTY

*** OAH CASE NO.: DLR-REC-21-10-26138**

RESPONDENT

*** REC COMPLAINT NO: 10-REC-252⁷**

*** * * * ***

FILE EXHIBIT LIST

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