

BEFORE THE
BUREAU OF REAL ESTATE
STATE OF CALIFORNIA

FILED

MAY 14 2014

BUREAU OF REAL ESTATE

By *L. Frost*

In the Matter of the Accusation of)
)
JOHN JAY MANGUBA NATIVIDAD,) NO. H-5986 SAC
)
Respondent.) OAH NO. 2013060859
)
_____)

DECISION

The Proposed Decision dated April 7, 2014, of the Administrative Law Judge of the Office of Administrative Hearings is hereby adopted as the Decision of the Real Estate Commissioner in the above-entitled matter.


The Decision suspends or revokes one or more real estate licenses, but the right to a restricted license is granted to Respondent.

The right to reinstatement of a revoked real estate license or to the reduction of a suspension is controlled by Section 11522 of the Government Code. A copy of Section 11522 and a copy of the Commissioner's Criteria of Rehabilitation are attached hereto for the information of respondent.

This Decision shall become effective at 12 o'clock noon on JUN 02 2014.

IT IS SO ORDERED 5/13/2014

REAL ESTATE COMMISSIONER


WAYNE S. BELL

BEFORE THE
BUREAU OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

JOHN JAY MANGUBA NATIVIDAD,

Respondent.

Case No. H-5986 SAC

OAH No. 2013060859

CORRECTED PROPOSED DECISION

This matter was heard before Danette C. Brown, Administrative Law Judge, Office of Administrative Hearings, State of California, on February 24, 2014, in Sacramento, California.

Jason D. Lazark, Legal Counsel, Bureau of Real Estate (bureau), represented complainant Tricia D. Sommers, Deputy Real Estate Commissioner of the State of California.

John Jay Natividad (respondent) was present, and was represented by Sasha F. Ganji, Attorney at Law.

Evidence was received, the record was closed, and the matter was submitted for decision. The administrative law judge issued a proposed decision on March 20, 2014.

On March 27, 2014, counsel for complainant filed with the Office of Administrative Hearings an application¹ for correction of a mistake or clerical error pursuant to Government Code section 11518.5, on the basis that the Order in the Proposed Decision misstated the bureau's costs, in that the total costs were \$2,199.60, not \$4,177.20. By email dated April 2, 2014,² respondent stated that he did not oppose the application. The application is granted. Corrections were made to Factual Finding 18, Legal Conclusions 12 and 13, and paragraph 2 of the Order.

¹ The application was marked and admitted as Exhibit 10.

² The email was marked and admitted as Exhibit 11.

FACTUAL FINDINGS

1. Respondent's license history reflects that on June 29, 2001, the bureau issued a real estate salesperson license to respondent.³ On April 8, 2005, the bureau issued real estate broker license number B01313460 to respondent, doing business as Majestic Realty Group, Majestic Mortgage Solutions and Cosmopolitan Realtors & Associates. Respondent's broker license expires on April 7, 2017, unless renewed.

2. On March 18, 2013, complainant made and filed the Accusation in her official capacity. Complainant seeks to revoke respondent's real estate broker license based upon his negligence or incompetence involving the sale of real property located on Camino Segura in Pleasanton (subject property). The tenant of the subject property risked losing his sizeable security deposit, causing tenant to sue the sellers and buyers in the sales transaction.

3. Respondent timely filed a Notice of Defense to the Accusation, pursuant to Government Code section 11506. The matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.

4. On January 9, 2011, respondent entered into a California Residential Listing Agreement to list for sale the subject property owned by Fidel and Carrie A. (sellers). On the same date, the sellers completed a Disclosure Regarding Real Estate Agency Relationship (Disclosure), indicating that respondent's company, Majestic Realty Group, acted as the broker for the seller.

5. On January 23, 2011, respondent entered into an agency relationship with Tao W. and Hong C., (buyers), by completing another Disclosure. Respondent thereafter represented the buyers and the sellers of the subject property as their broker. That same day, the buyers entered into an agreement to purchase the subject property by completing a California Residential Purchase Agreement and Joint Escrow Instructions.

6. The Disclosure provided, in part, the following language:

In a dual agency situation, the agent has the following affirmative obligations to both the Seller and the Buyer:

- (a) A fiduciary duty of utmost care, integrity, honesty and loyalty in the dealings with either the Seller or the Buyer.
- (b) Other duties to the Seller and the Buyer as stated above in their respective sections.

³ No other license history regarding respondent's real estate salesperson license was provided.

7. The subject property was occupied by tenant Charles B. (tenant). Tenant testified that he leased the subject property from the sellers beginning on June 10, 2010. The lease term was one year. Tenant provided a total security deposit of \$7,500, consisting of a \$4,500 security deposit, a pet deposit of \$2,000, and a refundable deposit of \$1,000. On September 28, 2010, tenant found a foreclosure notice posted on the door stating that the subject property was scheduled for auction on October 18, 2010. In early January 2011, the sellers called tenant and informed him that they were selling the subject property. Tenant and sellers renegotiated their lease contract. On February 14, 2011, tenant informed respondent that he was moving out of the subject property, and that he wanted the sellers to return his security deposit in the amount of \$7,500. Tenant was concerned that seller might not return his deposit after speaking with a former tenant, who told tenant that the sellers failed to return his security deposit. The former tenant did not pursue the recovery of his deposit. Tenant informed respondent that if the sellers did not refund tenant's security deposit, the buyers would be responsible for returning the deposit. Tenant informed respondent several times prior to the sale of his intent to hold the buyers liable for the return of his security deposit if the sellers did not do so. Tenant made repeated inquiries to respondent about the status of the return of his security deposit. Respondent failed to inform the buyers of tenant's intent to hold them liable if the sellers failed to refund his deposit.

8. On February 17, 2011, the sellers completed a Seller Property Questionnaire which asked, *inter alia*, whether the sellers knew of any material facts affecting the property, or any "[p]ast, present, pending or threatened lawsuits ... affecting or relating to the Property, Homeowner Association or neighborhood." The sellers answered "No" to both questions. Respondent reviewed and initialed the questionnaire on the same date, thus affirming that there were no material facts affecting the property, and no present, pending or threatened lawsuits, despite tenant's repeated concerns and statements to respondent that if the sellers did not return the security deposit, the buyers would be liable.

9. Tenant testified that he moved out on March 10, 2011. A final "walk-through" of the subject property occurred on April 21, 2011. The sellers wanted tenant to pay for more than \$500 in repairs, and after several phone calls and emails, they were unable to agree on a reasonable settlement of the final deposit to be returned to tenant. At the close of escrow on April 13, 2011, the sellers had not yet returned tenant's security deposit. Respondent's firm earned a six percent commission on the sale of the subject property, amounting to \$40,500.

10. On April 20, 2011, tenant testified that he sent an email to respondent about his intent to sue the sellers and the buyers to claim his security deposit. Tenant asked respondent to inform the buyers of their risk of liability. He did not do so. Tenant contacted the buyers, and the buyers confirmed in a November 16, 2011 email to tenant that respondent did not inform them of tenant's claim. Had respondent done so, the buyers would not have "close[d] the deal" until the issue was cleared.

11. On May 24, 2011, tenant filed a lawsuit in small claims court⁴ against the buyers and sellers, seeking the return of his security deposit, less rent due of \$1,500, for a total of \$6,000. Tenant also sought damages due to the delay in returning his deposit, and sought the statutory maximum damage limit for \$7,500. Tenant testified that the buyers repeatedly requested to be removed from the lawsuit, which was denied. On June 1, 2012, the court entered judgment in favor of tenant in the amount of \$5,950 plus \$75 in costs against the sellers.⁵

12. On July 14, 2011, tenant filed a complaint with the bureau. In his complaint, tenant indicated that he was a renter of the subject property, which was put on the market as a short sale with respondent as the listing agent. The seller delayed the return of tenant's \$7,500 security deposit. Respondent was aware of the problem. Tenant and respondent communicated several times via phone and email regarding tenant's concerns. Tenant suspected that the seller was going to keep his deposit, and he asked respondent to advise the buyers of the issue and of the risk that they could be liable. Respondent stated in an email to tenant that he had informed the buyers, but after speaking with the buyers, tenant learned that the buyers did not know of tenant's claim. Tenant complained to the bureau that respondent failed to disclose material information to the buyers that may have impacted their purchase decision. Due to respondent's failure to inform the buyers of tenant's claim of his security deposit, buyers were named in tenant's small claims lawsuit.

13. After conducting an investigation of tenant's complaint to the bureau, complainant issued the Accusation against respondent.

Respondent's Evidence

14. Respondent testified that he learned for the first time about tenant's intent to sue the sellers and buyers for return of his security deposit on April 20, 2011. Tenant made no "threats" to sue prior to that time, therefore respondent asserted that he had no duty to disclose anything to the buyers. Respondent's testimony was not credible in this regard. Respondent admitted having several prior discussions with tenant about his concerns with the sellers not returning his security deposit, but respondent always referred tenant to the seller. Respondent believed that the return of the security deposit was simply a matter between the sellers and tenant, and that it was not related to the sale of the subject property. Respondent believed that his role was only to sell the property, and that he was not in the position to discuss the security deposit issue with the buyers because the sellers did not disclose anything to him about the deposit. Respondent believed that he did not have the right to ask the sellers whether they intended to return tenant's deposit. In respondent's opinion, tenant was still living in the subject property at the time he inquired about the return of his security

⁴ Superior Court of California, County of Alameda, Gale/Schenone Hall of Justice, Case No. VS11577120.

⁵ The court documents did not indicate whether the buyers were also held jointly and severally liable for tenant's damages.

deposit. He felt the right time to discuss return of the security deposit was when tenant moved out. Respondent did not feel that he committed any ethical violations in this matter.

Discussion

15. Tenant testified credibly about his concerns regarding the return of his security deposit, and his repeated communications with the sellers and respondent that the buyers could be liable if his security deposit was not returned. Tenant's claim for the return of his security deposit was a material fact affecting the subject property that respondent should have disclosed to the buyers. Respondent did not inform the buyers of this risk.

16. Respondent breached his fiduciary duty of utmost care, integrity, honesty and loyalty in his dealings with both the sellers and the buyers by failing to disclose tenant's claim for the return of his security deposit. If he had done so, the buyers would not have "closed the deal" until tenant's issue was resolved. Respondent's failure to disclose the material fact of tenant's claim subjected the buyers to risk of loss. Respondent knew or should have known that tenant's claim was significant and material enough to delay or impair the sale of the subject property.

17. Respondent's claim that he did not learn of the lawsuit until April 20, 2011, and therefore had no duty to inform the buyers of this material fact prior to that time lacks merit. Tenant had been informing respondent of his intent to claim his security deposit against either the buyers or the sellers as early as February 2011. Tenant repeatedly mentioned the size of the deposit and how important it was to be returned. Therefore, respondent knew of a potential lawsuit against the buyers that he should have disclosed. Tenant's intent to seek recourse against the buyers was clear, and it should have been disclosed in the Disclosure, as well as to the buyers.

Costs

18. Complainant has requested reimbursement for costs incurred by the bureau in connection with prosecution and investigation of this matter, in the total amount of \$2,199.60. (\$551.80 for prosecution, and \$1,567.80 for investigation). The costs were certified in the manner provided by Business and Professions Code section 10106. The time spent appears to be reasonable, and the activities claimed were necessary for the development and presentation of the case. Respondent did not present evidence regarding his ability to pay costs of prosecution and investigation.

LEGAL CONCLUSIONS

Burden of Proof

1. In an Accusation seeking to revoke, suspend, or otherwise discipline respondents' professional licenses, the agency has the burden of proof to establish the allegations in the Accusation by "clear and convincing evidence." (*Ettinger v. Board of*

Medical Quality Assurance (1982) 135 Cal.App.3d 853, 856.) The department has the burden of proving the facts alleged in the Accusation by clear and convincing evidence to a reasonable certainty. (*Realty Projects v. Smith* (1973) 32 Cal.App.3d 204.)

Applicable Statutes and Regulations

2. Business and Professions Code section 10131, subdivision (a), states that a real estate broker is a person who, for a compensation or in expectation of a compensation, regardless of the form or time of payment, does or negotiates to do one or more of the following acts for another or others:

(a) Sells or offers to sell, buys or offers to buy, solicits prospective sellers or purchases of, solicits or obtains listings of, or negotiates the purchase, sale or exchange of real property or a business opportunity.

3. Business and Professions Code section 10177, subdivision (g), states, in pertinent part:

The commissioner may suspend or revoke the license of a real estate licensee, or may deny the issuance of a license to an applicant, who has done any of the following ...

[¶]...[¶]

(g) Demonstrated negligence or incompetence in performing an act for which he is required to hold a license.

[¶]...[¶]

Broker's Duties

4. Standing in a fiduciary relationship with their principals, real estate brokers are subject to the: (1) duty of loyalty and good faith (*Burch v. Argus Properties, Inc.* (1979) 92 Cal.App.3d 128, 131, 154); (2) duty to be honest and truthful (*Ward v. Taggart* (1959) 51 Cal.2d 736, 741); and (3) duty to investigate and disclose material facts that might affect the principal's decision (*Roberts v. Lomanto* (2003) 112 Cal.App. 4th 1553, 1567.) A real estate broker has a fiduciary duty to disclose to his principals all "material facts – that is, all facts which might affect the principal's willingness to enter into or complete a transaction." The test of materiality is objective: whether a reasonable person in the principal's position would have acted differently had he known the undisclosed facts." (*Ibid.*) The duty to disclose material facts arises upon creation of the principal-broker relationship, before the purchase contract is entered into. (*Excess Electronix v. Heger Realty Corp.* (1998) 64 Cal.App. 4th 698.)

5. As set forth in Findings 10 and 16, the buyers would not have “closed the deal” had they known of tenant’s potential claim against them. Tenant’s claim to his security deposit was a material fact that would have caused the buyers to “act differently” by not completing the sales transaction. Thus, respondent breached his fiduciary duty to disclose material facts to the buyers, by not disclosing tenant’s claim to the buyers at the time tenant made known his concerns to respondent.

6. As set forth in Finding 14, respondent believed that tenant’s claim was a confidential matter that he could not discuss with the buyers, because the sellers did not discuss the issue with him. He did not feel he had the right to ask the sellers whether they intended to return the security deposit. A “dual agency” arises where the same salesperson (or same brokerage firm, through different salesperson) represents both buyer and seller. In such cases, the broker is a fiduciary for both buyer and seller. (*Fragale v. Faulkner* (2003) 110 Cal.App.4th 229, 235, 239.) The limitations on broad disclosure do “not alter in any way the duty or responsibility of a dual agent to any principal with respect to confidential information other than price.” (*Brown v. FSR Brokerage, Inc.* (1998) 62 Cal.App.4th 766, 777.) Thus respondent owed a duty to disclose what he felt was confidential information, i.e., tenant’s claim, to the buyers.

7. As set forth in Finding 16, respondent also breached his fiduciary duty of utmost care, integrity, honesty and loyalty, to ensure that tenant’s claim would be satisfied prior to close of escrow. If he had addressed tenant’s claim with the sellers, and disclosed tenant’s claim to the buyers, the issue could have been resolved prior to or during the close of escrow, without tenant having to sue the buyers and sellers for his security deposit. Respondent’s failure to exercise due care to both the buyers and sellers subjected them to legal action by tenant. The buyers would not have gone forward with the purchase of the subject property had they known of tenant’s claim. Respondent’s firm profited \$40,500 as a result of the sale.

8. By virtue of respondent’s breach of his duties as set forth in Legal Conclusions 5 through 7, respondent demonstrated negligence as a real estate broker. Even if the evidence did not establish that respondent was negligent, he was, at the very minimum, incompetent with respect to his duty to disclose material facts.

Cause for Revocation

9. Cause for revocation of respondent’s real estate license was established pursuant to Business and Professions Code sections 10177, subdivision (g), by reason of Findings 4 through 13, and Legal Conclusions 4 through 8.

Appropriate Discipline

10. Respondent’s breach of his duties as a real estate broker is a serious matter. Tenant was justifiably concerned with the return of his security deposit. After being required to move out of the subject property before the end of his lease, the tenant told respondent on multiple occasions of his intention to hold the buyers liable for the return of his security deposit if the sellers did not do so. Respondent chose to stay out of the situation and he

consistently referred tenant to the sellers for answers. Respondent failed to disclose tenant's claim to the buyers, who would not have "closed the deal" if they had been informed of the tenant's potential claim against them. This resulted in a judgment for damages against them. Respondent provided little or no evidence by way of justification or mitigation. His failure to acknowledge the consequences of his actions creates the concern that he does not know his fiduciary duties as a real estate broker, particularly when acting as a dual agent. In this regard, some discipline is required in order to assure the public that respondent can carry out his fiduciary duties as a broker in the future.

Costs of Investigation and Prosecution

11. Business and Professions Code section 10106 provides, in pertinent part, that the commissioner may request the administrative law judge to direct a licensee found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case. Subdivision (c), states:

(c) A certified copy of the actual costs, or a good faith estimate of costs where actual costs are not available, signed by the commissioner or the commissioner's designated representative, shall be prima facie evidence of reasonable costs of investigation and prosecution of the case. The costs shall include the amount of investigative and enforcement costs up to the date of the hearing, including, but not limited to, charges imposed by the Attorney General.

12. As set forth in Finding 18, the reasonable costs of investigating and prosecuting this matter by the bureau are \$2,199.60. The factors to be considered in determining the reasonableness of costs pursuant to statutory provisions like Business and Professions Code section 10106 were identified in *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, to include whether the licensee has been successful at hearing in getting charges dismissed or reduced; the licensee's subjective good faith belief in the merits of his or her position; whether the licensee has raised a colorable challenge to the proposed discipline; the financial ability of the licensee to pay; and whether the scope of the investigation and prosecution was appropriate to the nature of the misconduct. In the Accusation against respondent, the cause for discipline was established despite respondent's subjective good faith belief in his position. He offered no colorable challenge to the proposed discipline, and did not present evidence of his inability to pay costs. The bureau is entitled to costs.

13. Under all of the facts and circumstances, and balancing respondent's concerns against the bureau's obligation to protect the public through licensing actions such as this one, assessment of costs in the amount of \$2,199.60, in bringing and prosecuting the Accusation is reasonable and appropriate.

ORDER

1. All licenses and licensing rights of respondent John Jay Manguba Natividad are revoked; provided, however a restricted real estate broker license shall be issued to respondent pursuant to Section 10156.5 of the Business and Professions Code if respondent makes application therefor and pays to the Bureau of Real Estate the appropriate fee for the restricted license within 90 days from the effective date of this Decision. The restricted license issued to respondent shall be subject to all of the provisions of Section 10156.7 of the Business and Professions Code and to the following limitations, conditions and restrictions imposed under authority of Section 10156.6 of that Code:

a. The restricted license issued to respondent may be suspended prior to hearing by Order of the Real Estate Commissioner in the event of respondent's conviction or plea of nolo contendere to a crime which is substantially related to respondent's fitness or capacity as a real estate licensee.

b. The restricted license issued to respondent may be suspended prior to hearing by Order of the Real Estate Commissioner on evidence satisfactory to the Commissioner that respondent has violated provisions of the California Real Estate Law, the Subdivided Lands Law, Regulations of the Real Estate Commissioner or conditions attaching to the restricted license.

c. Respondent shall not be eligible to apply for the issuance of an unrestricted real estate license nor for the removal of any of the conditions, limitations or restrictions of a restricted license until two years have elapsed from the effective date of this Decision.

d. Respondent shall, within nine months from the effective date of this Decision, present evidence satisfactory to the Real Estate Commissioner that respondent has, since the most recent issuance of an original or renewal real estate license, taken and successfully completed the continuing education requirements of Article 2.5 of Chapter 3 of the Real Estate Law for renewal of a real estate license. If respondent fails to satisfy this condition, the Commissioner may order the suspension of the restricted license until respondent presents such evidence. The Commissioner shall afford respondent the opportunity for a hearing pursuant to the Administrative Procedure Act to present such evidence.

e. Respondent shall, within nine months from the effective date of this Decision, take and pass the Professional Responsibility Examination administered by the bureau including the payment of the appropriate examination fee. If respondent fails to satisfy this

condition, the Commissioner may order suspension of respondent's license until respondent passes the examination.

f. Respondent shall report in writing to the Bureau of Real Estate as the Real Estate Commissioner shall direct by his Decision herein or by separate written order issued while the restricted license is in effect such information concerning respondent's activities for which a real estate license is required as the Commissioner shall deem to be appropriate to protect the public interest.

Such reports may include, but shall not be limited to, periodic independent accountings of trust funds in the custody and control of Respondent and periodic summaries of salient information concerning each real estate transaction in which the Respondent engaged during the period covered by the report.

2. Pursuant to Legal Conclusions 11 to 13, respondent shall pay to the Commissioner the sum of \$2,199.60, representing the costs of investigation and prosecution by the bureau, in a manner as provided by the bureau.

DATED: April 7, 2014



DANETTE C. BROWN
Administrative Law Judge
Office of Administrative Hearings