

FILED

SEP -7 2021

DEPT. OF REAL ESTATE

By *[Signature]*

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of: SHAWN R. ELLIOTT, Respondent.)))))	DRE No. H-41869 LA OAH No. 2021030802
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DECISION

The Proposed Decision dated July 22, 2021 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 broker license is granted to Respondent.

Pursuant to Government Code Section 11521, the Department of Real Estate may order reconsideration of this Decision on petition of any party. The party seeking reconsideration shall set forth new facts, circumstances, and evidence, or errors in law or analysis, that show(s) grounds and good cause for the Commissioner to reconsider the Decision. If new evidence is presented, the party shall specifically identify the new evidence and explain why it was not previously presented. The Department's power to order reconsideration of this Decision shall expire 30 days after mailing of this Decision, or on the effective date of this Decision, whichever occurs first.

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The right to reinstatement of a revoked real estate license or to the reduction of a penalty is controlled by Section 11522 of the Government Code. A copy of Sections 11521 and 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 SEP 27 2021.

IT IS SO ORDERED 9.1.21

DOUGLAS R. McCAULEY
REAL ESTATE COMMISSIONER

Douglas R. McCauley

**BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:

SHAWN R. ELLIOTT, Respondent

Agency Case No. H-41869 LA

OAH No. 2021030802

PROPOSED DECISION

Thomas Lucero, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by videoconference on June 23, 2021. Andrea Bentler, Staff Counsel, represented Maria Suarez, complainant, a Supervising Special Investigator of the State of California. Shawn R. Elliott, respondent, represented himself. Testimony and documents were received in evidence. The record closed and the matter was submitted for decision on June 23, 2021.

STATEMENT OF THE CASE

Encountering financial distress, respondent borrowed money from a client in New York and was for a few years unable to repay the entire loan as agreed. The client complained to New York real estate regulatory authorities. Respondent agreed to a consent order for repayment, but failed to fulfill its terms, ending with disciplinary proceedings and revocation of respondent's New York license. Respondent has since

repaid the client and they are on good terms. But respondent failed to report the New York disciplinary proceedings timely as required by California law. Respondent sincerely apologized for all aspects of his misconduct.

ISSUES

Whether respondent's misconduct in New York, compounded by his failure to follow California disclosure obligations, is grounds for discipline of his California broker license and, if so, what degree of discipline is warranted.

SUMMARY OF DECISION

Respondent's misconduct in New York is serious enough to warrant discipline in this state, but he made his New York client whole and presented other good evidence of thoroughgoing rehabilitation. On the other hand, respondent's failure to disclose the New York proceedings to DRE constitutes grounds for discipline not entirely mitigated by respondent's considerable efforts at rehabilitation. A restricted license is warranted.

FINDINGS OF FACT

1. Respondent timely sought a hearing in a February 7, 2021 Notice of Defense on Accusation, which he filed in response to the accusation DRE served on January 26, 2021.
2. On December 19, 2017, as indicated in Exhibit 2, DRE issued respondent license number B/02018471, which is scheduled to expire on December 18, 2021.

2019 Discipline of Respondent's New York Broker License

3. In November 2019, as set out in Exhibit 3, the State of New York disciplined respondent's license to act as a real estate broker.

A. In September 2016, a law firm acting on behalf of Lawrence Helfant filed a complaint with the Division of Licensing Services (Licensing Division), Department of State, the New York agency that regulates real estate brokers and enforces the state's real estate laws. Among the allegations were that:

i. Respondent committed fraud in failing to pay Mr. Helfant \$106,875 which, under a Notice of Assignment, was due within 72 hours of the March 5, 2016 close of a sale of real property in Brookeville, New York.

ii. Respondent had made five partial payments to Mr. Helfant totaling \$42,500, but still owed him \$64,375 plus ten percent interest.

B. In June 2018, the Licensing Division filed a complaint against respondent, case number 2016-1693.

C. On July 6, 2018, respondent agreed to a Consent Order, which became effective on October 16, 2018. The Consent Order was based on the agreement between respondent and the Licensing Division that:

i. By failing to cooperate with investigation by the Licensing Division, respondent violated section 442-e(5) of the New York State Property Law (NY RPL).

ii. Respondent failed timely to satisfy the terms of the Notice of Assignment with respect to Mr. Helfant, in violation of NY RPL section 441-c.

D. Terms of the Consent Order included requirements that respondent:

- i. Pay a fine of \$1,000 due November 2, 2018; and
- ii. Pay Mr. Helfant \$21,000 in restitution due November 2, 2018.

E. Because respondent did not comply with the Consent Order, a hearing was set. Respondent did not appear at either session of the hearing on March 13 and June 19, 2019. In a November 21, 2019 decision, the ALJ revoked respondent's New York broker license, finding that:

i. "By misrepresenting to Mr. Helfant that the closing for the subject property never took place and by defaulting on the money owed to Mr. Helfant pursuant to the Notice of Assignment . . . [respondent] demonstrated untrustworthiness pursuant to RPL §441-c."

ii. "By failing to provide the documentation that the DLS (Licensing Division) was seeking . . . [respondent] violated RPL §442-e(5) and demonstrated untrustworthiness in violation of RPL §441-c."

iii. By failing to comply with the terms of the Consent Order, the respondent has demonstrated untrustworthiness pursuant to RPL §441-c."

4. As set out in the Department's October 23, 2020 license certification, Exhibit 4, respondent did not inform DRE of the New York disciplinary action within 30 days, as required by Business and Code section 10186.2. Also noteworthy in Exhibit 4 is the last paragraph, just above the signature block, of the Broker Exam & License

Certification, which respondent signed under penalty of perjury on September 15, 2016:

I understand that it is my obligation to notify the Bureau [now called the Department, DRE] upon licensure within 30 days in writing or by filing form RE 238 of any . . . disciplinary action taken by another licensing entity or authority of this state or an agency of the federal government pursuant to Business and Professions Code section 10186.2. . . .

Respondent's Evidence

5. As respondent testified believably, he did nothing and had no intent to conceal the New York discipline. He had not faced comparable disciplinary proceedings in the past and simply gave no thought to whether they might concern the authorities or people of California.

6. Regarding events that led to the discipline of his New York license, respondent explained that approximately six years ago, when his business encountered significant setbacks, he borrowed money from Mr. Helfant, with whom he was friendly. Respondent executed a Notice of Assignment, under which respondent was obligated to repay Mr. Helfant's loan of \$107,000 upon the closing of a purchase and sale transaction of real property in Old Brokerville, New York. The transaction closed in March 2015, but respondent was unable to repay Mr. Helfant in full. For approximately three years, respondent made sporadic partial repayments, though his business continued to struggle. Mr. Helfant complained to New York real estate

authorities, as described above, when respondent was liable for a balance of \$17,845, plus 10 percent yearly interest.

7. Respondent testified credibly that he always intended to repay and would have repaid Mr. Helfant as promised but for unforeseen difficulties. He agreed to the Consent Order because, again, he believed he could fulfill its terms. Respondent also intended to attend the hearing in New York following his failure to abide by the Consent Order, but did not because of a last-minute personal emergency, the details of which are not in evidence. As respondent emphasized, however, he has since made Mr. Helfant whole and they are once again on friendly terms.

8. In a February 24, 2020 letter, Exhibit A, a lawyer representing Mr. Helfant advised the New York Department of State that "Mr. Helfant has received all amounts due and owing to him by [respondent] in accordance with the Consent Order dated October 16, 2018"

9. In a February 27, 2020 affidavit, Exhibit B, Mr. Helfant declared that "as a result of [respondent's] compliance with the Consent Order, and the fact that I have been paid all outstanding sums owed, I fully support [respondent's] re-application for his Real Estate Broker's License."

10. In an October 30, 2020 letter, Exhibit C, addressed to whom it may concern, Mr. Helfant wrote a character reference for respondent. He described how respondent was honored in 2014 for his success in raising money for "Alzheimer's and the Dementia organization," agreed to a request by Mr. Helfant, which resulted in respondent's raising nearly \$400,000 for a charity that fights diabetes. As Mr. Helfant stated generally, respondent "is a generous person who has a great heart and is very philanthropic." The letter proceeds to describe respondent's financial struggles. Mr.

Helfant also states that respondent "paid the balance in full in February 2020 . . . and I clearly regret taking those actions and putting [respondent's] license in jeopardy and would like it to be reinstated as soon as possible. † Our friendship has resumed and I am sorry for ever making this claim against him."

11. Respondent was convincing in testifying to the joy and pride he takes in his decades of work as a real estate broker. One indication that respondent has been a good broker is that for 20 years respondent was ably managing approximately 100 agents (though not in California). He believes that he is able to inspire good work and confidence in his work as a broker. Respondent's job as a broker, as he said, is his favorite thing to do.

12. Respondent expressed in likewise convincing terms his regret and remorse for the conduct that has put his license in jeopardy and that resulted in harm to a client, Mr. Helfant. Respondent believes that he has always striven and succeeded in being of good service to his clientele, who continue to believe in him and appreciate his efforts on their behalf.

Costs

13. DRE incurred reasonable costs totaling \$1,521.20: (i) \$916.40 for investigation and (ii) \$604.80 for enforcement, as set out in Exhibit 5.

14. The evidence indicates that respondent has largely recovered from previous financial or business difficulties. There was no evidence that it would be unfair or respondent would find it at present unduly difficult if ordered to reimburse DRE its costs. (See *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32.)

PRINCIPLES OF LAW

1. DRE bears the burden of proof and must demonstrate by "clear and convincing proof to a reasonable certainty" that discipline of respondent's license is warranted. (*Borror v. Dept. of Real Estate* (1971) 15 Cal.App.3d 531; *Ettinger v. Medical Board of Quality Assurance* (1982) 135 Cal.App.3d 853, 855.)

2. Business and Professions Code section 10177 provides in part:

The commissioner may suspend or revoke the license of a real estate licensee . . . who has done any of the following, or may suspend or revoke the license of a corporation . . . if an officer, director, or person owning or controlling 10 percent or more of the corporation's stock has done any of the following: [¶] . . . [¶]

(f) [H]ad a license issued by . . . another state . . . revoked, surrendered, or suspended for acts that, if done by a real estate licensee, would be grounds for the suspension or revocation of a California real estate license, if the action of denial, revocation, surrender, or suspension by the other agency or entity was taken only after giving the licensee or applicant fair notice of the charges, an opportunity for a hearing, and other due process protections comparable to the Administrative Procedure Act . . . commencing with Section 11340 . . . and . . . Section 11500 [et seq.] . . . of the Government Code . . . , and only upon an express finding of a violation of law by the agency or entity.

3. Business and Professions Code section 10186.2 provides in part:

(a) (1) A licensee shall report any of the following to the department: [1] . . . [1]

(C) Any disciplinary action taken by another licensing entity or authority of this state or of another state or an agency of the federal government.

(2) The report required by this subdivision shall be made in writing within 30 days of the date of . . . the disciplinary action.

(b) Failure to make a report required by this section shall constitute a cause for discipline.

ANALYSIS

First Cause for Discipline

1. There is cause for discipline of respondent's license under the first cause for discipline of the accusation. The Office of Administrative Hearings, Department of State, State of New York, found respondent demonstrated untrustworthiness as a real estate broker in that he did not cooperate in an official investigation and he did not comply with a consent order, to the injury of one of respondent's clients. Discipline of his New York license was imposed after respondent was afforded due process of law comparable to the due process protections of the Government Code. Such misconduct by a California licensee is grounds for discipline under Business and Professions Code

section 10177, subdivision (f). (See *Fahmy v. Medical Board of California* (1995) 38 Cal.App.4th 810, 817.)

2. In mitigation, respondent not only made his injured client whole financially, but repaired the business relationship to the point that the client expressed regret that he complained of respondent.

3. Another mitigating set of circumstances is that respondent was experiencing financial difficulties, which eventually led to Mr. Helfant's complaint. Respondent borrowed money from Mr. Helfant as a result of the difficulties. He intended to pay back the money as promised in writing. But respondent found that his financial predicament lasted longer than expected and made repayment impossible as agreed. Respondent did not act willfully to injure Mr. Helfant and ultimately paid him back.

4. There was, moreover, no evidence that respondent has been subject to discipline before. He has no record of discipline against his California license and evidently no discipline against his New York license except with respect to his dealings involving Mr. Helfant, as described above.

Second Cause for Discipline

5. Cause for discipline of respondent's license exists under the accusation's second cause for discipline. Respondent failed to report the New York disciplinary action within 30 days, as required under Business and Professions Code section 10186.2.

6. Respondent has long experience in real estate. His excuse for not reporting the New York discipline was honest. As respondent testified believably, he

did not mean to conceal information, but disclosure just did not occur to him. He simply gave no thought to whether the New York proceedings might concern the authorities or people of California.

7. However honest respondent's excuse for the failure to report, however, it is not acceptable.

A. Respondent had a poignant reference to the reporting requirement of Business and Professions Code section 10186.2 before his eyes when he signed his California broker application in 2016.

B. The application may be read as more pertinent to California and federal authorities than those of other states of the United States. Still, respondent took the broker examination in 2016 and his license was issued in 2017. Quite recently, then, respondent was required to learn and pay attention to all California disclosure requirements.

C. The prolonged and serious proceedings against respondent in New York implicated his dealings with authorities who are on the watch for the well-being of the public and respondent's clients in particular. California and DRE have precisely the same concerns, and are on the watch in the same way. Respondent may have forgot details of California law, but his experience should have impelled him to think that the New York proceedings and their resolution against him are pertinent in the most vital and immediate way to any real estate market and its regulatory authorities.

D. Despite all the prompts to disclose, respondent ignored a duty of disclosure that cannot be excused as nothing more than forgetfulness or inattention.

Rehabilitation

8. The degree of appropriate discipline is affected by several things, such as suggested by criteria to evaluate rehabilitation developed by DRE and promulgated in the California Code of Regulations, title 10, section 2912 (Regulation 2912).

9. Not in the record is when respondent disclosed the New York proceedings to DRE. More than two years have passed since the misconduct that led to the New York disciplinary action against respondent. Thus under Regulation 2912, subdivision (a)(1), respondent may be regarded as having had sufficient time for efforts at rehabilitation with respect to the New York misconduct.

10. In support of rehabilitation under Regulation 2912, subdivision (b), is that respondent restitution to Mr. Helfant, wholly removing his financial injury. Similarly, under Regulation 2912, subdivision (g), respondent paid his fines imposed by New York authorities.

11. Under Regulation 2912, subdivision (l), there was credible evidence from Mr. Helfant that respondent has been diligent in support of charitable causes that provide social benefits or ameliorate social problems like disease.

12. It is perhaps not quite accurate that respondent has changed his attitude since the New York misconduct. Regulation 2912, subdivision (m), is concerned with this sort of reform. But respondent made clear in convincing fashion that he was always trying to maintain his friendship with Mr. Helfant and only caused harm involuntarily, because of respondent's own financial and personal distress. It is also fair to consider respondent's attitude to government and regulatory authorities respectful. That is how he conducted himself throughout the administrative hearing in this matter. Respondent did not attend the New York hearing on his failure to comply with the

consent order because of an intervening emergency. In sum, respondent has kept a good attitude, one he should not change, and a willingness to abide by laws and regulations.

13. The caveat to the last observation is that respondent was quite neglectful, with no good excuse, of his obligation to report the New York discipline to DRE. But on this score respondent has changed his attitude for the better and is not likely to neglect his disclosure duty again.

14. Respondent was moreover forthright in acknowledging and remorseful for his misconduct, both the original misconduct that led to discipline against his New York license, and his failure to report it in California. (See *Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933, 940.) Further, a commendable reason for respondent's remorse is, as he testified sincerely, he is dedicated to his profession as a real estate broker, taking joy and pride in his work.

15. On balance, the evidence indicates that respondent has made great progress toward reform of matters that led to the New York discipline and his failure to report in California. Discipline is warranted for the protection of the public in California, but a restricted license is adequate to DRE's protective purposes.

Costs

16. Under Business and Professions Code section 10106, subdivision (a), an order that respondent reimburse DRE its costs of investigation and enforcement is appropriate.

CONCLUSIONS OF LAW

Respondent's New York misconduct, especially as it is compounded by his failure to respect California's disclosure obligations, is grounds for discipline of respondent's California broker license. Respondent's evidence of rehabilitation and respect for the law and the profession were reassuring that he is unlikely to pose danger to the public in the future. A restricted license will adequately protect the public.

ORDER

All licenses and licensing rights of respondent Shawn R. Elliott under the Real Estate Law are revoked; provided, however, a restricted real estate broker license shall be issued to respondent pursuant to Business and Professions Code section 10156.5 if respondent makes application therefor and pays to the Department 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 Business and Professions Code section 10156.7 and to the following limitations, conditions, and restrictions imposed under authority of Business and Professions Code section 10156.6:

1. 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.

2. 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.

3. 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.

4. 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.

5. Respondent shall pay the Commissioner a total of \$1,521.20 in reimbursement of enforcement and investigation costs. Respondent shall pay such reimbursement within 60 days of receiving an invoice from the Commissioner or on such terms as the Commissioner may determine.

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6. Respondent shall, within six months from the effective date of this Decision, take and pass the Professional Responsibility Examination administered by the Department, 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.

DATE: Jul 22, 2021

Thomas Lucero
Thomas Lucero (Jul 22, 2021 16:29 PDT)

THOMAS LUCERO

Administrative Law Judge

Office of Administrative Hearings