

MBefore the
Administrative Hearing Commission
State of Missouri



MISSOURI REAL ESTATE COMMISSION,)	
)	
Petitioner,)	
)	
vs.)	No. 10-2373 RE
)	
MARIE E. GREEN and)	
)	
WILLIAM D. HEAD,)	
)	
)	
Respondents.)	

DECISION ON RECONSIDERATION

William D. Head is subject to discipline because he misrepresented that the buyer in a real estate transaction paid the down payment when it was the seller who actually paid it, and thus misrepresented the sales price of the property. Upon the motion for reconsideration by the Missouri Real Estate Commission (“the MREC”), as discussed later, we issue this decision deleting references to causes to discipline Marie E. Green.

Procedure

On December 22, 2010, the MREC filed a complaint seeking to discipline Green and Head. On February 18, 2011, Green was served with a copy of the complaint and our notice of hearing/notice of complaint by certified mail. On April 14, 2011, Head was served with a copy of the complaint and our notice of hearing/notice of complaint by personal service.

On November 15, 2011, we held a hearing on the complaint. Assistant Attorney General Kevin Hall represented the MREC. Head appeared *pro se*. Neither Green nor anyone representing her appeared. The matter became ready for our decision on July 17, 2012, the date the last written argument was filed.

On July 9, 2013, we issued a decision finding cause to discipline Green and Head. On July 11, 2013, the MREC filed a motion to amend to amend our decision and notice of dismissal as to Green. The MREC stated that it reached a settlement with Green soon after the hearing, but its attorney failed to dismiss Green from the case. The MREC asked us to amend our decision to remove the findings of fact and conclusions of law regarding Green. By order dated August 2, 2013, we granted the motion to reconsider our decision.¹ We issue this decision upon reconsideration. While we do not remove Green from the Findings of Fact, we remove references that determine whether there is cause to discipline her.

Findings of Fact

1. Green held a real estate salesperson license issued by the MREC on July 23, 1986. Green's license was at all relevant times, current and active. Her license was cancelled on March 10, 2011.
2. Green was at all relevant times, employed by Reece and Nichols Realtors, Inc.
3. Head's current real estate broker-salesperson license was active at all relevant times.²
4. Head was at all relevant times employed by ReMax First Realtors ("ReMax") in Leawood, Kansas.
5. Head was the listing agent for David Smith for Smith's sale of a property located at 7405 East 56th Terrace, Kansas City, Missouri ("the property").
6. On September 6, 2006, Head listed the property at \$84,900.

¹ *Woodman v. Director of Revenue*, 8 S.W.3d 154 (Mo. App., W.D. 1999).

² Petitioner's exhibit 1. The affidavit states that the license would expire on June 30, 2012. We have no further information on the status of the license.

7. On September 20, 2006, Head listed the property at \$79,900.

8. On September 25, 2006, Tina and Reginald Harris entered into a buyer's agent contract with Green. Tina Harris had met Green through her sister's boyfriend. Green asked Ms. Harris if she wanted to buy a home, and Ms. Harris said that she could not afford to do so. Green indicated that she could get approval, and they looked at several properties. Ms. Harris did not know Smith or Head before the transaction at issue. The Harrises had never purchased a home before. At the time of the hearing, both the Harrises were unemployed and had five children.

9. When Ms. Harris looked at the property in September 2006, she believed that the sales price for the property was \$79,000.

10. On October 20, 2006, Head listed the subject property at \$89,900.

11. On October 25, 2006, First United Mortgage pre-approved Harris for a loan totaling \$82,350 pursuant to a signed and executed sales contract for \$91,500. First United Mortgage acted as mortgage brokers to the transaction. The true lender was America's Wholesale Lender in the state of Colorado.

12. On November 4, 2006, Harris and Smith entered into an initial real estate contract for \$91,500, with \$82,350 due to be financed, and approximately another \$9,150 due from Harris in the form of certified funds at closing ("the transaction"). The contract required that Smith pay \$4,941 in closing costs.³ The closing date was changed to December 12, 2006.

13. Sometime before the closing date, Green and Head discussed the inability of Harris to acquire the down payment required for their purchase of the subject property and the possibility of having Smith provide the funds needed for Harris' down payment.

³ Petitioner's exhibit 6 at p. 9.

14. After Head discussed with Smith the possibility of having Smith provide the down payment funds, Smith's wife proceeded to wire approximately \$10,000 into Harris' bank account.

15. On December 18, 2006, the parties met for closing and Harris learned that they were required to provide approximately \$10,000 as a down payment for the subject property. Harris was then informed by Green that Smith had transferred approximately \$10,000 into Harris' bank account, which was to be used as Harris' down payment.

16. Later that day, Harris obtained a cashier's check for the amount of \$10,894.07 and used the check as the down payment in their purchase of the subject property.

17. The residential real estate sale contract, including its financial addendum, executed by Harris and Smith on November 4, 2006, indicates that Harris would provide the balance of the purchase price in certified funds on or before the closing date. The settlement statement executed by Harris and Smith on December 15, 2006 indicates that Harris was providing cash in the amount of \$10,894.07.

18. Despite being aware of the fact that Smith was providing the funds for the down payment on Harris' purchase of the subject property, neither Head nor Green amended the residential real estate sale contract or the settlement statement executed by Harris and Smith to correctly reflect that the down payment funds had been provided by Smith.

19. Head never discussed the transaction with his broker or any representative of the lender for Harris' loan.

20. Gina Schnitz, the Mortgage Specialist with First United Mortgage, was instrumental in the transfer of funds for the sale of the property.

21. The Harrises lived in the home on the property from December 2006 until September/October 2008. The repairs were not made to the property, and the problems with the property included a furnace that leaked carbon monoxide, and a dishwasher that leaked water

into the basement. The Harrises were unable to make the mortgage payments and they lost the property to foreclosure.

Conclusions of Law

We have jurisdiction to hear the complaint.⁴ The MREC bears the burden of proving that there is cause for discipline by a preponderance of the evidence.⁵

I. Credibility

This Commission must judge the credibility of witnesses, and we have the discretion to believe all, part, or none of the testimony of any witness. *Harrington v. Smarr*, 844 S.W.2d 16, 19 (Mo. App., W.D. 1992). When there is a direct conflict in the testimony, we must make a choice between the conflicting testimony. *Id.*

Ms. Harris testified at the hearing and was a credible witness. She testified that, up until the closing date, she believed that she and her husband were purchasing the property for approximately \$79,000. Ms. Harris also testified that she was not aware that she and her husband would be required to provide any money for the purchase:

Q: And outside of a monthly payment, what was your understanding of any other obligations you had to the real estate loan that you were approved for?

A: Mr. Smith, I guess he – well, he told Marie to have me sign something setting up where I would make payments back to him for some points –

Q: Okay.

A: -- that he bought, that he purchased, because couldn't buy any. I didn't have any money.

Q: Did you have any money for a down payment at closing?

A: Not at all, no.

⁴ Statutory references, unless otherwise noted, are to the 2012 Supplement to the Revised Statutes of Missouri.

⁵ *Kerwin v. Mo. Dental Bd.*, 375 S.W.3d 219, 229-30 (Mo. App. W.D. 2012).

Q: Even though the closing had been moved to December 2006, what was your understanding of the sales price for the property at that time?

A: That it was \$79,000.

Q: And even though the closing had been moved to December, what was your understanding of what down payment or what money you had to bring to closing?

A: None, none. I wasn't told of any money that I had to have as a down payment. She said I didn't need money for a down payment. She knew I didn't have money for a down payment.

Q: Okay. When you say "she," who are you –

A: Marie Green.[⁶]

Head testified that Ms. Harris knew about the financial arrangements and the transfer of money into her account, and that the buyers were not harmed by the transaction. We do not see that Ms. Harris' knowledge would excuse the allegations against Head, and in any event, we believe Ms. Harris. She testified that she was harmed, in that repairs were never made, and she and her family lost the property through foreclosure, although she had been honest about her financial situation throughout the transaction.

Our Findings of Fact reflect our credibility determination.

II. Objection Taken with Case

Head objected to a witness testifying that Head had referred to his conduct as a "scheme," and we took the objection with the case.⁷ We sustain the objection.

III. Objection to Head's Written Argument

The MREC objects to statements in Head's written argument because the facts he asserted were not in evidence. We make our findings of fact only on evidence contained in the record.

⁶ Tr. at 62-63.

⁷ Tr. at 40.

IV. Cause for Discipline

The MREC argues that there is cause for discipline under 339.100.2:⁸

2. The commission may cause a complaint to be filed with the administrative hearing commission as provided by the provisions of chapter 621 against any person or entity licensed under this chapter or any licensee who has failed to renew or has surrendered his or her individual or entity license for any one or any combination of the following acts:

(2) Making substantial misrepresentations or false promises or suppression, concealment or omission of material facts in the conduct of his or her business or pursuing a flagrant and continued course of misrepresentation through agents, salespersons, advertising or otherwise in any transaction;

(4) Representing to any lender, guaranteeing agency, or any other interested party, either verbally or through the preparation of false documents, an amount in excess of the true and actual sale price of the real estate or terms differing from those actually agreed upon;

(15) Violation of, or attempting to violate, directly or indirectly, or assisting or enabling any person to violate, any provision of sections 339.010 to 339.180 and sections 339.710 to 339.860, or of any lawful rule adopted pursuant to sections 339.010 to 339.180 and sections 339.710 to 339.860;

(16) Committing any act which would otherwise be grounds for the commission to refuse to issue a license under section 339.040;

(19) Any other conduct which constitutes untrustworthy, improper or fraudulent business dealings, demonstrates bad faith or incompetence, misconduct, or gross negligence[.]

Head admitted that he failed to review the settlement statement and failed to amend the

⁸ These grounds for discipline have not changed significantly since 2006.

contract.⁹ He denied the other allegations.

A. Subdivision (2) – Misrepresentation

Head admitted that he failed to review the settlement statement and failed to amend the contract. The dictionary definition of “material” is “having real importance or great consequences[.]” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 765 (11th ed. 2004). Misrepresentation is a falsehood or untruth made with the intent and purpose of deceit. *Id.* at 794 (11th ed. 2004).

The identity of the person paying the down payment is a material fact. Head made substantial misrepresentations in the conduct of his business in that the sales contract and settlement statement did not reflect the true selling price or that the seller was paying the down payment.

There is cause to discipline Head under § 339.100.2(2).

B. Subdivision (4) – Representing to Lender

Head argues that there was no misrepresentation to the lender because Schnitz knew exactly what was happening in the sale of the property. But, as the MREC argues, Schnitz worked for the mortgage broker, not the lender. The sales contract and settlement agreement both represented a sale amount greater than the buyer was paying and differing terms from those agreed upon, in that the seller was actually paying the down payment.

There is cause to discipline Head under § 339.100.2(2).

C. Subdivision (15) – Violation of Statutes/Regulations

Section 339.740¹⁰ states:

1. A licensee representing a buyer or tenant as a buyer’s or tenant’s agent shall be a limited agent with the following duties and obligations:

⁹ Tr. at 10.

¹⁰ RSMo. 2000.

- (1) To perform the terms of any written agreement made with the client;
- (2) To exercise reasonable skill and care for the client;
- (3) To promote the interests of the client with the utmost good faith, loyalty, and fidelity, including:
 - (a) Seeking a price and terms which are acceptable to the client, except that the licensee shall not be obligated to seek other properties while the client is a party to a contract to purchase property or to a lease or letter of intent to lease;
 - (b) Presenting all written offers to and from the client in a timely manner regardless of whether the client is already a party to a contract to purchase property or is already a party to a contract or a letter of intent to lease;
 - (c) Disclosing to the client adverse material facts actually known or that should have been known by the licensee; and
 - (d) Advising the client to obtain expert advice as to material matters about which the licensee knows but the specifics of which are beyond the expertise of the licensee;
- (4) To account in a timely manner for all money and property received;
- (5) To comply with all requirements of sections 339.710 to 339.860, subsection 2 of section 339.100, and any rules and regulations promulgated pursuant to those sections; and
- (6) To comply with any applicable federal, state, and local laws, rules, regulations, and ordinances, including fair housing and civil rights statutes or regulations.

Although the MREC argues that Head violated this statute, it appears to apply only to a licensee representing a buyer or tenant as a buyer's or tenant's agent. Head represented Smith, the seller. He did not violate this regulation.

Regulation 15 C.S.R. 60-9.110 provides:

Concealment, Suppression, or Omission of any Material Fact in General:

(1) Concealment of a material fact is any method, act, use or practice which operates to hide or keep material facts from consumers.

(2) Suppression of a material fact is any method, act, use or practice which is likely to curtail or reduce the ability of consumers to take notice of material facts which are stated.

(3) Omission of a material fact is any failure by a person to disclose material facts known to him/her or upon reasonable inquiry would be known to him/her.

(4) Reliance and intent that others rely upon such concealment, suppression or omission are not elements of concealment, suppression or omission as used in section 407.020.1, RSMo.

Head concealed information that Smith, rather than Harris, supplied the down payment.

There is cause to discipline Head under § 339.100.2(15).

D. Subdivision (16) – Cause to Deny License

Section 339.040 sets forth the requirements for licensure:

1. Licenses shall be granted only to persons who present, and corporations, associations, partnerships, limited partnerships, limited liability companies, and professional corporations whose officers, managers, associates, general partners, or members who actively participate in such entity's brokerage, broker-salesperson, or salesperson business present, satisfactory proof to the commission that they:

(1) Are persons of good moral character; and

(2) Bear a reputation for honesty, integrity, and fair dealing; and

(3) Are competent to transact the business of a broker or salesperson in such a manner as to safeguard the interest of the public.

1. Good Moral Character

Good moral character is honesty, fairness, and respect for the law and the rights of others.

Hernandez v. State Bd. of Regis'n for Healing Arts, 936 S.W.2d 894, 899 n.1 (Mo. App., W.D. 1997). This case presents evidence of bad acts in one transaction. We cannot say categorically that the one incident proves a lack of good moral character, but on these facts, Head violated his

duties and obligations imposed by statutes and regulations to protect the public from underhanded conduct.

There is cause to discipline Head under § 339.100.2(16).

2. Reputation

Reputation is the “consensus view of many people[.]” *Haynam v. Laclede Elec. Coop.*, 827 S.W.2d 200, 206 (Mo. banc 1992). Reputation is not a person’s actions; it is “the general opinion . . . held of a person by those in the community in which such person resides[.]” *State v. Ruhr*, 533 S.W.2d 656, 659 (Mo. App., K.C.D. 1976) (quoting Black’s Law Dictionary, Rev. 4th ed. 1467-68)).

The MREC presented no evidence of Head’s reputation. There is no cause for discipline under § 339.100.2(16).

3. Competence

Competent is defined as “having requisite or adequate ability or qualities[.]” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 253 (11th ed. 2004). Again, this is one incident, but we accept the Board’s argument that the conduct of allowing the settlement statement to falsely reflect that Harris had provided the down payment at the time of closing was an intentional perversion of the truth to induce Harris’ lender to rely on it and supply funds – in other words, fraud. We find that Head is not competent to transact business in such a manner to safeguard the interest of the public.

There is cause to discipline Head under § 339.100.2(16).

E. Subdivision (19) – Other Conduct

The adjective “other” means “not the same : DIFFERENT, any [other] man would have done better[.]” WEBSTER’S THIRD INTERNATIONAL DICTIONARY 1598 (unabr. 1986). Therefore, subdivision (19) refers to conduct different than referred to in the remaining subdivisions of the statute. We have found that the conduct at issue is cause for discipline under

other subdivisions of § 339.100.2. There is no “other” conduct. Therefore, we find no cause for discipline under § 339.100.2(19).

F. Head’s Arguments

In his written argument, Head points to his many years in real estate and his service to his profession. The Administrative Hearing Commission determines whether there is cause for discipline. Arguments such as Head makes may be made to the MREC when it determines the level of discipline to impose.

Summary

Head is subject to discipline under § 339.100.2(2), (4), (15), and (16). He is not subject to discipline under § 339.100.2(19).

SO ORDERED on August 13, 2013.

\s\ Nimrod T. Chapel, Jr.
NIMROD T. CHAPEL, JR.
Commissioner