

NEW JERSEY REAL ESTATE COMMISSION

NEW JERSEY REAL ESTATE)	Docket No.: CAM-19-008
COMMISSION,)	REC Ref No.: 10007669
)	
Complainant,)	
)	
v.)	FINAL ORDER OF
)	DETERMINATION
TITO SANTIAGO, Licensed New Jersey)	
Real Estate Salesperson (SP9032851),)	
)	
Respondent.)	
)	

THIS MATTER was heard by the New Jersey Real Estate Commission (“Commission”) in the Department of Banking and Insurance, State of New Jersey at the Commission Hearing Room, 20 West State Street, Trenton, New Jersey on May 14, 2019.

BEFORE: Commissioners Linda K. Stefanik, Darlene Bandazian, Jacob S. Elkes, Denise M. Illes, Carlos Lejnieks, and Kathryn Godby Oram.

APPEARANCES: Marianne Gallina, Regulatory Officer (“RO Gallina”), appeared on behalf of the New Jersey Real Estate Commission staff (“REC”). Respondent Tito Santiago (“Respondent”) appeared on his own behalf. The Respondent acknowledged his right to counsel and voluntarily waived that right.

STATEMENT OF THE CASE

The REC initiated this matter on its own motion through service of an Order to Show Cause (“OTSC”) dated February 4, 2019, pursuant to N.J.S.A. 45:15-17, N.J.S.A. 45:15-18, and N.J.A.C. 11:5-1.1 to -12.18.

The OTSC alleges that on August 27, 2018, the Respondent made an appointment to show a home that was listed for sale with Keller Williams Burlington County located at 67 Aberdeen Place, Woodbury, New Jersey ("Property"). The Property is owned by Mr. and Mrs. Luis Rios. The appointment was made through a third-party service, "Showing Time", which is used by the Trend Multiple Listing Service ("Trend MLS"). The appointment was scheduled for 8:00 a.m. on August 28, 2018.

At 8:00 p.m. on August 27, 2018, prospective buyers Antonio Solis and Carlitos Montenegro, along with several other family members, entered the Property, while the Rios' were at home. The buyers were unaccompanied by the Respondent. When the buyers were asked how they gained access to the Property, they explained that the Respondent had provided them with the lockbox code and alarm code. Mr. and Mrs. Rios asked the buyers to leave the premises. The Rios' then expressed to their listing agent, Ivy Cabrera, that they would not entertain any offers from those buyers or any other buyer produced by the Respondent.

The Respondent was subsequently questioned by a REC investigator, to whom he admitted that he had provided the buyers with the lockbox code and alarm code for the Property. He explained that he was ill and could not accompany the buyers. He explained that he did not inform his broker of the situation. He further admitted that he was mistaken as to both the time and date of the scheduled showing and the owner-occupied status of the property, which he believed to be vacant. The Respondent also admitted that he had little information about the buyers, which was limited to a name, phone number, and a prequalification letter for one of them.

The OTSC alleged that the Respondent's conduct demonstrated unworthiness, incompetency, bad faith, and dishonesty in violation of N.J.S.A. 45:15-17(e) when he provided the lockbox code and alarm code for the Rios property to the prospective buyers. Furthermore,

the OTSC alleged that the Respondent violated N.J.A.C. 11:5-6.4(a) in that he failed in his fiduciary duty when he put his own interests above those of his clients by allowing them to enter the property of another unaccompanied and without a licensee or other authorized person and caused the property to no longer be available to the buyers.

The Respondent filed an Answer to the OTSC, wherein he admitted to the factual allegations set forth in the OTSC and agreed that the conduct constituted violations of N.J.S.A. 45:15-17(e) and N.J.A.C. 11:5-6.4(a). The Respondent expressed remorse and asked for leniency.

Accordingly, on March 26, 2019, the Commission reviewed the pleadings, and deemed this matter uncontested and directed that a hearing be scheduled.

A hearing before the Commission was conducted on May 14, 2019.

TESTIMONY OF THE WITNESSES

Tito Santiago

The Respondent testified that he has been a real estate agent for twenty-five years with no prior complaints. He testified that he made a mistake with the time and date when scheduling the appointment to show the buyers the Property. The Respondent stated he was not feeling well when he made the appointment and his judgment failed him. He further testified that he does not want to make excuses for his actions and he knows that he will never do this again. The Respondent testified that he understands the seriousness of his actions, and that they constituted a betrayal of trust. The Respondent stated that he is not contesting the facts.

Catherine Laufer

Catherine Laufer ("Laufer") offered a statement on behalf of the Respondent and his character. She testified that she has worked with the Respondent for twenty years and been his broker for five years. Laufer testified that the Respondent has never had a problem or complaint

against him, and that he is a good associate. She stated that the Respondent is always helpful and considerate to new agents. Laufer further testified that the Respondent told her what happened and that he knows that it was a terrible mistake.

Laufer testified that appointments to show properties are made through the Trend MLS. She stated that agents do not log in all the appointments they have in the office, and while she has access to appointments on the listings of the office, she is unable to see appointments on outside listings. Laufer testified that she is often aware of the appointments of her agents from information gathered while in the office. She further stated that she was unaware that the Respondent was ill the day of the appointment at the Property, or else she would have arranged for coverage. Laufer also testified that agents generally get potential buyers' names and phone numbers, but will have additional information, such as their current address, from the mortgage prequalification forms.

FINDINGS OF FACT

Based on the pleadings, the testimony of the witnesses, and the documentary evidence duly admitted into the record, the Commission makes the following findings of fact:

1. The Respondent is a licensed New Jersey real estate salesperson and is currently licensed with Garden State Properties Group, located at 5 West Park Avenue, Merchantville, New Jersey.
2. The Respondent obtained his New Jersey real estate salesperson license on September 20, 1990.
3. The property, located at 67 Aberdeen Place, Woodbury, New Jersey, is owned by Mr. and Mrs. Luis Rios, and was listed for sale with Keller Williams Burlington County.

4. On or about August 27, 2018, the Respondent made an appoint to show the property through "Showing Time" to prospective buyers Antonio Solis and Carlitos Montenegro at 8:00 a.m. on August 28, 2018.
5. On August 27, 2018, at 8:00 p.m., while the Rios family was home, the prospective buyers entered the Property unaccompanied by the Respondent, using the lockbox code and alarm code that the Respondent had provided.
6. Mr. and Mrs. Rios asked the buyers to leave, and informed their listing agent, Ivy Cabrera, that they would not entertain any offers from those buyers or any other buyer produced by the Respondent.
7. When questioned by an REC investigator, the Respondent admitted to the following: that he provided the buyers with the lockbox code and alarm code; that he was mistaken to the time and date of the showing; that he did not inform his broker that he was ill and could not accompany the buyers to the showing; that he did not read the information on the Multiple Listing Service which included the fact that the property was currently occupied by the owners; and that he did not have detailed information for the prospective buyers.

CONCLUSIONS OF LAW

In light of the above findings of fact, the Commission makes the following conclusions of law with regard to the charges contained in the OTSC as summarized above:

1. The Respondent's conduct is in violation of N.J.S.A. 45:15-17(e) in that his conduct demonstrated unworthiness and incompetency because he purposefully obtained an electronic lockbox code and alarm code and provided the same to his clients for the purpose of allowing them unauthorized and unsupervised access to the Property.

2. The Respondent's conduct is in violation of N.J.A.C. 11:5-6.4(a) in that by allowing his clients to enter into and view the property of another, unaccompanied and without a real estate licensee or other authorized person, he failed to deal fairly with all parties to the transaction.¹

DETERMINATION

At the conclusion of the hearing in this matter, the Commission voted in favor of finding the violations and imposing the sanctions described in this Final Order of Determination. In arriving at the determination in this matter, the Commission took into consideration the testimony of the witnesses and the nature of and circumstances surrounding the Respondent's conduct.

The REC bears the burden of proving the allegations in the OTSC by a preponderance of the competent, relevant, and credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962); In re Polk, 90 N.J. 550, 560 (1982). The evidence must be such as would "lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro Bottling Co., 26 N.J. 263, 275 (1958). Preponderance may be described as "the greater weight of credible evidence in the case. It does not necessarily mean evidence of the greater number of witnesses but means that evidence which carries the greater convincing power." State v. Lewis, 67 N.J. 47, 49 (1975).

¹ The OTSC alleged that the Respondent violated N.J.A.C. 11:5-6.4(a) and cited the language that the Respondent "failed in his fiduciary duties" and "placed his own interest above those of his clients." The Commission found that the Respondent failed in his "obligation of dealing fairly with all parties," which is also a violation of N.J.A.C. 11:5-6.4(a). "Unless precluded by law or constitutional principle, pleadings may be freely amended when, in the judge's discretion, an amendment would be in the interest of efficiency, expediency and the avoidance of over-technical pleading requirements and would not create undue prejudice." N.J.A.C. 1:1-6.2(a). The Respondent was on notice as to the factual basis underlying the charge of a violation of N.J.A.C. 11:5-6.4(a). Thus, the OTSC in this matter should be conformed to reflect the Commission's conclusion that the Respondent failed to deal fairly with all parties to a transaction.

Allegations Against the Respondent

The OTSC alleges that the Respondent violated N.J.S.A. 45:15-17(e) and N.J.A.C. 11:5-6.4(a) when he obtained the electronic lockbox code and alarm code to the Property with the intent to provide those codes to his clients, potential buyers, allowing them to enter the Property without proper authorization or supervision. In a letter dated February 16, 2019 addressed to the Commission, the Respondent admitted to the allegations made against him in the OTSC.

In this case, the Respondent does not dispute that his conduct is in violation of N.J.S.A. 45:15-17(e). He repeatedly admitted that he purposefully obtained an electronic lockbox code and alarm code and provided the same to his clients to allow them unauthorized and unsupervised access to the Property. In addition, he has repeatedly admitted that this conduct reflects an error in judgment and lacks the integrity that is demanded and expected from real estate licensees. In light of these admissions, the Respondent has violated N.J.S.A. 45:15-17(e) and his license is subject to suspension, revocation, or probation.

Additionally, the Respondent's conduct is in a violation of N.J.A.C. 11:5-6.4(a). Under N.J.A.C. 11:5-6.4(a), by accepting employment as an agent, a licensee pledges to protect and promote, as he would his own, the interests of the client he has undertaken to represent; this obligation of absolute fidelity to the client's interests is primary but does not relieve the licensee from the obligation of dealing fairly with all parties to the transaction. Here, the Respondent failed to deal fairly with all parties to the transaction, namely the homeowners.

Penalty Against the Respondent

The Real Estate License Act, N.J.S.A. 45:15-1 to -42 ("the Act") charges the Commission with the "high responsibility of maintaining ethical standards among real estate brokers and sales[persons]" in order to protect New Jersey real estate consumers. Goodley v. New Jersey Real

Estate Commission, 29 N.J. Super. 178, 181-182 (App. Div. 1954). The Commission is empowered to suspend and revoke the licenses of, and impose fines against, brokers and salespersons that violate any of the offenses enumerated in N.J.S.A. 45:15-17 or the real estate regulations. Maple Hill Farms, Inc. v. New Jersey Real Estate Commission, 67 N.J. Super. 223, 232 (App. Div. 1961); Division of New Jersey Real Estate Commission v. Ponsi, 39 N.J. Super. 526, 527 (App. Div. 1956). Courts have long recognized that the real estate sales industry should exclude individuals who are incompetent, unworthy, and unscrupulous, in order to protect the public interest. See Div. of New Jersey Real Estate Commission v. Ponsi, *supra* at 532-533.

Thus, the Commission has the power to suspend, revoke, or place on probation the license of any licensee for “any conduct which demonstrates unworthiness, incompetency, bad faith or dishonesty.” N.J.S.A. 45:15-17(e). Given the serious nature of the Respondent’s actions and the severe lack of judgment, the Commission determined that the suspension of the Respondent’s real estate salesperson license for thirty days and then a two year probationary basis for any license thereafter issued is necessary and appropriate. Moreover, the suspension of the Respondent’s license and then probationary period is consistent with the Commission’s decisions in similar matters. See NJREC v. Piacentine, Final Order of Determination, Dkt. No. CAP-16-028 (02/28/17) (for violations of N.J.S.A. 45:15-17(e) and N.J.A.C. 11:5-6.4(a), the Commission suspended the licensee’s real estate salesperson license for forty-five days, imposed a \$2,500 fine, and required six additional hours of continuing education courses after the Respondent had provided the electronic lockbox code to potential buyers thereby allowing the potential buyers to enter a home unattended by a real estate licensee or other authorized person).

Furthermore, within six months of the issuance of this Final Order of Determination, the Respondent shall complete an additional six hours of continuing education courses in the area of

agency (three hours) and ethics (three hours) which shall not count towards the continuing education requirement for the next license renewal term.

Pursuant to N.J.S.A. 45:15-17, the Commission may impose “a penalty of not more than \$5,000 for the first violation” of the Act, and a “penalty of not more than \$10,000 for any subsequent violation.” In Kimmelman v. Henkels & McCoy, Inc., 108 N.J. 123 (1987), the Supreme Court established the following seven factors that must be considered in evaluating the imposition of fines in administrative proceedings and these factors are applicable to this matter which seeks the imposition of penalties under the Act: (1) the good or bad faith of the respondent; (2) the respondent’s ability to pay; (3) the amount of profits obtained from the illegal activity; (4) the injury to the public; (5) the duration of the illegal activity or conspiracy; (6) the existence of criminal or treble actions; and (7) any past violations. Id. at 137-139.

The first Kimmelman factor is whether the Respondent acted in good or bad faith. The facts presented in this matter are undisputed. The Respondent allowed his clients to enter the Property without proper authorization or supervision. As previously stated, the Respondent has apologized for his conduct and poor judgment repeatedly and taken responsibility for his actions. However, it is imperative to acknowledge that the Respondent’s lapse in judgment is so severe it rises to the level of bad faith. The facts do not indicate that the Respondent’s conduct was meant to be deliberately nefarious, but he knew he was providing the electronic lockbox code and alarm code to provide his clients access, so they could enter the Property without supervision or permission. Additionally, providing the alarm code to the Property is a clear violation of the Rios’ privacy. This act put all the parties involved in danger. This factor weighs in favor of a significant monetary penalty.

The second factor of the Kimmelman analysis is the respondent's ability to pay the fines assessed. Here, no evidence was presented as to the Respondent's ability to pay fines assessed, and thus it cannot be determined if this factor weighs in favor or against a monetary penalty.

The third factor of the Kimmelman analysis is the amount of profits obtained from the illegal activity. In this case, the Respondent received the benefit of providing clients access to a home without his presence or other authorized supervision, which could have led to a contract of sale. This factor weighs in favor of a monetary penalty.

The fourth factor of the Kimmelman analysis is to determine whether the licensee's conduct caused injury to the public. The public is harmed when licensed professionals fail to maintain the level of honesty and trustworthiness demanded under the laws of this State. It is the responsibility of the Commission to ensure that individuals who hold licenses demonstrate behavior which instills the utmost public trust. Licensees are responsible for the homes of the seller, which includes supervising the conduct of potential buyers who enter the premises and survey their property. In this matter, for the Rios family to have multiple strangers they do not know enter their home, with access to the locks, alarms, and all their belongings, without the supervision of a licensed agent has caused them irreversible harm and destroys their trust in real estate professionals. This factor weighs in favor of a monetary penalty.

The fifth factor in a Kimmelman analysis is the duration of the illegal conspiracy or scheme. The evidence presented indicates that the Respondent's conduct was an isolated, one-time occurrence and not part of an ongoing scheme. This factor does not weigh in favor of a significant monetary penalty.

The existence of criminal actions and whether a civil penalty may be unduly punitive if other sanctions have been imposed is the sixth factor. The Supreme Court held in Kimmelman

that a lack of criminal punishment weighs in favor of a more significant civil penalty because the defendant cannot argue that he or she has already paid a price for his or her unlawful conduct. Kimmelman, supra, 108 N.J. at 139. Here, the Respondent has not faced any criminal punishment for his actions. As such, this factor does weigh in favor of a significant monetary penalty.

The seventh and final factor takes into consideration the Respondent's past violations, of which there are none. No evidence of past violations was presented at the hearing. This factor does not weigh in favor of a significant monetary penalty.

In light of these factors, the Respondent shall pay a fine in the total amount of \$1,500. The fine is fully warranted, not excessive or unduly punitive, and is necessary to demonstrate the appropriate level of opprobrium for the Respondent's conduct.

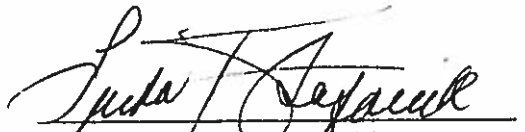
Accordingly, and pursuant to N.J.S.A. 45:15-17, the Commission imposes the following sanctions:

1. Respondent Santiago's real estate salesperson license is hereby suspended for a period of thirty days from the issuance of this Order.
2. Respondent Santiago shall pay a fine of \$1,500.
3. Within six months of the date of this Order, Respondent Santiago shall complete six hours of continuing education courses in the areas of agency (three hours) and ethics (three hours) which shall not count towards the continuing education requirement for the next renewal term. Respondent Santiago is required to provide proof of completion to the Commission.
4. After the term of suspension is complete, any real estate license thereafter issued to Respondent Santiago shall be held on probation for a period of two years. During the period of probation, the following conditions shall apply: 1) the Respondent

shall inform his employing broker that his license is currently on probation; 2) the Respondent's broker shall notify the Commission within 72 hours if he or she receives any information indicating that the Respondent may have violated the Act or corresponding regulations; and 3) the Respondent must notify the Commission within 72 hours if he is charged with or convicted of any criminal or disorderly persons offense.

SO ORDERED this 23rd day of July, 2020.

By: Linda K. Stefanik, President
Darlene Bandazian, Commissioner
Jacob S. Elkes, Commissioner
Denise M. Illes, Commissioner
Carlos Lejnieks, Commissioner
Kathryn Godby Oram, Commissioner


Linda K. Stefanik, President
New Jersey Real Estate Commission

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