

MARYLAND REAL ESTATE COMMISSION

MARYLAND REAL ESTATE
COMMISSION

*

v.

* OAH CASE NO. DLR-REC-24-08-28187

GREGORY BENNETT,

* REC CASE NO. 2007-RE-301

RESPONDENT

*

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* * * * *

OPINION AND FINAL ORDER

Respondent, Gregory Bennett, filed Exceptions to the Proposed Order of May 20, 2009. On April 3, 2009, Administrative Law Judge Kimberly A. Farrell (“ALJ”) filed a Proposed Decision and Recommended Order in which she recommended that the Respondent pay a civil penalty of \$15,000.00 and that the Respondent’s real estate commission license be revoked. Natresha Dawson, who had filed a claim with the Maryland Real Estate Commission Guaranty Fund, withdrew that claim based on an agreement with the Respondent at the hearing before the ALJ.

On May 20, 2009, the Maryland Real Estate Commission (“Commission”) issued a Proposed Order that affirmed the ALJ’s Findings of Fact; approved the ALJ’s Conclusions of Law and adopted the ALJ’s Recommended Order.

A hearing was held by a panel of Commissioners consisting of Commissioners Nicholas D’Ambrosia, Marla S. Johnson and Surina A. Jordan on August 19, 2009. Jessica Berman Kaufman represented the Commission. Alan W. Bernstein represented Gregory Bennett, the Respondent. The proceedings were electronically recorded.

SUMMARY OF THE EVIDENCE

On behalf of the Commission, seven exhibits, including the file related to the hearing before the ALJ which contained all exhibits admitted at the hearing before the ALJ, were entered into evidence. A transcript of the hearing before the ALJ was submitted to the Commission.

PRELIMINARY MATTERS

The Respondent's Motion to Introduce Evidence was denied by the Commission.

FINDINGS OF FACT

The Commission adopts the Findings of Fact recommended by the ALJ.

CONCLUSIONS OF LAW

The Commission adopts the Conclusions of Law recommended by the ALJ.

DISCUSSION

At all times relevant to this matter, the Respondent was a licensed salesperson. Since the transaction at issue, the Respondent has also been licensed as a broker. FF1¹. Ms. Natresha Dawson engaged the services of the Respondent to sell her home in the summer of 2002. FF2. Unable to sell the property, Respondent offered to purchase it. CCPGp1². On December 6, 2002, Ms. Dawson and the Respondent entered into a "regional sales contract" which referenced a "land installment contract". CSAp2.³ On December 16, 2002, the parties settled on the property. The land installment contract was signed by both parties and Ms. Dawson signed the deed to the property. The deed was notarized at settlement. CCPGp1. The documents provided that the property would be conveyed to the Respondent upon payment of 40% or more of the purchase price, subject to a mortgage for the balance of the price. CSAp2. According to Ms. Dawson,

¹ "FF" refers to the ALJ's Findings of Fact.

² "CCPG" refers to the Opinion and Order of the Circuit Court for Prince George's County in *Natresha Dawson v. Gregory Bennett and Cynthia Bennett*, Case No. CAE05-11304.

³ "CSA" refers to the unreported Opinion of the Court of Special Appeals in *Natresha Dawson v. Gregory Bennett, et Ux.*, No. 2181, September Term, 2006.

Mr. Bennett agreed to obtain a mortgage on the property within 90 days from settlement and during the interim period to keep Ms. Dawson's mortgage payments current. CSAp2. Several months after settlement, Ms. Dawson began receiving phone calls from her mortgage company advising that the mortgage had not been paid. In October, 2003, Ms. Dawson began receiving letters from the mortgage company indicating that the loan was in default and foreclosure proceedings were going to be initiated. CSApp.2-3. On December 15, 2003, Ms. Dawson sent a letter to Mr. Bennett citing Mr. Bennett's failure to make timely monthly mortgage payments and his failure to secure a loan and notifying him that their relationship "shall cease to exist and shall be severed." CCPGp2, CSAp3. She subsequently re-entered the property, changed the locks on the property and secured a tenant. CSApp3-4. When Ms. Dawson contacted the mortgage company to set up a forbearance plan to bring the past due mortgage current she was informed that the mortgage had been paid in full by Cynthia Bennett, the wife of the Respondent. CSAp4. On February 17, 2004, Troese Hughes Title Service, the settlement agent, sent a letter to Ms. Dawson's attorney enclosing documents for Ms. Dawson's signature. Ms. Dawson refused to sign the enclosed documents, consisting of an Affidavit of Principal Residence and an Affidavit as to Total Payment. Ms. Dawson subsequently learned that her signature had been forged on the two Affidavits. CSAp4. An employee of Troese Hughes notarized the December 16, 2002 deed to the property with a backdated jurat, seemingly without Ms. Dawson's consent. CCPGp2. Because she was dissatisfied with her dealings with the Respondent, Natresha Dawson filed a complaint in the Circuit Court for Prince George's County against the Respondent, the Respondent's spouse and Troese Hughes Title Services, Inc.⁴ The complaint contained three counts against the Respondent: fraud, quiet title/rescission, and breach of contract. At trial, Ms.

⁴ Troese Hughes and Ms. Dawson reached a settlement prior to the start of the bench trial. The Court found that Ms. Dawson failed to meet her burden of proof as to the Respondent's spouse.

Dawson proceeded on the fraud and quiet title/rescission counts and abandoned her breach of contract claim. FF3. Ms. Dawson and the Respondent were represented by counsel at the trial. FF4. The Circuit Court for Prince George's County issued an opinion and order on October 12, 2006 awarding actual and punitive damages to Ms. Dawson based on its determination that the Respondent, acting in his capacity as a real estate professional, had engaged in constructive fraud to Ms. Dawson's detriment. FF5. The Circuit Court based its determination on the finding that Ms. Dawson's signature had been forged on two documents necessary for the Respondent to effectuate a recordation of the deed changing the ownership of the property from Ms. Dawson to the Respondent's spouse. The Court noted that although the Respondent was not shown to have personally forged the documents, he "clearly knew she [Ms. Dawson] did not sign the documents". FF6. Ms. Dawson appealed the Circuit Court's decision but the Respondent did not. FF7. The Court of Special Appeals, in an unreported decision dated October 11, 2007, affirmed the Circuit Court's judgment. FF7. Neither party appealed or requested leave to appeal the Court of Special Appeals' affirmation of the Circuit Court's judgment. FF8.

During the hearing before the Office of Administrative Hearings, the ALJ ruled that collateral estoppel barred the Respondent from re-litigating the issue of whether he engaged in fraudulent dealings. The ALJ ruled, after considering evidence and argument from the parties, that the issue had been fully litigated before, and decided by, the Circuit Court for Prince George's County and the decision was affirmed by the Court of Special Appeals.

Collateral estoppel is a doctrine which provides that when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim. See *Deitz v. Palagos*, 120 Md. App. 381, 395-396

(1998). As noted by the Court in *Pope v. School Commissioners of Baltimore City, et al.*, 106 Md.App. 578, 594 (1995), cert denied, 342 Md. 116 (1996), the policy of precluding re-litigation of matters already fairly and fully litigated avoids multiple lawsuits, conserves judicial resources, and fosters reliance on judicial decisions by minimizing the chance of inconsistent decisions.

Collateral estoppel is considered to be of the “non-mutual” variety if one of the parties in the present suit was neither a party nor in privity with a party to the prior action. *Culver v. Maryland Insurance Commissioner*, 175 Md.App. 645, 653 (2007). Offensive use of non-mutual collateral estoppel occurs when a plaintiff seeks to foreclose a defendant from re-litigating an issue the defendant has previously litigated unsuccessfully in another action against a different party. *Culver* citing *Welsh v. Gerber Products, Inc.*, 315 Md. 510, 518 n.6 (1989). In reaching its conclusion that the offensive use of non-mutual collateral estoppel was proper in *Culver*, the Court addressed the concerns foreseen by the Supreme court in *Parklane Hosiery v. Shore*, 439 U.S. 322, 330-331 (1979). Those concerns were that the plaintiff would adopt a “wait and see” attitude towards the first action in the hope that the first action by another plaintiff will result in a favorable judgment. The second concern was that offensive non-mutual collateral estoppel may be unfair to a defendant for several reasons: (1) if a defendant in the first action is sued for small or nominal damages, he may have little incentive to defend vigorously, particularly if future suits are not foreseeable; (2) if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant, offensive use of non-mutual collateral estoppel may be unfair; and (3) such use may be unfair where the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result. The Court in *Culver* concluded that those detriments were not present in that case.

The *Culver* Court held that an application for offensive non-mutual collateral estoppel must pass a four-part test:

1. Was the issue decided in the prior adjudication identical with the one presented in the action in question?
2. Was there a final judgment on the merits?
3. Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?
4. Was the party against whom the plea is asserted given a fair opportunity to be heard on the issue?

Culver at 657 (citing *Leeds Fed. Sav. & Loan Ass'n v. Metcalf*, 332 Md. 107, 117-118 (1993) quoting *Washington Suburban Sanitary Commission v. TKU Associates*, 281 Md. 1, 18-19 (1977)).

The concerns enunciated by the Supreme Court in *Parklane* are not applicable in this case. The Commission did not adopt a “wait and see” attitude towards the litigation between Ms. Dawson and Mr. Bennett: The complaint of Ms. Dawson was not filed until after the Circuit Court had rendered its decision. In addition, the Real Estate Commission is a regulatory agency charged with protecting consumers from untrustworthy real estate salespersons and brokers by revoking, suspending or denying their licenses. It is not a plaintiff seeking a windfall without work. As a regulatory agency, the Commission’s intervention in the Circuit Court case which sought damages and rescission of the contract, even if the Commission had known about it, would have been inappropriate. The second concern of the *Parklane* Court, unfairness to the defendant, is not a valid concern in this case: Mr. Bennett was sued by Ms. Dawson for compensatory damages, punitive damages, prejudgment interest, costs and attorney’s fees in the

amount of \$250,000 on the fraud count of her Complaint. Clearly, Mr. Bennett had a strong financial incentive to vigorously defend the action. Secondly, the judgment against Mr. Bennett was not inconsistent with any prior judgment in his favor. Third, there were no procedural protections available in the case before the ALJ and unavailable in the Circuit Court which were likely to lead to a result inconsistent with the Court's decision.

The application of offensive non-mutual collateral estoppel by the ALJ was also appropriate based upon the four-part test cited in *Culver*. The issue of whether the Respondent engaged in fraud in his dealings with Ms. Dawson was squarely before the Circuit Court, was addressed in the written opinion and order, and was essential to the judgment. There was a judicial determination that the Respondent engaged in fraudulent dealings in regard to Ms. Dawson, the identical issue before the ALJ. The Respondent did not seek judicial review but was nonetheless exposed to the appellate process when Ms. Dawson appealed the Circuit Court's decision to the Court of Special Appeals. That Court affirmed the Circuit Court's decision and no further appeal was taken or requested by the parties. Thus, there was a final judgment that Mr. Bennett had engaged in fraud in his dealings with Ms. Dawson. Mr. Bennett was a party in the court case. Mr. Bennett was given a fair opportunity to be heard in the Circuit Court case where he testified and presented the testimony of a witness and was afforded the opportunity to appeal that Court's decision, an opportunity which he chose not to take.

As in the *Culver* case, the charges brought against the Respondent were based on the findings of the Court. The ALJ considered the concerns cited in *Parklawn* and applied the requirements cited in *Culver* before properly applying the doctrine of offensive non-mutual collateral estoppel to bar the Respondent from re-litigating the issue of whether he engaged in fraudulent conduct in his dealings with Ms. Dawson.

The Respondent alleged that he was denied procedural due process at the hearing before the ALJ. The first basis for this contention is that there was neither a pre-hearing conference at which the issue of collateral estoppel was raised nor did counsel for the Commission file a summary motion to prevent a full evidentiary hearing. Secondly, he complained that he was not informed, in advance of the hearing, that he would not be permitted to present evidence on the issue of fraud. The Commission finds these allegations to be without merit: Pursuant to Code of Maryland Regulations (“COMAR”) 28.02.01.13A, it is within the ALJ’s discretion to decide whether or not a pre-hearing conference is necessary. In the instant case, the ALJ did not find that it was necessary to conduct such a hearing and there is no evidence that this decision was an abuse of the ALJ’s discretion. The Respondent was given advance notice in the Statement of Charges that: “The charges against the Respondent arise out of the determination of the Circuit Court for Prince George’s County, Case No. CAE05-11304 (September 2006), and the subsequent affirmation of the Maryland Court of Special Appeals (Case No. 2181 from the September Term, 2006, filed October 11, 2007), regarding the transfer of the Claimant’s property located at 6317 Kilmer Street, Cheverly, Maryland. Both of these cases are attached and incorporated by reference.... It was determined by the Court that the Respondent filed papers which had been altered when transferring the Claimant’s property to himself. It is alleged that based on the findings of the Circuit Court for Prince George’s County, the Respondent has violated the provisions of the Real Estate Law and regulations.” Thus, he was put on notice that the charges against him were based upon a final judgment of the Court. Further, counsel for the Commission raised the issue of collateral estoppel in her opening statement before the ALJ and the Respondent was provided with an opportunity to respond to her argument.⁵ The Commission concludes that the Respondent was provided with adequate notice that the hearing before the

⁵ See pages 25-46 of the transcript of the hearing before the ALJ in OAH Case No. DLR-REC-24-08-28187.

ALJ would be based upon the decision of the Circuit Court, which was affirmed by the Court of Special Appeals, and was provided with an adequate opportunity to argue against the application of the doctrine of collateral estoppel at the hearing before the ALJ. Therefore, the Commission concludes that he was not denied procedural due process.

The Respondent also argued that he was denied substantive due process. He alleged that the issues before the Court were more limited than what was to be presented before the ALJ. According to the Respondent, the major issue before the Court was the question of who owned the property which was the subject of the court action not whether there were any forged documents involved in the transaction. He argued that there was less than \$2,000 at issue in the forgery claim and he treated the forgery issue as insignificant. The Respondent contended that since the forgery issue was not one which he had an incentive to fight, collateral estoppel should not have applied.

The record in the case before the Circuit Court reveals that the question of whether Mr. Bennett engaged in actions which constituted constructive fraud was squarely before the Court and was vigorously litigated. Mr. Bennett not only testified on the issue but his sole witness, Kristina Harens, testified regarding the signatures on the Affidavits of Principal Residence and as to Total Payment as well as the notarization of the deed – all matters directly related to the issue of whether there was constructive fraud involved in the transaction. Further, Mr. Bennett's counsel cross-examined Ms. Dawson's handwriting expert regarding her findings and conclusions concerning the signatures on the Affidavits. As previously noted, Mr. Bennett also had a strong financial incentive to fully and vigorously litigate the fraud count since Ms. Dawson was seeking \$250,000.00 in damages on that count.

Although the Respondent acknowledges that the Circuit Court found that he breached his duty of loyalty to Ms. Dawson, he argued that his duty to her ended at settlement and therefore, he should have not have been found to have violated Business Occupations and Professions Article, (“Md. Bus. Occ. & Prof. Art.”) *Annotated Code of Maryland*, § 17-322(b)(33) and COMAR 09.11.02.02A. This regulation requires the following:

“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 does not relieve the licensee from the statutory obligations towards the other parties to the transaction.”

Even if the Commission were to accept the Respondent’s argument that the client-agent relationship ended at settlement, the Respondent nonetheless had a statutory duty as a licensee of the Commission not to engage in constructive fraud against Ms. Dawson, the other party to the transaction. The Commission notes that the Circuit Court found that Mr. Bennett’s “... breach of duty constituted constructive fraud.”⁶ and the Respondent did not appeal that decision.

Mr. Bennett was found by the court to have engaged in fraudulent dealings. Therefore, he violated Md. Bus. Occ. & Prof. Art., Section 17-322(b)(25) which prohibits a licensee from engaging “...in conduct that demonstrates bad faith, incompetency, or untrustworthiness or that constitutes dishonest, fraudulent, or improper dealings. The Respondent also violated Md. Bus. Occ. & Prof. Art. Section 17-322(b)(33) by violating COMAR 09.11.02.01C which mandates that:

“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

⁶ See page 7 of the Opinion and Order of Court in *Natresha Dawson v. Gregory Bennett and Cynthia Bennett*, Circuit Court for Prince George’s County, Case No. CAE05-11304.

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.” The Respondent had a duty in his relationship with Ms. Dawson, a member of the public, to protect her from fraud. As found by the Court, he failed in this affirmative duty. The Respondent was found to have engaged in constructive fraud as regards documents which were filed in land records. The Respondent violated his responsibility under this Code of Ethics section when he permitted the filing of documents in the land records which had been forged. The public must be able to have confidence that deeds and supporting documents which are filed in the land records are not the product of fraud.

In determining the penalty to be imposed for violations of statutory and regulatory provisions, § 17-322(c)(2), Md. Bus. Occ. & Prof. Art., cites the following factors to be considered:

1. the seriousness of the violation;
2. the harm caused by the violation;
3. the good faith of the licensee; and
4. any history of previous violations by the licensee.

The violations committed by the Respondent are serious. Violations involving fraud are among the most serious which can be committed by a licensee. Fraudulent behavior by a licensee negatively impacts not only the individual who has been the victim of the fraud but also the profession’s dealings with the public. The Respondent had a statutory duty not to engage in constructive fraud in his dealings with Ms. Dawson but he did not do so. As found by the Circuit Court, Ms. Dawson incurred actual damages in the amount of \$1,927.39. The recording of

documents with forged signatures in the land records is damaging to the public which has a right to rely on the authenticity of such signatures and to the integrity of the real estate profession.

The Court noted that “While the Defendant was not shown to have forged Plaintiff’s signature, he clearly knew she had not signed the documents.” The Court found the Respondent to have engaged in constructive fraud by permitting forged documents to be used to transfer title to property. This behavior clearly indicates a lack of good faith on his part.

No evidence was presented of any previous violations by the Respondent. Nonetheless, the serious nature of the violation, the harm caused by the violation and the lack of good faith involved in the transaction at issue warrant the imposition of a \$15,000.00 penalty, calculated as \$5,000.00 for the violation of Md. Bus. Occ. & Prof. Art. § 17-322(b)(25) and (33) and, related to the subsection (33) charge, the violations of COMAR 09.11.02.01C and COMAR 09.11.02.02A, and revocation of the Respondent’s license.

ORDER

It is this 25th day of September, 2009 **ORDERED** that:

1.. The Respondent violated Md. Bus. Occ. & Prof. Art. § 17-322(b)(25) and (33) and COMAR 09.11.02.01C and COMAR 09.11.02.02A;

2. That all real estate licenses held by the Respondent be and are hereby **REVOKED**;

3. That the Respondent be assessed a civil penalty of \$15,000.00 which shall be paid within thirty (30) days of the date of this Order;

4. That the Respondent shall not be eligible for the issuance of a license until the civil penalty has been paid in full;

5. That the license revocation shall become effective thirty (30) days from the date of this Order; and

6. That the records and publications of the Maryland Real State Commission reflects this decision.

MARYLAND REAL ESTATE COMMISSION

By: *Suzanne A. Jordan, Commissioner*  (A handwritten signature in cursive script, reading "Suzanne A. Jordan, Commissioner", is written over a horizontal line. To the right of the signature is a circular stamp containing the initials "CR".)

NOTE: A judicial review of this Final Order may be sought in the Circuit Court of Maryland in which the Appellant resides or has his/her principal place of business, or in the Circuit Court for Baltimore City. A petition for judicial review must be filed with the court within 30 days after the mailing of this Order.

THE MARYLAND REAL ESTATE COMMISSION

MARYLAND REAL ESTATE * BEFORE KIMBERLY A. FARRELL,
COMMISSION * ADMINISTRATIVE LAW JUDGE
V. * OF THE MARYLAND OFFICE OF
GREGORY BENNETT * ADMINISTRATIVE HEARINGS
* OAH No: DLR-REC-24-08-28187
* REC CASE NO: 2007-RE-301

* * * * *

PROPOSED ORDER

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated April 3, 2009, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 20th day of May, 2009,

ORDERED,

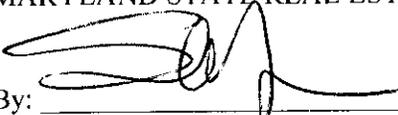
- A. That the Findings of Fact in the Recommended Decision be, and hereby are, AFFIRMED;
- B. That the Conclusions of Law in the Recommended Decision be, and hereby are, APPROVED;
- C. That the Recommended Order in the Recommended Decision be, and hereby is, ADOPTED;

and,

D. That the records, files and documents of the Maryland State Real Estate Commission reflect this decision.

MARYLAND STATE REAL ESTATE COMMISSION

5/20/09
Date

By: 
Surina A. Jordan, Commissioner

**MARYLAND REAL ESTATE
COMMISSION**

v.

**GREGORY BENNETT,
RESPONDENT**

*** BEFORE KIMBERLY A. FARRELL,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE OF
* ADMINISTRATIVE HEARINGS
* OAH NO.: DLR-REC-24-08-28187
* COMPLAINT NO.: 2007-RE-301**

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PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

In October of 2006, Natresha Dawson (Claimant) filed a complaint against Gregory Bennett (Respondent), a real estate salesperson. The Claimant also filed a claim for reimbursement from the Real Estate Guaranty Fund (Fund) for losses allegedly incurred as a result of the conduct of the Respondent. Based on the complaint, the Maryland Real Estate Commission (REC) determined that it would bring regulatory charges against the Respondent and issued a Hearing Order dated July 8, 2008. The REC transmitted the case to the Office of Administrative Hearings (OAH) on July 11, 2008, consolidating the Fund claim and the regulatory charges for hearing.

The consolidated matters were scheduled for hearing on January 20, 2009, at the OAH in Hunt Valley, Maryland. Assistant Attorney General (AAG) Jessica Kaufman represented the

REC. AAG Kris King represented the Fund. The Claimant appeared on her own behalf. The Respondent represented himself.

At the outset, I was advised that the parties to the Fund claim portion of the case had reached an agreement and wished to withdraw those issues from consideration for settlement purposes pursuant to COMAR 09.01.03.07.¹ The parties to the Fund claim - the Claimant, the Respondent and the Fund - all stated on the record that they wished to have that portion of the case withdrawn. They also signed a written Withdrawal of Appeal form. I then held a hearing on the regulatory charges.

I conducted the hearing pursuant to section 17-324 of the Business Occupations and Professions Article, Annotated Code of Maryland (2004).² Procedure in this case is governed by the Administrative Procedure Act, OAH's Rules of Procedure, and the REC's hearing regulations. Md. Code Ann., State Gov't. §§ 10-201 through 10-226 (2004 & Supp. 2008); Code of Maryland Regulations (COMAR) 28.02.01; COMAR 09.11.03 and 09.01.03.

ISSUES

1. Is the Respondent barred by collateral estoppel from contesting the allegations that he engaged in fraudulent conduct in the course of serving as a real estate salesperson for the Claimant?
2. Did the Respondent violate Section 17-322(b)(25) of the Business Occupations Article by engaging in conduct that demonstrates bad faith, incompetency, or untrustworthiness or that constitutes dishonest, fraudulent or improper dealings?
3. Did the Respondent violate Section 17-322(b)(33) of the Business Occupations Article by violating any regulation adopted under title 17 or any provision of the code of ethics?

¹ COMAR 09.01.03.07 reads as follows:

Withdrawal of a Case.

A. At any stage of the proceedings, upon the agreement of the parties, the case may be withdrawn from the Office of Administrative Hearings docket for settlement purposes.

B. Withdrawal of the case from the Office of Administrative Hearings docket may not be deemed a dismissal of the regulatory charges or the guaranty fund claim, and may not preclude a subsequent referral to the Office of Administrative Hearings, if settlement is not accomplished.

² The short form "Business Occupations Article" will be used in this Proposed Decision.

4. Did the Respondent violate the REC Code of Ethics found in COMAR 09.11.02.01C which requires that:

The licensee [the term licensee refers to the Respondent] 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.

5. Did the Respondent violate the REC Code of Ethics found in COMAR 09.11.02.02A which requires that:

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.

6. If the Respondent violated any of the cited provisions, what, if any, penalty should be imposed?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on behalf of the REC:

- REC #1 Notice dated October 8, 2008, for hearing scheduled January 20, 2009, with attachments including the Statement of Charges and Order for Hearing
- REC #2 Hearing Transmittal with the following attachments: Statement of Charges and Order for Hearing, dated July 8, 2008; unreported decision in the case of Natresha Dawson v. Gregory Bennett, et ux., Court of Special Appeals, No. 2181, September Term 2006; decision in the case of Natresha Dawson v. Gregory Bennett & Cynthia Bennett, Circuit Court for Prince George's County, Maryland, Case No. CAE05-11304
- REC #3 REC Licensing history for the Respondent, dated January 9, 2009
- REC #4 Packet containing the following:
- Correspondence from the REC to the Claimant, dated November 2, 2006
 - Correspondence from the REC to the Respondent, dated November 3, 2006

- Correspondence from the Claimant to the REC, dated January 30, 2008
- Correspondence from the Claimant to the REC, dated March 4, 2008, with nineteen accompanying invoices for legal services on letterhead of Vangrack, Axelson, Williamowsky, Bender and Fishman, P.C.

REC #5 Transcript of the Circuit Court proceedings in Natresha Dawson v. Gregory Bennett & Cynthia Bennett, Circuit Court for Prince George's County, Maryland, Case No. CAE05-11304

The Respondent did not offer any exhibits into evidence.

Testimony

The Claimant was called as a witness by the REC. The Respondent testified on his own behalf. No other witnesses were called.

FINDINGS OF FACT

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

1. The Respondent was a licensed real estate salesperson assigned REC number 05 305702 at all times relevant to this matter. In the time since the transaction at issue, the Respondent has also been licensed as a broker.
2. The Claimant engaged the Respondent to act as her real estate agent to assist her in selling her home in the summer of 2002.
3. The Claimant was dissatisfied with her course of dealings with the Respondent and filed a complaint in the Circuit Court for Prince George's County against the Respondent and others.³ The Claimant initially pursued three counts against the Respondent: fraud, quiet title/recission, and breach of contract. At trial, the Claimant abandoned her breach of contract claim and proceeded on the fraud and the quiet title/recission counts.

³ The Respondent's spouse and Troese Hughes Title Services, Inc., were also named as defendants. Troese Hughes and the Claimant reached a settlement prior to the start of the bench trial. The Court found that the Claimant failed to meet her burden of proof as to the Respondent's spouse.

4. Both the Claimant and the Respondent were represented by counsel at the trial.
5. Following a bench trial on September 12 and 13, 2006, the Circuit Court, on October 12, 2006, issued an opinion and order awarding actual and punitive damages to the Claimant based on the Court's determination that the Respondent, acting in his capacity as a real estate professional, had engaged in constructive fraud to the Claimant's detriment.
6. The Circuit Court found that the Claimant's signature had been forged on two documents necessary for the Respondent to effect a recordation of the deed changing the property out of the Claimant's name and ultimately to reflect ownership by the Respondent's spouse. While the Court noted that the Respondent was not shown to have personally forged the signature, he "clearly knew she [the Claimant] did not sign the documents."
7. Although the Respondent did not elect to appeal the Circuit Court's judgment, the Claimant did. In an unreported opinion filed October 11, 2007, the Court of Special Appeals affirmed the Circuit Court's judgment.
8. Neither party took any appeal or requested leave to appeal from the Court of Special Appeals' affirmance of the Circuit Court judgment.

DISCUSSION

Collateral Estoppel and Its Effect on These Proceedings

During the hearing, the REC sought and I granted a ruling that collateral estoppel bars the Respondent from re-litigating the issue of whether he engaged in fraudulent dealings with the Claimant in the course of serving as her real estate salesperson. After considering evidence and argument from the parties on the REC's motion, I ruled that these issues had been fully litigated before, and decided by, the Circuit Court for Prince George's County. The Circuit Court's

judgment and order was then reviewed by the Court of Special Appeals, which affirmed the judgment of the Circuit Court. My rationale for this ruling follows.

The particular form of collateral estoppel at issue in this case is offensive collateral estoppel (also referred to as issue preclusion), that is, the use of a prior judgment by a party (the REC in this case) who was not bound by that judgment to preclude a defendant (the Respondent in the current case) from re-litigating issues resolved in an earlier proceeding. The Supreme Court has approved the use of offensive collateral estoppel subject to certain considerations. *Parklane Hosiery Company, Inc., et al. v. Leo M. Shore*, 439 U.S. 322, 329-333 (1979). First, part of the justification for permitting collateral estoppel is to conserve scarce judicial resources. Accordingly, collateral estoppel should not be used to reward a plaintiff who could have joined in the earlier action, but who instead sat back and took a “wait and see” attitude. The REC had no knowledge of the facts of this case until the Claimant filed a complaint in October of 2006. By that time, the trial was over and the Court’s opinion and order had been issued. The REC had no reasonable opportunity to participate in the Circuit Court proceeding because it was not made aware of relevant events until too late. Even had the REC known about the Circuit Court case, it could not have joined regulatory charges against the Respondent with the Claimant’s civil claims. Thus, permitting the REC to use the prior judgment does not reward a party for failing to take part in the original hearing.

The second *Parklane* consideration is whether the party being estopped had incentive to fully and vigorously litigate the critical issues in the original proceeding. In the Circuit Court proceedings, the Respondent was represented by counsel. They participated in a two-day bench trial. At stake was title to the property and an allegation that the Respondent had engaged in fraud in the course of professional dealings with the Claimant. Although the Respondent ultimately kept

title to the property, he was ordered to pay over \$20,000 to the Claimant. The Respondent had every incentive to fully and vigorously litigate in the Circuit Court.

Parklane also requires consideration of whether there are inconsistent decisions extant. If so, it could well be unfair to allow an entity who was not a party to any of the earlier proceedings to pick and choose which earlier decision it would use to collaterally estop another party. There are no inconsistent decisions outstanding regarding this case.

Finally, *Parklane* requires consideration of whether the second proceeding, the one where collateral estoppel is being used, would have afforded procedural opportunities that were unavailable in the first action that “could readily cause a different result.” *Parklane*, 439 U.S. at 331. By way of example, the Court recognized that if the original forum where the defendant was forced to defend himself was very inconvenient to the defendant, it could well impact his ability to engage in discovery or call witnesses. Under such circumstances, it could be unfair to permit the use of collateral estoppel. No such circumstances exist in this case.

Maryland has also considered the question of offensive use of collateral estoppel. The Court of Special Appeals discussed this concept in *Pope v. Board of School Comm’rs of Baltimore City*, 106 Md.App. 578, 593-595 (1995), *cert. denied* 342 Md. 116 (1996), stating the following:

Traditionally, under the doctrine of collateral estoppel, in a second suit between the same parties, even if the cause of action is different, any determination of fact actually litigated in the first case is conclusive in the second case. The rationale is that, as a matter of general policy, the law ordinarily precludes re-litigation of matters already fairly and fully litigated. This policy avoids multiple lawsuits, conserves judicial resources, and fosters reliance on judicial decisions by minimizing the chance of inconsistent decisions.

Under the modern approach to collateral estoppel, the requirement that the parties be the “same” no longer exists. A party to an action, therefore, may be conclusively bound by a stranger to that action in a subsequent litigation with respect to facts and issues actually determined in the prior action. Essentially, collateral estoppel involves a three-part analysis:

1. Was the issue or fact decided in the prior litigation identical with the one presented in the subsequent litigation?
2. Was there a final judgment on the merits in the prior litigation?
3. Was the party against whom collateral estoppel is asserted a party or in privity with a party to the prior litigation?

In addition, the fact actually litigated in the prior action must have been “essential” to the judgment in that action. To this end, it becomes necessary to determine whether judgment in the prior action could have been rendered without making the factual determinations at issue. Moreover, the rule of collateral estoppel will not apply where review of the judgment in the initial action was not available to the party against whom collateral estoppel is now sought.

(Internal citations omitted.)

Applying the *Pope* criteria to this case, the first question is whether the issues or facts decided by the Circuit Court and affirmed by the Court of Special Appeals were identical to those on which the REC seeks preclusion here. The REC seeks to preclude the Respondent from re-litigating the question of whether he engaged in fraud in his dealing with the Claimant. That issue was squarely before the Circuit Court, was directly addressed in the written opinion and order, and was decided adversely to the Respondent. One of the counts brought by the Claimant in the civil action was fraud. Actual and punitive damages were awarded for the Respondent’s constructive fraud. This provides conclusive evidence that the Circuit Court found the Respondent to have engaged in fraud. Further, the Circuit Court found that the fraud arose due to the Respondent’s breach of a duty he owed the Claimant as her real estate salesperson. The first *Pope* criteria is satisfied.

The second question is whether there was a final judgment on the merits. In this instance, the Respondent did not appeal the judgment of the Circuit Court. The Respondent was disappointed that he was ordered to pay money to the Claimant, but he testified more than once that his main goal in litigation was keeping the house. The Claimant appealed the Circuit Court

decision to the Court of Special Appeals. Neither party further appealed the matter. There has been a final judgment on the merits of the issues presented.

The third question under *Pope* is whether the Respondent was a party to the prior litigation. There is no doubt that he was, and this part of the test is also satisfied.

Another requirement of collateral estoppel is that the issue previously litigated must have been essential to the prior judgment. Clearly the fraud count of the civil case could not have been decided without a determination of whether or not the Respondent engaged in fraud. The Circuit Court found that the Respondent owed the Claimant a fiduciary duty and was bound to act in good faith. The Circuit Court further found that the Respondent made use of, or allowed use of, or knew of the use of documents which he had to have known were forged. The Circuit Court awarded both actual and punitive damages on the fraud count. There is no question that the Circuit Court rendered a decision on the issue of fraud and that it was essential to the judgment in that action.

The final requirement mentioned in *Pope*, is also met. It requires that the party against whom collateral estoppel is being asserted must have had the opportunity for a review of the earlier adverse judgment. Here, the Respondent had a right to, but did not seek appellate review. He was nonetheless exposed to the appellate process because the Claimant appealed the Circuit Court's decision.

For the reasons set forth above, I ruled at the hearing that the Respondent was precluded from re-litigating the issues of whether he had engaged in fraudulent conduct in his role as a real estate salesperson for the Claimant. The issues remaining to be decided are whether the Respondent's conduct violates the specific regulatory charges brought by the REC, and what, if any, penalty should be imposed if a violation is found.

Regulatory Charges

The REC has charged the Respondent with violating Business Occupations Article § 17-322(b)(25) and (33) (Supp. 2008). Those read 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:

...

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

...

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

The Respondent is a licensee and he engaged in fraudulent dealings, therefore he violated the first charged subsection. Business Occupations Article § 17-322(b)(25).

The second subsection charged, Business Occupations Article § 17-322(b)(33) authorizes the REC to impose discipline on a licensee for a violation of any provision of the code of ethics.

The REC has charged the Respondent with violating two sections of the ethics code found at COMAR 09.11.02. The first section is entitled “Relations to the Public.” It mandates that:

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 09.11.02.01C. This imposes an affirmative requirement that the Respondent protect the public against fraud.

The Circuit Court’s findings on the fraud count centered on three documents that were forged or altered. One was a deed, actually signed by the Claimant, but later notarized in a way

that was improperly backdated. The other two documents were necessary to the Respondent's goal of transferring title of the property to his spouse. The Claimant had refused to sign the documents. Forged documents were used to accomplish the Respondent's goal. While the Circuit Court stopped short of finding that the Respondent actually forged the documents himself, he used them or allowed them to be used knowing that they had been forged. This does not protect the public against fraud. The integrity of land records is of critical importance to the public at large. The public in general must be able to repose confidence in deeds and the documents that support their recordation. The Respondent violated this ethical code section by his conduct.

The last regulatory charge brought by the REC is another violation of the ethics code, this one entitled, "Relations to the Client." It requires the following:

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.

COMAR 09.11.02.02A. The Respondent's conduct constitutes a violation of this ethical code provision, too. The flavor of the whole transaction is brought out in the Circuit Court transcript as well as the two written opinions.

The Claimant wanted to sell her house because she was getting married and moving to her new husband's home. She chose the Respondent because he promised to sell the house within ninety days or pay the Claimant \$1,000.00. Instead, he ended up buying the house from the Claimant. The Claimant and the Respondent testified to widely divergent understandings of their deal, which was poorly memorialized, to the extent it was memorialized at all, in writing. The Claimant believed that within ninety days after settlement the Respondent would obtain his own financing and the mortgage would then be in his name. The Respondent testified that he

was assuming the Claimant's mortgage. In any event, the Respondent got behind on the existing mortgage which negatively impacted the Claimant's credit rating. The Respondent did not tell the Claimant, but she found out from the mortgage lender. When it became clear that the Claimant was trying to take back the property, the Respondent arranged for the mortgage to be paid off and for the property to be transferred to his spouse's name. He did not protect and promote the interest of the Claimant.

The Claimant wanted the house so badly she was willing to sue in Circuit Court and pursue an appeal to the Court of Special Appeals, followed by filing a REC complaint and a Fund claim. The Respondent wanted the house badly enough that he did not pursue any appeal from the Circuit Court ruling because being ordered to pay over \$20,000.00 to the Claimant was acceptable to him, as long as he was able to retain the property.

In summary, the REC has met its burden of proof with respect to all charged regulatory violations. The precision with which the charges meet the Circuit Court findings is no accident. In its order for hearing, as well as in argument, the REC made it clear it brought only charges it believed could be sustained based on the Circuit Court's opinion and order under collateral estoppel principles.

Appropriate Sanction

Available regulatory sanctions are outlined in Business Occupations Article Sections 17-322(b) and (c). They include denying a license to any applicant, reprimanding any licensee, or suspending or revoking a license if the licensee commits any one of a number of listed infractions. Dues to his violations of Section 17-322(b)(25) and (33) and, related to the subsection (33) charge, the code of ethics violations, the Respondent is subject to these sanctions. In addition, the statute provides the following:

(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.

(3) The Commission shall pay any penalty collected under this subsection into the General Fund of the State.

(4) The Commission may not impose a fine based solely on a violation of subsection (b)(35) of this section.

Business Occupations Article Section 17-322(c).

The REC seeks to revoke the Respondent's license and is also seeking a penalty of \$15,000.00 – the statutory maximum of \$5,000.00 for each of the three violations. The REC pointed out that brokers and other actors in the real estate arena are regulated to make sure the public is protected. The Respondent breached his duty to the Claimant. He was professionally obligated to promote and protect her interests, but he did not. He acknowledged that his action or inaction caused the Claimant's credit to be damaged. He also acknowledged owing her restitution. The Respondent came prepared to fully litigate the facts of the underlying transaction and was not expecting to be limited to addressing the narrow areas not decided by application of collateral estoppel – namely what, if any, penalty should apply.

He expressed his disagreement with the Circuit Court's conclusions. He emphasized that he tried to represent the Claimant to the utmost of his abilities and he did not think he should be penalized by losing his license. He insisted that he bought the property to "help" the Claimant, although he acknowledged that he "maybe" ended up harming her instead. In response to the REC's comment that he was not remorseful for what he had done, the Respondent claimed that he was remorseful; otherwise, he would not have paid the mortgage. Since the Respondent's

goal was to keep the property, paying the mortgage would seem to be more a function of meeting his own goals than conduct demonstrating remorse.

In support of its monetary penalty recommendation, the REC noted the seriousness of the violation. The Claimant documented approximately \$17,000.00 in legal fees she paid to fight the Respondent over the property. When the Claimant tried to rescind the transaction, the Respondent caused the property to be transferred to his spouse. He took deliberate action specifically adverse to the wishes of the Claimant.

The Respondent answered that whatever fraud had been perpetrated, the fault was not his. He stated that he was not the custodian of the documents found to be forged and that he did not have “jurisdiction” over them. The Circuit Court, as stated above, did not find that the Respondent personally forged the documents, but it found that the Respondent used the documents to accomplish his own goals – goals that were not in keeping with his client’s wishes – and, that he knew the Claimant’s signature was forged because the Claimant had flatly refused to sign the documents.

The harm caused to the Claimant is substantial. She ended up losing the property; her credit rating was hurt; her faith in real estate professionals has been damaged. The damage to the public is also an important factor for consideration in this case. The use of forged documents in land transactions cannot be tolerated. It strikes at the very heart of the reliability of the entire system. The Respondent, a licensed real estate professional, should be held accountable for his failure to appreciate the importance of the integrity of land records and the harm caused by reliance on fraudulent documents.

On the issue of the good faith of the Respondent, the Court found the Respondent to have engaged in fraudulent conduct and awarded punitive damages to the Claimant. The evidence of a lack of good faith is clear, despite the Respondent's protestations to the contrary.

No evidence was presented of any previous violations by the Respondent, nevertheless, the seriousness of this one violation warrants revocation of the Respondent's license. At the administrative hearing, it was clear that the Respondent still fails to grasp the magnitude of the ethical violations he committed. He testified repeatedly that his goal was to keep the property. His client wanted it back. He was duty bound to protect and promote his client's interests over his own. Beyond that, permitting forged documents to be used to transfer title of the property to his spouse demonstrates a lack trustworthiness that is not diminished by the Respondent pointing out that he personally did not forge the signatures, and that he was not a custodian of the documents.

I recommend that the Respondent's professional license, issued by the REC, be revoked and that a \$15,000.00 penalty be imposed, calculated as \$5,000.00 for each of the three violations charged and proven by the REC.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Respondent violated Business Occupations Article Sections 17-322(b)(25) and (33) (Supp. 2008), COMAR 09.11.02.01C, and COMAR 09.11.02.02A when he engaged in fraudulent conduct detrimental to the Claimant in the course of acting as her real estate salesperson.

I conclude as a matter of law that the Respondent is subject to a monetary penalty for violations of the Business Occupations Article as cited above, and that a \$5,000.00 penalty for

each of the three violations is appropriate. Business Occupations Article § 17-322(c) (Supp. 2008).

I conclude that the Respondent's REC issued license should be revoked. Business Occupations Article § 17-322(b) and (c).

RECOMMENDED ORDER

I **RECOMMEND** that the REC:

ORDER, that the Respondent violated Sections 17-322(b)(25) and (33) of Business Occupations Article, COMAR 09.11.02.01C, and COMAR 09.11.02.02A, and be it further,

ORDERED, that the Respondent pay a civil statutory penalty to the REC in the amount of \$15,000; and be it further,

ORDERED, that the Respondent's REC license be Revoked; and that it be further

ORDERED, that the records and publications of the REC reflect this Decision.

April 3, 2009
Date Decision Mailed



Kimberly A. Farrell
Administrative Law Judge

KAF
#103873

MARYLAND REAL ESTATE
COMMISSION

v.

GREGORY BENNETT,
RESPONDENT

* BEFORE KIMBERLY A. FARRELL,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE OF
* ADMINISTRATIVE HEARINGS
* OAH NO.: DLR-REC-24-08-28187
* COMPLAINT NO.: 2007-RE-301

* * * * *

EXHIBIT LIST

I admitted the following exhibits on behalf of the REC:

- REC #1 Notice dated October 8, 2008, for hearing scheduled January 20, 2009, with attachments including the Statement of Charges and Order for Hearing

- REC #2 Hearing Transmittal with the following attachments: Statement of Charges and Order for Hearing, dated July 8, 2008; unreported decision in the case of Natresha Dawson v. Gregory Bennett, et ux., Court of Special Appeals, No. 2181, September Term 2006; decision in the case of Natresha Dawson v. Gregory Bennett & Cynthia Bennett, Circuit Court for Prince George's County, Maryland, Case No. CAE05-11304

- REC #3 REC Licensing history for the Respondent, dated January 9, 2009

- REC #4 Packet containing the following:
 - Correspondence from the REC to the Claimant, dated November 2, 2006
 - Correspondence from the REC to the Respondent, dated November 3, 2006
 - Correspondence from the Claimant to the REC, dated January 30, 2008
 - Correspondence from the Claimant to the REC, dated March 4, 2008, with nineteen accompanying invoices for legal services on letterhead of Vangrack, Axelson, Williamowsky, Bender and Fishman, P.C.

REC #5 Transcript of the Circuit Court proceedings in Natresha Dawson v.
Gregory Bennett & Cynthia Bennett, Circuit Court for Prince George's
County, Maryland, Case No. CAE05-11304

The Respondent did not offer any exhibits into evidence.