

THE MARYLAND REAL ESTATE COMMISSION

MARYLAND REAL ESTATE
COMMISSION

V.

KIMBERLY R. TRIMBLE

* BEFORE DAVID HOFSTETTER,
* ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE OF
* ADMINISTRATIVE HEARINGS
* OAH No: DLR-REC-21-08-46444
* REC CASE NO: 2007-RE-536

* * * * *

PROPOSED ORDER

The Findings of Fact, Conclusions of Law and Recommended Order of the Administrative Law Judge dated November 5, 2009, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 16th day of December, 2009,

ORDERED,

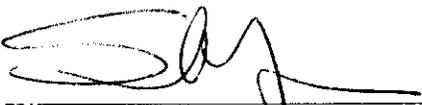
- A. That the Findings of Fact in the Recommended Decision be, and hereby are, AFFIRMED;
- B. That the Conclusions of Law in the Recommended Decision be, and hereby are, APPROVED;
- C. That the Recommended Order in the Recommended Decision be, and hereby is, ADOPTED;

and,

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

MARYLAND STATE REAL ESTATE COMMISSION

12/16/09
Date

By: 
Surina A. Jordan, Commissioner

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RECOMMENDED DECISION

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RECOMMENDED ORDER

STATEMENT OF THE CASE

On March 13, 2007, the Maryland Real Estate Commission (Commission or REC) received a complaint (Complaint) filed by Esther Williams-Butler (Complainant or Seller) against Kimberly Trimble (Respondent), a real estate salesperson, regarding the sale of residential property at 10765 Esprit Place, White Plains, Maryland. After an investigation, the Commission issued a Statement of Charges against the Respondent and Order for Hearing, dated December 1, 2008.

On August 7, 2009, I held a hearing at the Office of Administrative Hearings (OAH), 11101 Gilroy Road, Hunt Valley, Maryland. Md. Code Ann., Bus. Occ. & Prof. § 17-324 (2004). Jessica Berman Kaufman, Assistant Attorney General, represented the Commission. The

Respondent failed to appear after notice was sent to her address of record with the Commission.¹

The Administrative Procedure Act, the procedural regulations of the Department of Labor, Licensing and Regulation, and the Rules of Procedure of the OAH govern the procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009); COMAR 09.01.03, COMAR 09.11.03.02; and COMAR 28.02.01.

ISSUE

The issue is whether the Respondent, in providing real estate sales services in a sale of real property, is subject to sanction under the Business Occupations and Professions Article, Annotated Code of Maryland section 17-322(b)(31), (32), and (33); section 17-502; section 17-532; and COMAR 09.11.02.01H.

SUMMARY OF THE EVIDENCE

Exhibits

The Commission submitted the following documents, all of which were admitted into evidence:

- REC #1 - Notice of Hearing, dated May 5, 2009, and signed certified mail receipt, dated May 7, 2009
- REC #2 - Transmittal with Statement of Charges and Order for Hearing, dated December 1, 2008
- REC #3 - REC Licensing Information on the Respondent, dated July 1, 2009
- REC #4 - REC Complaint and Guaranty Fund Claim, dated March 9, 2007
- REC #5 - Letter from Louis M. Pope to the REC, dated April 9, 2007; letter from the Respondent to the REC, dated April 4, 2009
- REC #6 - REC Report of Investigation, with attachments, dated July 31, 2008

¹ Notice was sent both by certified and regular mail to the Respondent at her address of record on May 4, 2009. The certified mail receipt was signed for on May 7, 2009. The regular mail was not returned by the Postal Service.

The Respondent was not present and, therefore, did not submit any additional documents to be admitted into evidence.

Testimony

The Commission presented the testimony of Jennifer Grimes, Investigator, REC. The Respondent failed to appear for the hearing and no witnesses testified on her behalf.

FINDINGS OF FACT

Having considered all of the evidence presented, I find the following facts by a preponderance of the evidence:

1. At all times relevant, the Respondent held a license issued by the Commission as a real estate salesperson, and continues to be so licensed.
2. On August 18, 2006, the Seller entered into a listing agreement with ReMax 100 to sell her home located at 10765 Esprit Place, White Plains, Maryland.
3. On September 21, 2006, the Seller received an offer on her home, submitted on behalf of Warren Bradford and Danette Royster (Buyers) by the Respondent, who was the Buyers' agent.
4. On September 22, 2006, the Seller accepted the offer.
5. On or about September 21, 2006, a Residential Contract for Sale (Contract) was executed by the Seller and Buyers, with settlement scheduled for October 9, 2006.
6. On or about September 21, 2006, the Respondent received from the Buyers a good faith deposit of \$1,000.00, to be placed in an escrow account.
7. The Respondent promptly gave the ratified Contract along with the deposit to Alan Sherer in the accounting department at Century 21 for deposit into the Century 21 escrow account with BB&T Bank.

8. Established office procedure at Century 21 provided that real estate salespersons must provide Sherer or other accounting department staff with all ratified contracts and deposit checks. Sherer or other staff then reviewed the contracts and deposited the checks into the Century 21 escrow account with BB&T Bank. The Respondent complied with this procedure.

9. The broker of record for the Buyers was Louis Pope. The Respondent did not submit the good faith deposit check to Pope.

10. On October 9, 2006, the day of the settlement, the Seller received a call from the title company, informing her that the settlement would be postponed to October 12, 2006.

11. No written extension of the Contract, providing for the postponement from October 9 to October 12, 2006, was prepared by the Respondent, or any other person.

12. On October 12, 2006, the Seller received a call from her agent, informing her that the settlement would not go forward. No settlement occurred on October 12, 2006, or any other date.

13. At no time prior to the expected date of settlement did the Respondent take any action to confirm that the good faith deposit check had in fact been deposited in the bank and had cleared.

14. Paragraph 19 of the Contract provided that the Contract was contingent upon the buyers obtaining financing in the amount of \$315,000.00.

15. The Buyers did not proceed to settlement because they were not approved for financing.

16. The Buyer's good faith deposit check of \$1,000.00 was not deposited in a bank by the Respondent or Century 21 until October 14, 2006. The check was subsequently returned by the bank for insufficient funds.

17. Upon learning that the check had bounced, the Respondent called the Buyers and left messages that they were required to replace the \$1,000.00 check. The Buyers never responded to her calls and never provided the good faith deposit.

18. Because of the failure to obtain financing, the Seller would not have been entitled to the \$1,000.00 good faith deposit, even if the check had been properly deposited and had cleared.

DISCUSSION

The charges herein arise out of the Respondent's alleged failure to properly deposit a good faith deposit from the Buyers and to reduce to writing a postponement of the settlement date. The applicable sections of law provide:

§ 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:

...

- (31) violates any provision of Subtitle 5 of this title that relates to trust money;
- (32) violates any other provision of this title;
- (33) violates any regulation adopted under this title or any provision of the code of ethics.

...

§ 17-502. Handling of trust money.

(a) *Submission to brokers by associate brokers and salespersons.*- An associate real estate broker or a real estate salesperson who obtains trust money while providing real estate brokerage services promptly shall submit the trust money to the real estate broker on whose behalf the associate real estate broker or the real estate salesperson provided the real estate brokerage services

§ 17-532. Duties to client.

(c) *In general.*

- (1) A licensee shall:

(vi) exercise reasonable care and diligence[.]

Md. Code Ann., Bus. Occ. & Prof. §§ 17-322(b)(31), (32), and (33) 17-502 and 17-532 (Supp. 2009).

COMAR 09.11.02.01H provides:

H. For the protection of all parties with whom the licensee deals, the licensee shall see to it that financial obligations and commitments regarding real estate transactions are in writing, expressing the exact agreement of the parties, and that copies of these agreements are placed in the hands of all parties involved within a reasonable time after the agreements are executed.

Alleged violations of Section 17-502

Section 17-502 requires a real estate salesperson who receives trust money to promptly submit the money to the real estate broker on whose behalf the salesperson provided the services. In this case, the Broker of Record was Louis Pope. The evidence before me is that the Respondent took the check from the Buyers and submitted it to Alan Sherer in the accounting department. In doing so, she followed the established procedure at the firm. While it is clear that the Respondent did not give the check directly to Pope, every reasonable inference suggests that Pope had established, for the sake of business convenience and efficiency, the procedure whereby a deposit check would be handed over to the accounting department. In effect (if not literally) Pope had delegated to the accounting department the duty of accepting and depositing any good faith deposit checks. Indeed, to strictly require that a check be placed in the hand of Broker of Record would invite confusion and delay in cases where the Broker of Record was out of town, on vacation, or otherwise unavailable. Certainly, the statute is sufficiently broad to permit a reasonable system, such as that in place at the time at Century 21, authorizing a salesperson to submit a deposit check to the accounting department in accordance with an established office procedure. For these reasons, I conclude that the Respondent did not violate Section 17-502.

Alleged violations of Section 17-532

Section 17-532(c)(1)(iv) provides that a licensee shall “exercise reasonable care and diligence” in real estate transactions. The REC argues that at some point before the date scheduled for settlement, the Respondent should have verified that the deposit check had indeed been deposited in the bank. For the reasons stated above, I conclude that the Respondent did act with reasonable care and diligence in following the established procedures in her office by submitting the check to the Century 21 accounting office. Nothing in the REC’s evidence establishes that the Respondent had some independent legal obligation to, for example, contact Century 21’s bank to establish that the check had been deposited and had cleared. I, therefore, conclude that the Respondent did not violate section 17-532 of the Business Occupations and Professions Article.

Alleged violation of COMAR 09.11.02.01H

COMAR 09.11.02.01H provides, in substance, that agreements concerning real estate transactions shall be in writing. By failing to reduce to writing the agreement to extend the settlement date from October 9 to October 12, 2006, the Respondent violated this section. Although it is not clear on the record why the settlement was postponed, it is likely that it occurred as a result of the Buyers’ difficulty in obtaining financing. Regardless of the precise reason for the postponement, it is clear that all licensed persons involved in the transaction, including the Respondent, had an obligation under this regulation to reduce the agreement to writing for the signature of the parties. Nevertheless, as discussed below, it does not appear that the Seller or any other party was prejudiced or injured as a result of this violation by the Respondent.

Sanctions

As a result of the violation of COMAR 09.11.02.01H, the Respondent is subject to sanction under § 17-322(b)(33) of the Business Occupations and Professions Article. Md. Code Ann., Bus. Occ. & Prof. § 17-322(c) (Supp. 2009) provides:

(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.

. . . .

In this case the only violation charged which I have upheld is the violation of COMAR 09.11.02.01H dealing with the requirement that all agreements be reduced to writing. By failing to reduce to writing the postponement of the settlement date from October 9 to October 12, 2006, the Respondent violated this section. However, there is no evidence that any party was prejudiced by this error. The failure to prepare a written instrument regarding the postponement did not cause the settlement to be cancelled; the settlement did not occur because the Buyers could not get financing. I, therefore, conclude that the violation was not a grave one and that no harm was caused by the violation.² Md. Code Ann., Bus. Occ. & Prof. § 17-322(c)(2)(i) and (ii). (Supp. 2009). I have no evidence before me as to either the good faith or bad faith of the Respondent, nor

² Although I have not upheld the violations concerning the alleged failure to properly handle the good faith check, I note that even this alleged failure did not result in prejudice to the Seller. The evidence is uncontroverted that the matter did not proceed to settlement as a result of the Buyers inability to attain financing. As a result, the financing contingency section of the Contract came into effect and the contract was no longer binding. Due to the failure to obtain financing, and regardless of any alleged violation in handling the deposit check, the Seller would not have been entitled to deposit.

as to any history of previous violations. Md. Code Ann., Bus. Occ. & Prof. § 17-322(c)(2)(iii) and (iv). (Supp. 2009). Therefore, I do not consider these factors in considering an appropriate sanction.

The violation of COMAR 09.11.02.01H subjects the Respondent to sanction under to Md. Code Ann., Bus. Occ. & Prof. § 17-322(b)(33) (Supp. 2009). In this case, the Commission recommended a reprimand and a civil penalty of a total of \$1,000.00 for all the alleged violations. As I have upheld only one of the alleged violations, and based on my analysis as to amount of any monetary penalty to be imposed, I recommend that the Respondent be reprimanded and that no civil penalty be imposed.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Respondent is not subject to sanction under sections 17-502(a) and 17-532 of the Business Occupations and Professions Article. I further conclude that the Respondent is subject to sanction under Section 17-322(b)(33) and COMAR 09.11.02.01H.

RECOMMENDED ORDER

IT IS THEREFORE RECOMMENDED that the Maryland Real Estate Commission:

FIND that the Respondent is not subject to sanction under sections 17-502(a) and 17-532 of the Business Occupations and Professions Article.

FIND that the Respondent is subject to sanction under Section 17-322(b)(33) and COMAR 09.11.02.01H.

ORDER that a reprimand be issued to the Respondent under 17-322(b)(33) of the Business Occupations and Professions Article and COMAR 09.11.02.01H.

ORDER that the records and publications of the Commission reflect its final decision.

November 5, 2009
Date Decision Mailed

David Hofstetter
David Hofstetter
Administrative Law Judge

DH/rbs
#109287

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FILE EXHIBIT LIST

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