

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF BUSINESS REGULATION
JOHN O. PASTORE CENTER, BLDGS. 68-69
1511 PONTIAC AVENUE
CRANSTON, RHODE ISLAND 02920

:
ROGER A. TORTOLANI, :
Complainant :
:
v. : DBR No. 09-L-0134
:
ALFRED W. D’AGUANNO and :
ANTHONY M. CAPRIO :
Respondents. :

DECISION

Hearing Officer: Ellen R. Balasco, Esq.

Date of Hearing: November 15, 2010

Appearances: For Complainant: *Pro Se*

For Respondents: *Michael DiChiro, Jr., Esq.*

I. INTRODUCTION

This matter came before the Department for Business Regulation (“Department”) as the result of a complaint filed on or about April, 2009 by Roger A. Tortolani (“Complainant”) against Alfred W. D’aguanno and Anthony M. Caprio (“Respondents”). Each Respondent holds a real estate broker’s license pursuant to R.I. Gen. Laws §5-20.5-1, *et seq.* After an investigation by the Department, an order appointing Hearing Officer Ellen R. Balasco Esq. and providing notice of complaint hearing was issued on August 31, 2010 and served on the parties (“Order”). The pre-hearing conference in this matter was held on October 4, 2010. At that pre-hearing conference, the issues in this matter were clarified and an opportunity for

discovery was afforded to the parties. A Pre-Hearing Conference Order was issued on October 4, 2010, which set the deadline for completion of discovery as November 1, 2010, and scheduled a full evidentiary hearing for November 15, 2010.

II. JURISDICTION

The Department has jurisdiction over this matter pursuant R.I. Gen. Laws §§ 5-20.5-1 *et seq.*, 42-14-1, *et seq.*, and 42-35-1, *et seq.*.

III. RELEVANT LAW

The issues presented in this matter are whether or not either or both of the Respondents' actions violated the following laws and regulations:

1. R.I. Gen. Laws § 5-20.5-14(a)(1), which authorizes the Department to suspend or revoke a license where a licensee engaged in making any substantial misrepresentation;

2. R.I. Gen. Laws § 5-20.5-14(a)(16), which authorizes the Department to suspend or revoke a license in the case of a broker licensee, for failing to exercise adequate supervision over the acts of his or her licensed salesperson if the broker has knowledge of any misdeeds of his/her sales staff.

3. R.I. Gen. Laws § 5-20.5-14(a)(34), which authorizes the Department to suspend or revoke a license where a licensee fails to report all written offers to the seller of the subject property prior to the signing of a purchase and sales agreement.

4. *Commercial Licensing Regulation 11 – Real Estate Brokers and Salespersons* (as amended April 26, 2006 and in effect at all times pertinent to said transaction) Rule 20(c) which requires that a licensee shall diligently transmit every written offer on any specific real property to the owner or his/her authorized representative.

5. *Commercial Licensing Regulation 11 – Real Estate Brokers and Salespersons* (as amended April 26, 2006 and in effect at all times pertinent to said transaction) Rule 15(e) which requires that every agency shall be under the direct supervision of a Principal Broker, who shall be responsible for the full time management of said office.

IV. STANDARD OF REVIEW FOR AN ADMINISTRATIVE HEARING

It is well settled that in formal or informal adjudications modeled on the federal Administrative Procedures Act, the initial burdens of production and persuasion rest with the moving party. 2 Richard J. Pierce, *Administrative Law Treatise* § 10.7 at 759 (2002). Unless otherwise specified, a preponderance of the evidence is generally required in order to prevail. *Id.* at 763-766; see also, *Lyons v. Rhode Island Pub. Employees Council* 94, 559 A.2d 130, 134 (R.I. 1989) (preponderance standard is the “normal” standard in civil cases); *Parker v. Parker*, 238 A.2d 57, 60 (R.I. 1968) (“satisfaction by a ‘preponderance of the evidence’ [is] the recognized burden [of proof] in civil actions”). This means that for each element to be proven, the fact-finder must believe that the facts asserted by the proponent are more probably true than false. See *Parker*, 238 A.2d at 60. When there is no direct evidence on a particular issue, a fair preponderance of the evidence may be supported by circumstantial evidence. *Narragansett Electric Co. v. Carbone*, 898 A.2d 87, 100 (R.I. 2006).

Here, the proponent of this action is the Complainant. As such, he bears the burden of establishing why it is more likely than not that Respondents conducted themselves in a manner that violated the statutes and regulations under which they hold their real estate brokers’ licenses, as set forth in Section III herein.

V. MATERIAL FACTS AND TESTIMONY

The Complainant is a licensed broker who was acting as a buyer’s agent for the transaction referenced in his complaint, which forms the basis for this action. The subject property was a foreclosure, so the seller was the Fannie Mae financing program.

The Complainant's buyer was interested in purchasing the property and tendered an offer of \$47,500 – an amount \$2,500 in excess of the asking price. After many offers were received by the Respondent agency (the listing brokers), a call for “highest and best offer” was made by Fannie Mae. In response, the Complainant's client raised his offer to \$60,000. The seller signed an agreement with another co-broker's buyer for the highest offer received, \$65,000.

Due to minimum housing violations and title issues, the property remained in pending status for approximately 10 weeks without closing, and the deal later fell through. At that time, Fannie Mae instructed the Respondent's agency to re-list the property at its original asking price of \$45,000. The complainant's client did not place an offer and the property sold for the asking price to another party.

It is the position of the Complainant that the Respondents had a duty to contact him or his client as a previously interested potential buyer when the property was relisted to give him a second opportunity to make an offer. He argues that his client was prepared to pay a much higher price for the property than it sold for, and that the Respondents failed to communicate that information to the seller, resulting in a lost opportunity to purchase by his client.

The Respondents argue in their defense that they had no duty to notify and solicit offers from parties who had previously made offers for a property after a contracted sale had failed.

B. Complainants' Case in Chief

The Complainant was properly sworn in, and introduced a packet into evidence that would be referenced throughout his testimony and marked as exhibits as presented. The Complainant stated that he had passed by the Property “many times” and became

aware of fact that the Property was for sale on Oct. 23. The Complainant went on to say he immediately had a buyer in mind for the Property, with a listing price of \$45,000. The Complainant and the buyer had worked together on approximately 20-25 properties, and the Complainant was confident that the buyer would want the Property. Complainant's Exhibit #1 was an email dated 10/23/2008 that stated his offer price of \$47,500 cash, no inspection and no contingency. Complainant's Exhibit #2 included the Respondent's response that many offers have been made on the Property and that all cash offers required a 10% deposit. Complainant included a handwritten note written a few days prior to the Hearing.

Complainant sent a revised offer at 10am on 10/26/08 of \$60,000, which was marked as Exhibit #3 which encompassed the offer and bank statements consisting of a total of 6 pages. Exhibit #4 consisted of a 6 page document fronted by an email offer, sent 10:46am 10/26/08, consisting of the 10% deposit and 14 day closing. Exhibit #5 was a one page email message from the Complainant consisting of the same 10% deposit and 14 day closing, Complainant also wanted to know if this was the highest and best offer.

Sometime in late March or early April, Complainant was notified by the multiple listing service ("MLS") that the Property had sold for \$45,000, presented as Exhibit #6. Complainant informed his buyer of the sale for a lower price than what they offered and his intention to file a complaint. Complainant testified that he filed a complaint with the Department of Business Regulation ("the Department") (Exhibit #7) sometime in April of 2009. The Department notified the Complainant that he had to file a complaint on the proper complaint form. The Hearing Officer stated that the Complainant's proper complaint form to the Department was already on the record and did not need to be presented again.

The Complainant reiterated his argument that his offer of \$60,000 cash, with no contingencies, and not subject to inspections, was the “highest and best offer” and should have been accepted.

The Complainant called Respondent D’Aguanno as his first and only witness. After being sworn in, Respondent D’Aguanno stated that the initial buyer backed out of the deal on December 16, 2008. It was on January 10, 2009 that the Property was placed back onto the market for \$45,000. Respondent D’Aguanno stated that all of the initial offers were communicated to the Seller, and it was not his obligation to contact the second highest offeror if the initial deal failed. Respondent D’Aguanno contends that it is practically impossible, considering the sheer number of properties listed by him at the time, for him to recall all the prior offers. He stated that it was not his practice to contact previous offerors after 3 months if a transaction fell through, nor did he believe he was legally obliged to do so. With this testimony, the Complainant concluded the presentation of his case.

C. Respondents’ Case in Chief

Counsel for Respondents moved to dismiss under 12(b)(6) since the Complainant failed to state a claim, and the Respondents did not violate any rules or regulations by not notifying the complainant that the Property was back on the market. Counsel further contends that the final sale price of the Property is irrelevant to the proceedings at hand because, again, the Respondents were not obligated to notify the Complainant that the Property was back on the market, it was the obligations of the buyer’s broker (the Complainant) to continually check MLS and keep himself apprised of the situation.

The Hearing Officer withheld judgment on the Respondents’ motion to dismiss to enable a full record to be established. The Hearing Officer asked the Respondents to

present all of their witnesses and evidence now, rather than having to reconvene on a later date in the event the motion was denied.

Respondent D'Aguanno, having been previously sworn in, was called as a witness once again. The Respondent stated that there were numerous minimum housing and zoning violations on the Property and that it took two or three weeks to get the Property relisted after the person offering \$65,000 backed out. Once the Property was relisted, it became available for viewing by every buyer broker that had had previously made an offer on the Property. A diligent broker, Respondent contends, would have become aware of the property again being available by this monitoring.

The Respondent stated that he did not contact any of the previous parties who had made offers at the time of the first listing. The prevailing offer was identified on MLS. The Respondent stated that the Complainant had never asked to be notified if the previous deal did not go through. Had the Complainant made such a request, the Respondent claims that he would have notified him when the property was relisted.

Fannie Mae, Respondent contends, is the final decision maker. They have possession of all offers and property listing information so it would be up to them to determine whether or not to contact previous bidders, and would then instruct the listing agents to make that contact. That was not done in this case, and has not been done in his experience.

Respondent Caprio, having been duly sworn in, was called to be the second witness. Respondent Caprio stated that Respondent D'Aguanno acted properly throughout the entire transaction and it was not common practice or legally required for a any party who has made a previous offer to be contacted if a property was removed from MLS then was relisted. Respondent concedes that if one of the previous offerors were to

be contacted, then all of the previous offerors would have to be contacted. This would be an unduly burdensome practice. It is not common practice, therefore, for real estate professionals to do so, according to the Respondent.

Counsel for the Respondents reiterated his motion to dismiss based on the evidence presented.

VI. DISCUSSION

R.I. Gen. Laws § 5-20.5-6(b) provides that the Department, after a due and proper hearing, may suspend, revoke, or refuse to renew any license upon proof that the holder of the license has violated the statutes pertaining to real estate licensure or any rule or regulation promulgated thereunder. In addition, R.I. Gen. Laws § 5-20.5-14(b) authorizes the Department to levy an administrative penalty not exceeding one thousand dollars (\$1,000) for any violation of these laws.

The facts alleged in the Complaint and during the hearing, if preponderated, implicate four (4) statutory provisions of the Rhode Island laws and rules pertaining to real estate licensure. Each will be addressed in turn.

A. R.I. Gen. Laws § 5-20.5-14(a)(1) – Substantial Misrepresentation.

The first provision implicated is R.I. Gen. Laws § 5-20.5-14(a)(1), which authorizes the Department to suspend or revoke a license where a licensee makes a substantial misrepresentation in a real estate transaction. As noted in a previous Department decision, statutory and regulatory requirements serve and protect the public interest by promoting real estate transactions based on honesty, good-faith, competency and fair-dealing. See *D'Orsis v. Santilli*, DBR No. 99-L-0086 (July 18, 2000). A real estate licensee's representations in a real estate transaction influence the decisions of the

parties involved, decisions that entail important personal and financial issues. *Id.* For that reason, it is essential that licensees keep all parties to the transaction fully informed of all material facts in accordance with the duties placed upon them by law. *Id.* Among them is a duty to reasonably investigate all issues and disclose all reasonable and material facts to the relevant parties in order to create a transaction in which the parties are well informed. *Id.*

In this case, for Complainant to show the Respondent made a substantial misrepresentation, he would need to have established by the evidence that either or both of the Respondents made a statement to him with the specific intention to mislead or cause him to believe that the property in question was no longer available for purchase.

Based on the testimony of both Respondents, and the documentary evidence presented by the Complainant, no such statements were ever made. In fact, the Complainant has argued that it was the lack of contact by the Respondents as to the property being listed a second time of which he is aggrieved.

Accordingly, there is no evidence to support the allegation that either or both of the Respondents made any substantial misrepresentation to this Complainant relative to the offering or sale of the subject property.

B. R.I. Gen. Laws § 5-20.5-14(a)(34) - Failing to Report all Written Offers to the Seller.

There is a complete absence of evidence presented during the course of the hearing to support this allegation that the Respondents failed to disclose any offers, specifically any offers made by the Complainant's client. The testimony of the Complainants and both Respondents established that the two offers made by the Complainant on behalf of his client were, in fact, communicated to Fannie Mae, along with approximately a dozen "final and best offers" on October 28, 2008. The

Complainant's client made an offer of \$60,000. The Respondents established in their testimony that Fannie Mae accepted a higher offer (\$65,000.00) than that made by Complainant's client. The record does not support an obligation that the Respondents failed to present written offers to the seller in this case.

As no evidence was presented which establishes that the Respondents failed to meet their obligations under R.I. Gen. Laws § 5-20.5-14(a)(34), allegations that they violated *Commercial Licensing Regulation 11 – Real Estate Brokers and Salespersons*, Rule 20(c) which requires that a licensee shall diligently transmit every written offer on any specific real property to the owner or his/her authorized representative are also unsubstantiated.

It appears from the Complainant's testimony, that he was aggrieved only by the Respondents' failure to contact him two months after he tendered an offer on a subject property when the sale failed and it was relisted. This was not a breach of any duty inherent in the law governing real estate licensees. To make such notification a duty of real estate brokers and salesperson would pose an undue burden, especially in the current market which is inundated with bank-owned properties. Indeed, the Complainant during his testimony admitted that he was surprised to learn that this subject was owned by Fannie Mae, and that this was likely the cause for the two month delay prior to relisting.

C. **R.I. Gen. Laws § 5-20.5-14(a)(16), and CLR 11, Rule 15(e) - Failure to Exercise Adequate Supervision over the acts a Licensed Salesperson**

Proof of a violation of R.I. Gen Laws § 5-20.5-14(a)(16) carries the additional burden of establishing that the Principal Broker (in this case, Respondent Caprio) had "knowledge of misdeeds" by the sales staff in his agency. No portion of either the

Complaint or the Complainant's testimony support that any misdeeds were made by Respondent D'Aguanno either during, or prior to this transaction.

Respondent Caprio's testimony (which was uncontradicted in the record) clearly established that he had full knowledge of all activities taking place in this transaction by his salesperson, D'Aguanno. Accordingly, there is no evidence in the record which points to the failure of Respondent Caprio to have adequately supervised this specific transaction, the general management of Center Place Realty.

VII. FINDINGS OF FACT

1. On or about January 7, 2009, the Complainant filed a complaint with the Department of Business Regulation against the two named Respondents.
2. A full evidentiary hearing was held in this matter as outlined herein.
3. The facts, as detailed in sections I. through VI. *supra*. are incorporated herein by reference and adopted as findings.

VIII. CONCLUSION

For each of the potential violations identified, Complainant failed to provide sufficient evidence to support a finding that Respondent D'Aguanno engaged in improper conduct as a licensed real estate salesperson, and failed to provide evidence that Respondent Caprio failed to adequately supervise the activities of his licensed salesperson. As such, the Hearing Officer finds neither Respondent violated R.I. Gen. Laws §§ 5-20.5-14(a) or Rule 20 of *Commercial Licensing Regulation 11 – Real Estate Brokers and Salespersons*.

IX. CONCLUSIONS OF LAW

In accordance with the testimony and facts presented:

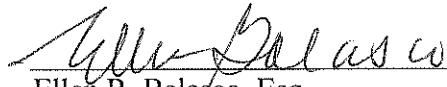
1. The Department has jurisdiction over this matter as set forth in Section II, *supra*.
2. Under the standard set forth in Section IV and the statutory framework and analysis set forth in Section VII, Complainant did not establish by a preponderance of the evidence that either of the Respondents made a substantial misrepresentation in a real estate transaction, in violation of R.I. Gen. Laws § 5-20.5-14(a)(1).
3. Under the standard set forth in Section IV and the statutory framework and analysis set forth in Section VII, Complainant failed to establish by a preponderance of the evidence that either of the Respondents failed to report all written offers to the seller of the subject property prior to the signing of a purchase and sales agreement, in violation of R.I. Gen. Laws § 5-20.5-14(a)(34).
4. Under the standard set forth in Section IV and the statutory framework and analysis set forth in Section VII, Complainant failed to establish by a preponderance of the evidence that either of the Respondents failed to diligently transmit every written offer on any specific real property to the owner or his/her authorized representative, in violation of Rule 20(c) of *Commercial Licensing Regulation 11 – Real Estate Brokers and Salespersons* (as amended April 26, 2006).
5. Under the standard set forth in Section IV and the statutory framework and analysis set forth in Section VII, Complainant failed to establish that Respondent Anthony Caprio, as Principal Broker for Center Place Realty, violated Rule 15(e) of *Commercial Licensing Regulation 11 – Real Estate Brokers and Salespersons* (as amended April 24, 2006).
6. Under the standard set forth in Section IV and the statutory framework and analysis set forth in Section VII, Complainant failed to establish by a preponderance of the evidence that Respondent Caprio violated R.I. Gen. Laws § 5-20.5-14(a)(16).

X. RECOMMENDATION

Based on the above analysis, the Hearing Officer recommends that the Director of the Department find that Complainant failed to meet his burden to prove that either of the named Respondents violated Rhode Island General Laws or Commercial Licensing Regulation 11, as detailed in Section IX herein.

Accordingly, it is the considered recommendation of the Hearing Officer that the Complaint be dismissed in its entirety as to both Respondents.

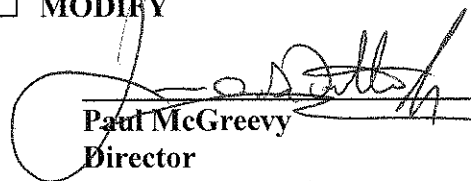
Dated: 10/26/11


Ellen R. Balasco, Esq.
Hearing Officer

I have read and considered the Hearing Officer's Decision and Order in this matter, and I hereby take the following action:

- ADOPT**
- REJECT**
- MODIFY**

Dated: 11/1/11


Louis A. DeQuattro, Sr. on
behalf of Director
Paul McGreevy

Entered as Administrative Order No. 11-080, this 1st day of Nov., 2011.

THIS DECISION CONSTITUTES A FINAL DECISION OF THE DEPARTMENT OF BUSINESS REGULATION PURSUANT TO RHODE ISLAND GENERAL LAWS TITLE 42, CHAPTER 35. AS SUCH, THIS DECISION MAY BE APPEALED TO THE SUPERIOR COURT SITTING IN AND FOR THE COUNTY OF PROVIDENCE WITHIN THIRTY (30) DAYS OF THE DATE OF THIS DECISION. SUCH APPEAL, IF TAKEN, MAY BE COMPLETED BY FILING A PETITION FOR REVIEW IN SAID COURT.

CERTIFICATION

I hereby certify on this 2nd day of November, 2011, that a copy of the within Decision was sent by first class mail, postage prepaid, to Michael DiChiro, Jr., Esq. at 1405 Plainfield Street, Johnston, RI 02919 and sent by electronic mail to the following parties at the Department of Business Regulation:

Maria D'Alessandro, Deputy Director - Commercial Licensing Division

William DeLuca, Real Estate Administrator – Commercial Licensing Division

Ellen R. Balasco, Esq., Deputy Chief of Legal Services

A B Ellison