

**BEFORE THE
REAL ESTATE AGENCY
STATE OF OREGON**

IN THE MATTER OF: CAROL ROSENBERG,) FINAL ORDER)) OAH Case No. 1403704) Agency Case No. 2014-110
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This matter came before the Real Estate Agency to consider the Proposed Order issued by Administrative Law Judge (ALJ) Rick Barber on January 28, 2015. No exceptions were filed to the Proposed Order.

After considering the records and the file herein, , the Agency adopts the attached and incorporated Proposed Order as the Final Order.

IT IS HEREBY ORDERED that the broker license of Carol Rosenberg be revoked, with said revocation to be effective the date of this order.

Dated this 16th day of March 2015.



Gene Bentley
Real Estate Commissioner

Date of Service: 3-16-2015

NOTICE: You are entitled to judicial review of this order. Judicial review may be obtained by filing a petition for review within 60 days of the service of this order. Judicial review is pursuant to the provisions of ORS 183.482 to the Oregon Court of Appeals.

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
REAL ESTATE AGENCY**

IN THE MATTER OF:) **PROPOSED ORDER**
)
CAROL ROSENBERG) OAH Case No. 1403704
) Agency Case No. 2014-110

HISTORY OF THE CASE

On April 29, 2014, the Real Estate Agency (Agency) issued a Notice of Intent to Revoke to Carol Rosenberg (Licensee). On May 12, 2014, Licensee's former attorney, Jesse Conway, requested a hearing on Licensee's behalf. Licensee later retained the services of David McDonald to represent her in the case.

On May 28, 2014, the Agency referred the hearing request to the Office of Administrative Hearings (OAH). The OAH assigned Administrative Law Judge (ALJ) Rick Barber to preside at hearing. The ALJ convened a prehearing conference on July 22, 2014, and the parties agreed upon a January 6, 2015 hearing date. The parties also set a schedule for motions for summary determination.

On July 31, 2014, the Agency filed a Motion for Summary Determination, with six exhibits attached. On September 8, 2014, Licensee filed a Response with eight attached exhibits. On September 18, 2014, the Agency filed a Reply with an additional exhibit. On September 22, Licensee filed a Supplemental Response, along with an additional exhibit, as well as a Motion to Allow a Deposition and to Stay the Motion for Summary Determination. On September 24, 2014, the Agency denied Licensee's request for a deposition.

On October 24, 2014, ALJ Barber issued a Ruling on Motion for Summary Determination, concluding that the Agency had established its Dishonest Conduct charge against Licensee, but reserving the other charge and the appropriate sanction for hearing. The Ruling is hereby incorporated in this Proposed Order.

Hearing was held on January 6, 2015, as scheduled. Licensee did not attend the hearing, but was represented by Mr. McDonald. Certified Law Student Jacqueline Houser represented the Agency,¹ along with Senior Assistant Attorney General Raul Ramirez. Agency investigator Frances Hlawatsch and complainant Holly Consol testified for the Agency. The hearing record closed on January 6, 2015.

¹ Documentation of Ms. Houser's representation and certification were presented by Mr. Ramirez on December 22, 2014, and are in the file.

ISSUES

1. Whether Licensee knowingly or recklessly published materially misleading or untruthful advertising, thereby violating ORS 696.301(4).
2. Whether Licensee committed an act of fraud or engaged in dishonest conduct when she forged her tenant's signature on the Tenant Notice and Waiver Form, thereby violating ORS 696.301(14). [*Decided by Ruling on Summary Determination*].
3. Whether, if Licensee committed the violations, her license should be revoked.

EVIDENTIARY RULING

Exhibits A1 through A7, offered by the Real Estate Agency, and Exhibit L1, offered by Licensee, were admitted into evidence without objection. Procedural Documents P1 through P16 are also included in the record.

FINDINGS OF FACT

1. Licensee has been licensed by the Agency at all times relevant to this proceeding. She was² the owner of a duplex at 15007 Boones Way, Lake Oswego, Oregon. (Ex. A1, A2). Holly Consol was a tenant on one side of the duplex. (Test. of Consol).
2. Licensee, through her attorney Jesse Conway, began the application process to convert her duplex into two condominiums. One of the requirements in a condominium conversion is to give existing tenants 120 days to find a new place to live. The 120 day time period can be waived by a tenant. Knowing that Consol did not want to waive the 120 day time period, Licensee forged Consol's name to the notice and waiver form without Consol's permission and instructed her attorney to submit it to the Agency. (Ruling on MSD).
3. Before the conversion was complete, Licensee put two listings on the MLS, one for an individual unit and one for the entire duplex. The duplex listing claimed to be a "Home like Plex being converted to condos[.]" The individual unit listing claimed to be a "Home like Condo, one of only two units[.]" (Ex. A7 at 1).
4. Consol discovered that the condominium conversion process was ongoing when she viewed the "for sale" sign on the property and then obtained a copy of the listing from real estate agent Aaron Heard. (Test. of Consol; Ex. A7). Consol contacted the Agency to find out her rights and discovered Licensee's forgery of her signature on the waiver form. Consol filed a complaint with the Agency. (Test of Consol; Ex. A6).
5. Investigator Frances Hlawatsch interviewed Licensee to ask about the signatures on the waiver form, and Licensee admitted she had signed Consol's name without her permission. Hlawatsch also asked Licensee about the two listings she had placed on the MLS before the condominium conversion was complete. Hlawatsch told her the listings were

² It is unclear whether she remains the owner of the property.

premature. (Test. of Hlawatsch). Licensee indicated she would change the listings to comply with the Agency's desires, and she did so. (Ruling on MSD).

6. On April 29, 2014, the Agency sent a Notice of Intent to Revoke to Licensee. The Notice alleged the following violations:

Violation: By advertising the subject property as a condominium on the Regional Multiple Listing Service prior to completion of the conversion process, Rosenberg violated ORS 696.301(4), which states that a licensee may be disciplined if they have knowingly or recklessly published materially misleading or untruthful advertising.

* * * * *

Violation: By forging Consol's signature on the Tenants' Notice and Waiver form, Rosenberg violated ORS 696.301(14), which states that a licensee may be subject to discipline if they have committed an act of fraud or engaged in dishonest conduct substantially related to the fitness of the licensee to conduct professional real estate activity, without regard to whether the act or conduct occurred in the course of professional real estate activity.

Based upon the two violations alleged, the Agency proposed to revoke Licensee's real estate license. (Pleading 1, at 3-4).

7. In her dealings with Hlawatsch, Rosenberg was cooperative and "forthcoming," admitting that she had signed Consol's name without her permission, and agreeing to make the changes that Hlawatsch suggested on the MLS listing. (Test. of Hlawatsch).

8. On June 4, 2014, Licensee was arrested in Clackamas County and charged with one count each of Forgery II and Identity Theft, arising from signing Consol's waiver form. On July 24, 2014, Consol signed a Civil Compromise Agreement by which she waived her right to sue Licensee and agreed to dismissal of the criminal charges, in return for a monetary settlement. (Ex. L1).

CONCLUSIONS OF LAW

1. Licensee knowingly or recklessly published materially misleading or untruthful advertising, thereby violating ORS 696.301(4).

2. Licensee committed an act of fraud or engaged in dishonest conduct when she forged her tenant's signature on the Tenant Notice and Waiver Form, thereby violating ORS 696.301(14).

3. Licensee's real estate license should be revoked.

OPINION

The Real Estate Agency contends that Licensee knowingly or recklessly published materially misleading or untruthful advertising, violating ORS 696.301(4). Based upon that charge and the charge of Dishonest Conduct previously established on summary determination, the Agency contends that Licensee's real estate license must be revoked. As the proponent of these positions, the Agency has the burden of proof. *Sobel v. Board of Pharmacy*, 130 Or App 374, 379 (1994), *rev den* 320 Or 588 (1995) (standard of proof under the Administrative Procedures Act is preponderance of evidence absent legislation adopting a different standard). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than not. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390 (1987). The burden of proof encompasses two burdens, the burden of production of evidence in support of an assertion, and the burden to persuade the fact-finder that the facts asserted are true. *Marvin Wood Products v. Callow*, 171 Or App 175 (2000).

As noted, the Ruling on Summary Determination decided the Dishonest Conduct charge, leaving only the questions whether Licensee's listing of her property on MLS was knowing or reckless, and also leaving the question of what sanction is appropriate. Because the serious violation has already been established, and because I find that it alone justifies the sanction of revocation, comments on the publishing charge will be brief.

Knowing or Reckless Publishing

The Agency's publishing charge in this case is governed by ORS 696.301, which states in part:

Grounds for discipline. Subject to ORS 696.396, the Real Estate Commissioner may suspend or revoke the real estate license of any real estate licensee, reprimand any licensee or deny the issuance or renewal of a license to an applicant who has done any of the following:

* * * * *

(4) Knowingly or recklessly published materially misleading or untruthful advertising.

Licensee did not attend and did not testify at hearing, so the only evidence concerning her mental state when she listed the property is found in the MSD exhibits. In her affidavit for the Response to the motion, Licensee indicated she did not realize that listing the properties during the conversion process would be a problem. The record indicates that Licensee did not "knowingly" try to be misleading or untruthful when listing her property on the MLS, and there is no evidence to establish that she knew she was violating the law. However, given Licensee's knowledge of her profession, including how to legally list properties, her decision to post the listings without knowing the legality of it was reckless.

As noted above, there were two listings in the MLS. One listing was for the entire duplex, and the listing explained that the conversion process was ongoing. Therefore, although it

was probably reckless for Licensee to list the property before it could be listed, there was nothing materially misleading or untruthful about that listing.

For the individual condo listing, however, the MLS listing was misleading and it was untruthful. The listing did not mention the conversion process; it represented that a "home like condo" was available, when it was not. The dwelling was not yet a condo, and it was not yet available. This listing was also reckless, so I conclude that Licensee violated ORS 696.301(4).

Looking at this violation in a vacuum, without consideration of the more serious dishonest conduct charge, I would be recommending a sanction of a reprimand or, perhaps, a short suspension for the violation. Given the progressive discipline standard discussed in more detail below, and taking into account Licensee's lack of prior discipline, those would have been the appropriate sanctions for the publishing charge.

Nature of the Sanction. However, setting the sanction for the more serious dishonest conduct charge is not as simple, nor is the result the same. For the reasons that follow, I propose that the Agency revoke Licensee's real estate license.

Licensee correctly contends that the Real Estate Agency requires a consideration of progressive discipline when sanctioning its licensees. Licensee relies on ORS 696.396, which states:

Investigation of complaints and progressive discipline; rules. (1) The Real Estate Commissioner shall provide by rule for the progressive discipline of real estate licensees and an objective method for investigation of complaints alleging grounds for discipline under ORS 696.301.

(2) The rules adopted by the commissioner under this section:

(a) Must establish procedures for the discovery of material facts relevant to an investigation and for the reporting of those facts without conclusions of violation or grounds for discipline to the commissioner or the commissioner's designee by the individual assigned to investigate the complaint.

(b) Must provide for progressive discipline designed and implemented to correct inappropriate behavior.

(c) May not authorize imposition of a suspension or a revocation of a real estate license unless the material facts establish a violation of a ground for discipline under ORS 696.301 that:

(A) Results in significant damage or injury;

(B) Exhibits incompetence in the performance of professional real estate activity;

(C) Exhibits dishonesty or fraudulent conduct; or

(D) Repeats conduct or an act that is substantially similar to conduct or an act for which the real estate licensee was disciplined previously.

Licensee contends that her lack of prior discipline with the Agency precludes the Agency from revoking her license. Under her theory, the Agency must utilize progressive discipline and impose a lesser sanction than revocation because of her lack of previous discipline.

Relying on the same statute, the Agency disagrees with Licensee's argument. Subsection (2)(c) of the statute notes four circumstances justifying the revocation of a license. The Agency relies upon (2)(c)(C), contending that Licensee "[e]xhibit[ed] dishonesty or fraudulent conduct" when she signed Consol's name to the waiver without her permission. I agree with the Agency.

Licensee's action in this case clearly involved dishonesty and fraudulent conduct, despite her later attempts to make things right with Consol and others. The language of the statute indicates that even in a system of progressive discipline there are circumstances too serious for lesser sanctions. This is such a case. The Agency contends that Licensee's license should be revoked, and I agree.

ORDER

I propose the Real Estate Agency issue the following order:

The Agency's April 29, 2014, Notice of Intent to Revoke is AFFIRMED, and Licensee's license to practice real estate is revoked.

Rick Barber

Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the Administrative Law Judge's Proposed Order. If the Proposed Order is adverse to you, you have the right to file written exceptions and argument to be considered by the Real Estate Commissioner in issuing the Final Order. Your exceptions and argument must be received by the 20th day from the date of service. Send them to:

Denise Lewis
Oregon Real Estate Agency
1177 Center St. NE
Salem OR 97301-2505

The Real Estate Commissioner will issue a Final Order, which will explain your appeal rights.

CERTIFICATE OF MAILING

On January 28, 2015, I mailed the foregoing PROPOSED ORDER issued on this date in OAH Case No. 1403704.

By: First Class Mail

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Administrative Specialist
Hearing Coordinator

CERTIFICATE OF MAILING

On March 16, 2015, I mailed the foregoing Final Order issued on this date in OAH Case No. 1403704 and Agency Case No. 2014-110.

By: First Class Mail

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