

FILED

OCT 18 2016

BUREAU OF REAL ESTATE
By [Signature]

BEFORE THE BUREAU OF REAL ESTATE

STATE OF CALIFORNIA

In the Matter of the Accusation of)	CalBRE No. H-40246 LA
)	
NORTHLAND REAL ESTATE INC.)	OAH No. 2016060067
and JINGJING LIU,)	
Respondents.)	

DECISION

The Proposed Decision dated September 2, 2016, of the Administrative Law Judge of the Office of Administrative Hearings, is hereby adopted as the Decision of the Real Estate Commissioner in the above-entitled matter.

The Decision suspends or revokes one or more real estate licenses.

Pursuant to Government Code section 11521, the Bureau of Real Estate may order reconsideration of this Decision on petition of any party. The Bureau's power to order reconsideration of this Decision shall expire 30 days after mailing of this Decision, or on the effective date of this Decision, whichever occurs first. The right to reinstatement of a revoked real estate license or to the reduction of a penalty is controlled by Section 11522 of the Government Code. A copy of Sections 11521 and 11522 and a copy of the Commissioner's Criteria of Rehabilitation are attached hereto for the information of respondent.

This Decision shall become effective at 12 o'clock noon on NOV 07 2016.

IT IS SO ORDERED 10/12/2016

WAYNE S. BELL

[Signature]
REAL ESTATE COMMISSIONER

BEFORE THE
BUREAU OF REAL ESTATE
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation of:

NORTHLAND REAL ESTATE, INC. and
JINGJING LIU,

Respondents.

No. H-40246 LA

OAH No. 2016060067

PROPOSED DECISION

Thomas Y. Lucero, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on August 3, 2016, in Los Angeles, California.

Veronica Kilpatrick, complainant, was represented at the hearing by Diane Lee, Staff Counsel.

JingJing Liu, respondent, was represented by Michael B. Montgomery, Attorney at Law. Ms. Liu did not appear at the hearing. Ms. Liu's husband, Tony Dong, testified. He and Ms. Liu are licensed real estate salespersons, both employed by respondent Northland Real Estate, Inc., which did not appear at the hearing.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on August 3, 2016.

FACTUAL FINDINGS

1. Complainant brought the accusation in her official capacity as a Deputy Real Estate Commissioner, Bureau of Real Estate (BRE), Department of Consumer Affairs, State of California. Complainant urges discipline against each respondent's license based on a civil judgment, which in turn was based on a jury's findings that respondents were liable for intentional wrongdoing in a real estate transaction. Each respondent filed a timely request for hearing.

2. On March 28, 2011, BRE issued corporation license number 01896249 to Northland Real Estate, Inc. (Northland). The license is set to expire on March 27, 2019.

(Exhibit 2.)

3. On March 28, 2007, BRE issued respondent Liu real estate salesperson license number 01800544. The license is set to expire on September 8, 2019. (Exhibit 3.)

4. There was no evidence that Ms. Liu's license has been disciplined in the past.

5. A civil judgment (the judgment), Exhibit 4, was entered against respondents on December 4, 2014.

A. The litigation that resulted in the judgment was commenced when two people, former operators of a massage parlor (sellers), filed a complaint in the Superior Court of California, County of Los Angeles, case number BC519580, entitled *YIN TING CHO etc. et al., Plaintiffs, vs. WEI TAO; LI LIU, Defendants; WEI TAO, an individual; and LI LIU, an individual; Cross-Complainants, vs. YIN TING CHO etc. et al., Cross-Defendants*.

B. Sellers, as plaintiffs, alleged that in June 2013, they agreed to sell and two individual defendants (buyers) agreed to buy a massage business known as J Spa, which plaintiffs had operated in Alhambra, California. They alleged that upon buyers' making an initial payment under the purchase and sale contract, buyers took possession of the premises and began operating J Spa. After investigating the business, however, the City of Alhambra refused buyers a business license. Buyers then refused to perform further under the contract.

C. Buyers filed a cross-complaint on August 27, 2013. The cross-complaint was eventually successful against six cross-defendants: the two sellers, the two respondents here, respondent Liu's husband, Tony Dong, and his accounting business, Dong & Associates, CPA. The cross-complaint alleged contradictory facts:

(i) J Spa had never had a business license; and

(ii) Sellers falsely represented to buyers that the business license held by J Spa could be transferred to buyers.

D. The court entered the judgment in favor of buyers on December 4, 2014. The judgment was amended to include costs totaling \$9,273.03 on January 6, 2015.

E. Respondents and the four other cross-defendants were found jointly and severally liable for compensatory damages totaling \$21,000.

F. Ms. Liu was found liable for \$30,000 in punitive damages.

G. Northland was found liable for \$30,000 in punitive damages.

H. The judgment was based on a special verdict, which found, with respect to respondents:

- buyers;
- (i) Respondent Liu “committed intentional misrepresentation against”
 - (ii) Ms. Liu “committed concealment against” buyers;
 - (iii) Ms. Liu “committed false advertising against” buyers;
 - (iv) Ms. Liu “committed a breach of fiduciary duty of undivided loyalty to” buyers;
 - (v) Ms. Liu “committed constructive fraud against” buyers; and
 - (vi) Northland “is liable for . . . Liu’s wrongful acts against” buyers.
- (Exhibit 4.)

6. Buyers filed an acknowledgement of partial satisfaction of judgment by Northland on March 17, 2015. (Exhibit 4, p. 69.)

7. Buyers filed an acknowledgement of full satisfaction of judgment by Ms. Liu on June 23, 2015. (Exhibit 4, p. 76.)

8. At hearing, Mr. Dong testified to his understanding of the transaction and documents, including a business license (Exhibit A) and occupancy permit (Exhibit B) related to the transaction, as well as a police report of investigation of J Spa after buyers took possession (Exhibit E).

9. The Bureau incurred investigation costs of \$1,574 and prosecution or enforcement costs of \$801, a total of \$2,375. (Exhibit 5.)

LEGAL CONCLUSIONS

1. The Bureau has the burden of showing by “clear and convincing proof to a reasonable certainty” that license discipline is warranted. (*Ettinger v. Medical Board of Quality Assurance* (1982) 135 Cal.App.3d 853, 855.)

2. Business and Professions Code section 10177.5 provides:

When a final judgment is obtained in a civil action against any real estate licensee upon grounds of fraud, misrepresentation, or deceit with reference to any transaction for which a license is required under this division, the commissioner may, after hearing in accordance with the provisions of this part relating to hearings, suspend or revoke the license of such real estate licensee.

//

3. The judgment became a final judgment when respondents' time to appeal expired. The award of punitive damages indicates that facts to support the judgment met the standard of clear and convincing evidence, as required by Civil Code section 3294. That is the same standard of proof that BRE was required to meet in this case. A final judgment on such proof, and its findings that respondents are liable for misrepresentation and the like, cannot be attacked in this proceeding. The findings must be accepted as immune from relitigation and collateral attack. Controlling case law holds "that under [Business and Professions Code] section 10177.5, 'if the elements of fraud have been proved in the civil action, collateral estoppel principles bar the licensee from attempting to relitigate those facts' in disciplinary proceedings before the [real estate] commissioner. (*California Real Estate Loans, Inc. v. Wallace* (1993) 18 Cal.App.4th 1575, 1582, 23 Cal.Rptr.2d 462, review den. Dec. 30, 1993, citations omitted.)" (*Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1994) 22 Cal.App.4th 1814, 1822.)

4. Cause exists to discipline the license of each respondent.

A. Cause for discipline exists under the portion of the judgment stating that Ms. Liu "committed intentional misrepresentation against" buyers, and that Northland is "liable for . . . Liu's wrongful acts." Business and Professions Code section 10177.5 specifically states that a judgment based on a licensee's misrepresentation is grounds for discipline. The employer of such a licensee, Northland, is likewise subject to discipline, even if its liability for the underlying misconduct was vicarious only. (*California Real Estate Loans, Inc. v. Wallace* (1993) 18 Cal.App.4th 1575, 1578-1579.)

B. Cause for discipline exists under the other findings of the judgment against Ms. Liu and Northland: concealment, false advertising, breach of fiduciary duty, and constructive fraud. These types of misconduct are not specifically stated to be grounds for discipline in Business and Professions Code section 10177.5, but case law holds that each, in circumstances such as those here, is the equivalent of fraud, and may be grounds for discipline for that reason.

(i) Concealment: the judgment found that respondents owed buyers a fiduciary duty. Concealment contrary to a professional's fiduciary duty to another is the equivalent of fraud. (*Hahn v. Mirda* (2007) 147 Cal.App.4th 740 [fiduciary relationship between physician and patient: fraud claim based on concealment against two physicians who breached a duty to inform their patient].)

(ii) False advertising: Falsehood in advertising has been held to be a form of fraudulent misrepresentation. (*Boeken v. Philip Morris* (2005) 127 Cal.App.4th 1640, 1659 [tobacco company's fraudulent statements in advertising].)

(iii) Breach of fiduciary duty: Breach of a fiduciary duty may not be the equivalent of fraud in all instances, but given that the judgment indicates respondents breached their fiduciary duty to buyers by concealment and misrepresentation, this part of the judgment must also be considered grounds for discipline.

(iv) Constructive fraud: Actual and constructive fraud are distinct. Civil Code section 1573 states:

Constructive fraud consists:

1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; or,
2. In any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud.

Business and Professions Code section 10177.5 states that fraud is grounds for a licensee's discipline, but does not mention constructive fraud. However, as already set out regarding breach of fiduciary duty, the judgment indicates that respondents harmed buyers in a real estate transaction by concealment and misrepresentation. Such misconduct must be considered the equivalent of actual fraud, especially in its consequences and legal effects on buyers. As the court stated in *Estate of Arbuckle* (1950) 98 Cal.App.2d 562, 568 (a dispute over a lost will):

Fraud assumes so many shapes that courts and authors have ever been cautious in attempting to define it. . . . In its generic sense, constructive fraud comprises all acts, omissions and concealments involving a breach of legal or equitable duty, trust, or confidence, and resulting in damage to another. . . . Constructive fraud exists in cases in which conduct, although not actually fraudulent, ought to be so treated—that is, in which such conduct is a constructive or quasi fraud, having all the actual consequences and all the legal effects of actual fraud.

5. There was no testimony from Ms. Liu, and evidence of rehabilitation was not otherwise presented.
6. Mitigating factors are that Ms. Liu paid the judgment against her in full and that there has been no discipline of her license in the past.
7. Business and Professions Code section 10106, subdivision (a), authorizes the BRE's recovery of reasonable costs in circumstances like those here. The costs incurred by BRE, totaling \$2,375, are reasonable.

ORDER

1. All licenses and licensing rights of respondent, JingJing Liu, under the Real Estate Law are revoked.

2. All licenses and licensing rights of respondent, Northland Real Estate, Inc., under the Real Estate Law are revoked.

3. Under Business and Professions Code section 10106, subdivision (a), respondents JingJing Liu and Northland Real Estate, Inc. are jointly and severally obligated to reimburse and shall reimburse BRE its costs in the amount of \$2,375, on such terms as BRE may direct.

Dated: September 2, 2016

DocuSigned by:

Thomas Lucero

3DA9A5E2A5304BD

THOMAS Y. LUCERO
Administrative Law Judge
Office of Administrative Hearings