FILED

APR 10 2012

DEPARTMENT OF REAL ESTATE
BY: C.S.

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

* * * * *

In the Matter of the Accusation of	)	No. H-37067 LA
	)	
CLAUDIO YAMILE ESCOBAR,	)	L-2011031320
	)	
Respondent.	)	
	)	

DECISION

The Proposed Decision dated February 24, 2012, 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.

This Decision shall become effective at 12 o'clock noon on April 30, 2012.

IT IS SO ORDERED 3/30/2012.

Real Estate Commissioner

By WAYNE S. BELL
Chief Counsel

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of:	Case No. H-37067 LA
CLAUDIO YAMILE ESCOBAR,	OAH No. 2011031320
Respondent.	

PROPOSED DECISION

This matter was heard on October 31, 2011, by Erlinda G. Shrenger, Administrative Law Judge with the Office of Administrative Hearings, in Los Angeles.

Lissete Garcia, Staff Counsel, represented Robin Trujillo (Complainant), a Deputy Real Estate Commissioner for the Department of Real Estate (Department), State of California.

Claudio Yamile Escobar (Respondent) represented himself.

Oral and documentary evidence was received and argument was heard. The matter was submitted for decision on October 31, 2011.

FACTUAL FINDINGS

1. Complainant filed the Accusation in her official capacity on February 10, 2011.

2. On March 15, 2005, the Department issued real estate broker license number B/01172538 to Respondent. The license will expire on March 19, 2013.

3. The Accusation is based on Respondent's solicitation of loan modification and negotiation services to Raul Sandoval-Salazar (Borrower) in connection with loans secured by real property, and the collection of advance fees for such services.

4. In December 2008, Borrower contacted Respondent because of difficulties he was having with the mortgage payments on his residence located at 7635 Rudnick Avenue in Canoga Park and another property located in Winetka. Borrower knew Respondent from previous real estate transactions. Respondent

suggested that a loan modification would reduce his interest rate and lower his mortgage payments. Respondent recommended Teresa Contreras (Contreras) for the loan modification. Respondent told Borrower the charge for the loan modification was $6,000.

5. On December 20, 2008, Borrower paid $6,000 to Respondent for loan modifications on his two properties. Borrower paid Respondent by a check made payable to Respondent. Borrower personally gave the check to Respondent in Respondent's office; no one else was present when the check was delivered. Respondent gave Borrower a receipt for the payment. The $6,000 charged and received by Respondent was an advance fee as it was charged and received by Respondent before the loan modification services he represented would be performed were fully completed.

6. At the time Respondent collected the $6,000 payment from Borrower, Respondent did not give him an advance fee agreement. The Department has no record of approving any advance fee materials for use by Respondent or his fictitious business name (DBA) Trans America Realty & Loans. Respondent admitted he has not submitted any advance fee agreement to the Department for its approval. He testified he was unaware that he was required to do so.

7. Respondent deposited the $6,000 check he received from Borrower into his personal checking account. Respondent testified that he does not have a trust account and has never had a trust account. He further testified he was not aware that advance fees are required to be deposited into a trust account. He testified that he does not charge advance fees to his clients.

8. Subsequently, in or about December 2008, Borrower met with Respondent and Contreras regarding the loan modification. Borrower understood that Contreras assisted Respondent with loan modifications, and that they would work together on his loan modification. Respondent told Borrower that he and Contreras "worked as a team." Borrower provided information for the loan modification to Contreras. He also signed a document entitled "Consent Form to Release of General Information," with Contreras signing on behalf of NPC & Associates.

9. The Department has no record of any real estate license being issued to Contreras. Borrower received a business card from Contreras that identified her as a consultant for "NPC & Associates, Foreclosure Negotiations" (NPC). The business card showed the same office address as Respondent's address of record with the Department as of December 2008 of 250 East Palmdale Boulevard, Palmdale, California. Respondent testified that Contreras was not his assistant but was a representative of NPC. Respondent testified he does not know who owns NPC.

10. According to Respondent, Contreras and another NPC representative came to his office one day and offered to provide loan modification services for his clients. Respondent agreed to refer his real estate clients to NPC for loan modifications in exchange for a finder's fee of 50 percent of the loan modification charge. Respondent testified that, in Borrower's case, he received $3,000 and sent a check to Contreras for the remaining $3,000. Respondent presented no documentation to corroborate his testimony regarding a finder's fee agreement with NPC or his payment of $3,000 to Contreras. As to the latter, Respondent testified he closed the bank account on which he wrote the $3,000 check to Contreras.

11. Borrower became concerned when three to four months passed and nothing appeared to be happening on his loan modification. He was unable to contact Respondent or Contreras despite numerous attempts to do so. Borrower continued to receive letters from his lender regarding foreclosure and sale dates on his properties. In April 2009, Borrower was in default on the mortgage for his residence on Rudnick Avenue.

12. Borrower finally reached Contreras in mid-April 2009. Contreras told Borrower that he needed to pay an additional $1,500 to hire an attorney to help with the loan modification on his Rudnick Avenue residence. Borrower paid Contreras $500 on April 21, 2009, and $1,000 on April 27, 2009, both payments made by checks payable to S.P.S. & Associates, per Contreras' instructions. Borrower testified that he paid Contreras an additional $1,200 in cash in order to protect his other property. Borrower testified that, in June 2009, upon Contreras' advice, he paid $2,800 to an attorney, which Contreras said he needed to protect his properties and file for bankruptcy.

13. Borrower did not receive a loan modification through Respondent or Contreras. Borrower lost his residence on Rudnick Avenue to foreclosure. He was able to save his other property in Winetka by getting help elsewhere. Borrower did not receive a refund of the $6,000 he paid to Respondent, or the other monies he paid to Contreras. Borrower did not receive an accounting regarding the services provided for his $6,000 payment to Respondent or the other monies paid to Contreras.

14. By letter dated July 23, 2009, Borrower made a complaint to the Department regarding his loan modification transaction with Respondent. The Department investigated the complaint by, among other things, requesting information and documents from Borrower and Respondent.

15. By letters dated December 3, 2009, and August 19, 2010, the Department requested Respondent to provide information and documents regarding the loan modification and/or short-sale negotiation services he was providing to consumers. The letters were properly addressed to Respondent at his addresses of record with the Department as of the date of the letters. Respondent admits that his

addresses are correctly shown on each of the letters. Nonetheless, Respondent denies receiving either of the two letters.[1]

Mitigation

16. Respondent contends his real estate license should not be disciplined based on Borrower's loan modification transaction. During his testimony, Respondent insisted that he told Borrower from the start that his loan modification would be done by NPC, not by him, and the $6,000 paid by Borrower was for loan modification services by NPC. This testimony was not persuasive. It was Respondent, not NPC or Contreras, that charged and collected the $6,000 paid by Borrower for a loan modification. Respondent's testimony, without any corroborating documentation, is insufficient to establish that any of the $6,000 amount was sent to Contreras or NPC or that Respondent's involvement in Borrower's loan modification was limited to collecting a referral fee. During cross-examination, Respondent testified that he spoke with Borrower two to three times a week, by telephone, regarding the loan modification. Such contact by Respondent with Borrower tends to prove that Respondent had more involvement in Borrower's loan modification than collecting a $3,000 referral fee. No mitigation is established by this testimony.

17. Respondent also contends that he did arrange a loan modification for Borrower with Borrower's lender, Aurora Bank. According to Respondent, three to four months into the loan modification process, Borrower came to his office and expressed concern that NPC was not doing anything on his loan modification. Respondent telephoned Aurora Bank while Respondent was present in his office. Respondent testified that he reached an agreement over the telephone with Aurora Bank for a loan modification for Borrower. The bank was to send documents to Borrower within two weeks, and Borrower was to complete the documents and return them to Aurora to finalize the agreement for the loan modification. According to Respondent, that was the last time he heard from Borrower before he received the Accusation in this case.

18. Respondent's testimony regarding a verbal agreement with Borrower's bank for a loan modification is not persuasive. Borrower lost his residence on Rudnick Avenue to foreclosure. Respondent presented insufficient documentary evidence to corroborate his testimony. Respondent requested documentation from Aurora Bank. The bank responded by letter dated September 21, 2011 that it was unable to release any information to Respondent because its records did not indicate he was an authorized person on Borrower's account. The bank's letter, however, does not corroborate Respondent's testimony about a verbal agreement for a loan modification. Consequently, no mitigation is established by such testimony.

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[1] "A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail." (Evid. Code, § 641.) Respondent's denial of receipt of the Department's letters, without more, does not rebut this presumption.

Rehabilitation

19. Respondent has worked in the real estate business for over 15 years. He was first licensed by the Department as a salesperson in 1993. He was issued a broker license in 2005. No evidence was presented of any prior history of discipline with the Department.

20. Respondent testified that he tries to be a fair and honest real estate broker. He has never had a problem like the situation with Borrower. Borrower is the only client he referred to Contreras and NPC for loan modification services. Respondent feels that if he made any mistakes, they were good faith mistakes. He would like to keep his real estate broker license.

LEGAL CONCLUSIONS

1. Business and Professions Code section 10177 provides, in part, that the commissioner may suspend or revoke the license of a real estate licensee who has "willfully disregarded or violated" the Real Estate Law or the rules and regulations for the administration and enforcement of the Real Estate Law (subdivision (d)), or who has "[d]emonstrated negligence or incompetence in performing an act for which he or she is required to hold a license" (subdivision (g)).[2]

2. Cause exists to suspend or revoke Respondent's real estate broker license, pursuant to section 10177, subdivision (d), in that Respondent willfully disregarded and violated the Real Estate Law, rules and regulations governing the collection of advance fees and advance fee agreements, based on the matters in Factual Findings 1-15 and the Discussion, below.

3. Cause does not exist to suspend or revoke Respondent's real estate broker license, pursuant to section 10177, subdivision (g). No evidence was presented, such as expert testimony, to establish that Respondent committed negligence or incompetence in Borrower's transaction.

Discussion

4. Section 10026, subdivision (a), defines an advance fee as "a fee, regardless of form, that is claimed, demanded, charged, received, or collected by a licensee for services requiring a license . . . before fully completing the service the licensee contracted to perform or represented would be performed."

5. Section 10085 provides that the commissioner "may require that any or all materials used in obtaining advance fee agreements . . . be submitted to him or her

[2] All further statutory references are to the Business and Professions Code unless otherwise indicated.

at least 10 calendar days before they are used." Further, section 10085 provides that the commissioner "may determine the form of the advance fee agreements, and all materials used in soliciting prospective owners and sellers . . . ."

6. California Code of Regulations, title 10 (Regulation), section 2970, subdivision (a), states: "A person who proposes to collect an advance fee as defined in Section 10026 of the [Business and Professions] Code shall submit to the Commissioner not less than ten calendar days before publication or other use, all materials to be used in advertising, promoting, soliciting and negotiating an agreement calling for the payment of an advance fee including the form of advance fee agreement proposed for use."

7. Section 10085.5 prohibits the collection of advance fees for loan modification activities. Subdivision (a)(1) reads, in part: "It shall be unlawful for any person to claim, demand, charge, receive, collect, or contract for an advance fee . . . for soliciting lenders on behalf of borrowers or performing services for borrowers in connection with loans to be secured directly or collaterally by a lien on real property, before the borrower becomes obligated to complete the loan."

8. The $6,000 payment that Respondent collected from Borrower for loan modification services was an advance fee pursuant to section 10026. By collecting this advance fee from Borrower, Respondent violated section 10085.5. Further, Respondent collected this advance fee without having an advance fee agreement approved by the Commissioner, in violation of section 10085 and Regulation section 2970. These violations of the Real Estate Law and regulations by Respondent establish grounds for disciplinary action against his real estate license.

9. Further, Respondent violated the Real Estate Law and regulations regarding advance fees based on the conduct of Contreras. A real estate broker's license is required for the performance of loan modification activities, which includes the "collect[ion] of payments or perform[ance] of services for borrowers or lenders in connection with loans secured directly or collaterally by liens on real property." (Bus. & Prof. Code, § 10131, subd. (d).) Respondent, as a licensed real estate broker, is authorized to perform loan modification activities. Respondent referred Borrower to Contreras for loan modification services. However, Contreras does not hold any real estate license issued by the Department. Under the circumstances, Respondent may be deemed to have delegated his authority to perform Borrower's loan modification to Contreras. It is settled law that a person may do an act through an agent, if that act is one he could do himself. (Civ. Code, §§ 2304, 2305.) Contreras was acting as Respondent's agent in performing loan modification services for Borrower. The $1,500 that Contreras collected from Borrower was an advance fee pursuant to

section 10026.[3] By collecting this advance fee, Contreras, acting as Respondent's agent, violated sections 10085.5 and 10085 and Regulation 2970, and thereby subjected Respondent's real estate license to disciplinary action.

10. Respondent's testimony that he was unaware of the Real Estate Law regarding advance fees and advance fee agreements does not shield his real estate license from discipline. Real estate licensees are expected to be familiar with the law and regulations that govern their license. Given his over 15 years' experience as a real estate licensee, Respondent can reasonably be expected to know the requirements of the Real Estate Law pertaining to transactions of his real estate clients. Respondent's failure to comply with the law in Borrower's transaction constituted a willful disregard and violation of the Real Estate Law and regulations pertaining to advance fees and advance fee agreements.

11. Administrative proceedings to revoke, suspend or impose discipline on a professional license are noncriminal and nonpenal; they are not intended to punish the licensee, but rather to protect the public. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 785-786.) In particular, the statutes relating to real estate licenses are designed to protect the public from any potential risk of harm. (*Lopez v. McMahon* (1988) 205 Cal.App.3d 1510, 1516; *Arneson v. Fox* (1980) 28 Cal.3d 440.)

12. A real estate licensee in this state must be truthful, honest, and have integrity at all times. "Honesty and truthfulness are two qualities deemed by the Legislature to bear on one's fitness and qualification to be a real estate licensee." (*Harrington v. Dept. of Real Estate* (1989) 214 Cal.App.3d 394, 402.) "The Legislature intended to ensure that real estate brokers and salespersons will be honest, truthful and worthy of the fiduciary responsibilities which they will bear." (*Ibid.*)

13. The revocation of Respondent's license is warranted. His violations of the Real Estate Law in this case reflect poorly on his character for honesty and truthfulness. His insistence that Borrower paid $6,000 for loan modification services by Contreras and NPC, and not by him, shows that he has not accepted responsibility for Borrower's transaction, which resulted in the foreclosure of Borrower's residence. He did not cooperate with the Department's investigation regarding Borrower's complaint, in that he denied receiving the Department's correctly addressed letters to him requesting information and documents. Respondent does not appear to fully appreciate the need to deal honestly with the Department in matters regarding his real estate license. Public protection requires the revocation of Respondent's real estate license.

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[3] Borrower's uncorroborated testimony was insufficient to establish a $1,200 cash payment to Contreras, and a $2,800 payment to an attorney. Respondent's license is not subject to disciplinary action for those payments.

14. Complainant requested an order that Respondent pay restitution to Borrower. An order of restitution is not appropriate. Respondent is not being granted a restricted license. (Cal. Code Regs., tit. 10, § 2930, subd. (7).)

ORDER

All licenses and licensing rights of Respondent Claudio Yamile Escobar under the Real Estate Law are revoked.

DATED: February 24, 2012

ERLINDA G. SHRENGER
Administrative Law Judge
Office of Administrative Hearings

LISSETE GARCIA, Counsel (SBN 211552)
Department of Real Estate
320 West 4th Street, Suite 350
Los Angeles, California 90013-1105

Telephone: (213) 576-6982
(Direct) (213) 576-6914

FILED
FEB 10 2011
DEPARTMENT OF REAL ESTATE
By

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of CLAUDIO YAMILE ESCOBAR, Respondent.	NO. H-37067 LA A C C U S A T I O N

The Complainant, Robin Trujillo, a Deputy Real Estate Commissioner of the State of California, for cause of Accusation against CLAUDIO YAMILE ESCOBAR, is informed and alleges as follows:

1.

The Complainant, Robin Trujillo, a Deputy Real Estate Commissioner of the State of California, makes this Accusation in her official capacity.

2.

At all times herein mentioned, Respondent CLAUDIO YAMILE ESCOBAR ("Respondent") was and still is licensed and/or has license rights under the Real Estate Law (Part 1 of Division 4 of the California Business and Professions Code) ("Code") as a

real estate broker. Respondent's mailing address is listed with the Department of Real Estate as 3166 E. Palmdale Blvd., Suite 208, Palmdale, California 93552.

3.

Teresa Ester Contreras ("Contreras") is not now, and has never been, licensed by the Department in any capacity.

4.

During the period of time set out below, Respondent solicited borrowers (including, but not necessarily limited to those noted below) and negotiated to do one or more of the following acts for another or others, for or in expectation of compensation: negotiate the purchase, sale or exchange of real property; negotiate one or more loans for, or perform services for, borrowers and/or lenders in connection with loans secured directly or collaterally by one or more liens on real property; and charge, demand or collect an advance fee for any of the services offered.

5.

On or about December 20, 2008, Respondent and his assistant/consultant Contreras, solicited loan modification and negotiation services to borrower Raul Sandoval-Salazar in connection with loans secured by real property. Respondent charged and collected an advance fee of $6,000 from Raul Sandoval-Salazar. Respondent failed to provide a copy of any written advance fee agreement to Raul Sandoval-Salazar for the loan modification and negotiation services. Respondent failed to place the advance fees into a trust fund account and/or provide an accounting of trust funds to the borrower.

Respondent failed to perform the loan modification and negotiation services that had been promised to Raul Sandoval-Salazar.

6.

Respondent did not have an advance fee agreement approved by the Department to charge or collect advance fees within the meaning of Code Sections 10026 and 10085.

7.

In or around April of 2009, Contreras contacted Raul Sandoval-Salazar and charged him an additional $1,500 advance fees in order to save his properties from foreclosure. Raul Sandoval-Salazar paid an advance fee of $1,500 to S.P.S. & Associates according to Contreras' instructions. Raul Sandoval-Salazar did not receive a modification of his mortgages and his properties were foreclosed by the lender.

8.

The conduct, acts and/or omissions of Respondent as set forth above, in collecting advance fees from prospective borrowers pursuant to a written fee agreement, which agreement was not submitted to the Department for review prior to use, was in violation of Code Sections 10085 and 10085.5 and Regulation 2970, and constitutes grounds for the suspension or revocation of the license and license rights of Respondent pursuant to Code Sections 10177(d) and/or 10177(g).

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WHEREFORE, Complainant prays that a hearing be conducted on the allegations of this Accusation and that upon proof thereof, a decision be rendered imposing disciplinary action against all licenses and/or license rights of Respondent CLAUDIO YAMILE ESCOBAR under the Real Estate Law (Part 1 of Division 4 of the Business and Professions Code) and for such other and further relief as may be proper under other applicable provisions of law.

Dated at Los Angeles, California
this 9 day of February, 2011.

ROBIN TRUJILLO
Deputy Real Estate Commissioner

cc: Claudio Yamile Escobar
Robin Trujillo
Phillip Ihde
Sacto.