

Act 1/23/85

MAY 30 1985

DEPARTMENT OF REAL ESTATE
K. Arnold

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DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

* * * *

In the Matter of the Accusation of)	No. H-1309 SD
REAL PROPERTY INVESTMENTS, INC.,)	L-33205
a corporation, and PATRICK H.)	
MILLER, individually and as)	
designated officer of Real)	
Property Investments, Inc.,)	
Respondents.)	

ORDER STAYING EFFECTIVE DATE

On April 17, 1985, a Decision was rendered in the above-entitled matter to become effective May 29, 1985.

IT IS HEREBY ORDERED that the effective date of the Decision of April 17, 1985, is stayed for a period of 30 days.

The Decision of April 17, 1985, shall become effective at 12 o'clock noon on June 28, 1985.

DATED: May 30, 1985

Robert Arnold
Robert Arnold
Regional Manager
Department of Real Estate

Handwritten initials/signature

DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

FILED

MAY -9 1985

DEPARTMENT OF REAL ESTATE
Handwritten signature

In the matter of the Accusation of)
)
REAL PROPERTY INVESTMENTS, INC.,)
a corporation, and PATRICK H.)
MILLER, individually and as)
designated officer of Real)
Property Investments, Inc.,)
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Respondent(s))

No. H- 1309 SD
L- 33205

DECISION

The Proposed Decision dated April 17, 1985,
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 May 29, 1985

IT IS SO ORDERED 4-26-85

Handwritten signature of James A. Edmonds, Jr.

JAMES A. EDMONDS, JR.
Real Estate Commissioner

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

In the Matter of the Accusation of)
)
REAL PROPERTY INVESTMENTS, INC.,) NO. H-1309 SD
A corporation, and PATRICK H.)
MILLER, individually and as) L 33205
designated officer of Real)
Property Investments, Inc.,)
)
Respondents.)

PROPOSED DECISION

This matter was heard before Stewart A. Judson, Administrative Law Judge, State of California, Office of Administrative Hearings, on March 15, 1985 at San Diego, California.

The complainant was represented by Marjorie P. Mersel, Counsel. Patrick H. Miller was present and was represented by Paul M. Karrsen and Russell G. Allen, Attorneys at Law; O'Melveny & Myers, 610 Newport Center Drive, Suite 1700, Newport Beach, California 92660-6429.

Submission of the matter was deferred pending filing of written argument which was duly received on April 10, 1985 and marked for the record.

PRELIMINARY MATTER

The standard of proof is the clear and convincing evidence to a reasonable certainty burden under Ettinger v. BMOA (1982) 135 CA 3d 853.

FINDINGS OF FACT

I

The accusation was made by Carl Lewis in his official capacity as a Deputy Real Estate Commissioner of the State of California.

II

Real Property Investments, Inc. (respondent corporation) is currently licensed and has license rights under the Real Estate Law (Part 1, Division 4, Business and Professions Code*) of the State of California.

III

At all times herein mentioned, respondent corporation was and now is licensed by the Department of Real Estate (the Department) as a real estate broker corporation. This license expires on December 28, 1986.

IV

Patrick H. Miller (respondent Miller) is currently licensed and has license rights under the Real Estate Law of the State of California.

V

At all times herein mentioned, respondent Miller was and now is licensed by the Department as the designated licensed officer of respondent corporation. This license expires on December 28, 1986.

VI

The following were stipulated to by the parties:

1. At all times relevant herein, Ralph T. Dennison, Martha Dennison, William Brausa and Clara Brausa (collectively, Seller) were the sellers of certain residential property at 1369 Friends Way, Fellbrook, California (the Property).

2. On September 5, 1982, Seller entered into a listing agreement regarding the Property with Zenovic Realty.

3. On March 27, 1983, Abba and Aida Demetrias (collectively, Buyer) made a written offer for the purchase of the Property through respondent Miller.

4. Said offer includes a provision granting Buyer the right to occupy the Property for a monthly rental of \$500 until the close of escrow.

5. On March 28, 1983, Seller made a counteroffer to Buyer.

6. Said counteroffer does not incorporate the provision granting to Buyer the right to occupy the Property for a monthly rental of \$500 until the close of escrow.

*All statutory references are to said Code unless otherwise noted.

7. On March 28, 1983, Buyer accepted Seller's counteroffer.

8. The counteroffer accepted by Buyer constitutes the purchase contract by and between Buyer and Seller.

9. The purchase contract contains an express condition precedent that Buyer obtain a VA loan in the amount of \$122,000 at an interest rate not to exceed 12% for a term of 30 years with Seller paying all VA charges.

10. The purchase contract provides that the escrow shall close "as soon as possible."

11. An escrow was established and maintained by Buyer and Seller at California First Bank.

12. According to the escrow instructions, escrow was to close on or before May 20, 1983.

13. The escrow instructions further provided that either party to the escrow could cancel the escrow if the conditions precedent to the close of escrow had not been met by May 20, 1983.

14. Concurrently with the execution of the purchase contract, Buyer delivered to respondent Miller a check in the amount of \$1,000.

15. The check was deposited in respondent corporation's trust account.

16. The funds were not paid from this account to the escrow.

17. As of May 20, 1983, the VA financing required under the terms of the purchase contract had not been obtained.

18. On June 10, 1983, the VA financing required under the terms of the purchase contract still had not been obtained, and Buyer notified the escrow that the escrow was terminated and demanded that respondent Miller return to Buyer the \$1,000 deposit.

19. On June 10, 1983, Seller, through their representative Zenovic Realty, demanded that the \$1,000 deposit be paid to Seller.

20. Respondent Miller then consulted with his local attorney to determine what course of action was required.

21. His attorney advised respondent Miller to return the \$1,000 deposit to Buyer.

22. Respondent Miller paid to Buyer, out of respondent corporation's trust account, the \$1,000 deposit. This payment was made without Seller's authorization.

23. Until Buyer's instruction to cancel the escrow, respondent Miller's acts were done for and in expectation of compensation for performing acts for which a real estate broker license is required.

VII

Respondent Miller has been in the real estate profession for approximately 18 years. Most of this time has been as a licensed broker. He has kept current in his continuing education requirements. Respondent Miller concedes that he did not personally review the various Business and Professions Code sections pertaining to the issue herein or relevant rules of the Commissioner. Zenovic Realty did advise respondent Miller to place the \$1,000 deposit into escrow.

VIII

At the time of the transaction, Section 10145 required "instructions from the principal or principals in the transaction" before a real estate licensee who accepted funds from others in connection with a transaction could disburse said funds. Rule 2785(a)(10), Title 16, California Administrative Code, further provides that a licensee, when acting as an agent or subagent of the seller, is prohibited from refunding a purchase money deposit without the "express permission of the seller."

IX

Section 10145 was amended effective January 1, 1985 and now reads, in pertinent part, as follows:

"All funds deposited by the broker in a trust fund account shall be maintained there until dispensed by the broker in accordance with instructions from the person entitled to the funds."

X

Respondent Miller urges that newly amended Section 10145 be applied retroactively and that, since Buyer is the person entitled to the \$1,000, Buyer is currently authorized to instruct its broker to return the funds. Respondent Miller further urges that Rule 2785 in its present form exceeds the authority of the Commissioner because it limits the disbursement of trust funds to the discretion of the seller.

XI

Statutes are presumed to operate prospectively (Civil Code, section 3). There is nothing either in the amended legislation or the analysis appended thereto reflecting a legislative desire that the amendments to Section 10145 be applied retroactively. Even assuming that the effect of the amendments favored respondent Miller's interpretation, the issue of whether Buyer could have unilaterally terminated the escrow on June 10, 1983 upon his own determination that the condition precedent could not be satisfied without Seller's agreement or acquiescence is questionable.

XII

The Department's Code of Ethics (10 California Administrative Code 2785(a)(10), (11)) provides that when a licensee acts as a subagent of the seller, he/she cannot refund any part of the deposit to the buyer without the seller's permission after the seller has accepted the offer (see also Miller & Starr Current Law of California Real Estate, Part 1, Book 1, October 1985 Supplement page 82, paragraph 2.4 reference to page 177, footnote 3).

XIII

In accordance with the purchase contract, Buyer delivered to respondent Miller a personal check in the amount of \$1,000 payable to respondent corporation to be held uncashed until acceptance of the offer. The counteroffer of Seller incorporated this condition and was accepted by Buyer. By June 10, 1983, Seller's obligation of full performance had been satisfied while Buyer's obligation remained conditional.

XIV

Respondent Miller, by accepting the deposit check of \$1,000, was acting as a subagent of Seller. The evidence established that respondent Miller, by returning the \$1,000 to Buyer without first obtaining Seller's permission, did not comply with the terms of Section 10145 as then written and Rule 2785(a)(10). Who had actual title to the \$1,000 is immaterial. Nor is it material that the purchase contract contained no liquidated damages clause.

XV

The evidence failed to establish fraud or dishonesty upon respondent Miller's part. The evidence did establish that respondent Miller acted out of a good faith belief that his fiduciary duty to his client required that he disburse the funds as found hereinabove. Respondent Miller so acted only

after consulting with an attorney and receiving such advice. Neither respondents have had any known disciplinary action.

XVII

Official Notice of the Lawson and Bennett decisions, Cases H-637 FRESNO and H-1122 SD respectively, is taken.

XVIII

The evidence failed to establish that respondent Miller's aforedescribed conduct was a departure from the standard of practice of real estate brokers in the State of California.

DETERMINATION OF ISSUES

I

A violation of Section 10145 and Rule 2785(a)(10), Title 10, California Administrative Code was established. Cause for disciplinary action exists under Section 10177(d).

II

Negligence was not established. Cause for disciplinary action does not exist under Section 10177(g).

III

The mitigating factors found in Finding XV and the disposition of the cases officially noticed in Finding XVII have been considered.*

ORDER

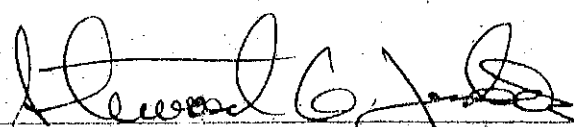
The license and license rights of respondent Miller and respondent corporation are suspended for fifteen (15) days provided that execution of said suspensions are hereby stayed upon the following conditions:

- A. No subsequent final determination be made, after hearing or upon stipulation, that cause for disciplinary action occurred within one (1) year from the effective date of this decision.

*In Lawson, the license was suspended for 15 days with all 15 days stayed. In Bennett, the licenses were suspended for 60 days with 15 days stayed and 30 days with all 30 days stayed.

- B. Should such determination be made, the Real Estate Commissioner may, in his discretion, vacate this stay and reimpose the stayed portion of this Order.
- C. Should no such determination be made, the stay shall become permanent.
- D. If an accusation is filed against respondents within one (1) year from the effective date of this decision, the Commissioner shall have continuing jurisdiction over this matter until said accusation is final, and period of this stay shall be extended until said accusation is final.

DATED: April 17, 1985


STEWART A. JUDSON
Administrative Law Judge

SAJ:lhj

fact

FILED

SEP 20 1964

DEPARTMENT OF REAL ESTATE
BY *[Signature]*

1 MARJORIE P. MERSEL, Counsel
2 Department of Real Estate
3 107 South Broadway, Room 8107
4 Los Angeles, California 90012
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10 (213) 620-4790

DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

* * * *

11	In the Matter of the Accusation of)	NO. H-1309 SD
12	REAL PROPERTY INVESTMENTS, INC.,)	
13	a corporation, and PATRICK H.)	
14	MILLER, individually and as)	<u>A C C U S A T I O N</u>
15	designated officer of Real)	
16	Property Investments, Inc.,)	
	Respondents.)	

17 The complainant, Carl Lewis, a Deputy Real Estate
18 Commissioner of the State of California, for cause of accusation
19 against REAL PROPERTY INVESTMENTS, INC., a corporation, and
20 PATRICK H. MILLER, individually and as designated officer of Real
21 Property Investments, Inc., alleges as follows:

I

22
23 The complainant, Carl Lewis, a Deputy Real Estate
24 Commissioner of the State of California, makes this accusation
25 in his official capacity.

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II

REAL PROPERTY INVESTMENTS, INC., a corporation (hereinafter referred to as respondent CORPORATION), is presently licensed and/or has license rights under the Real Estate Law (Part 1 of Division 4 of the Business and Professions Code).

III

At all times herein mentioned, respondent CORPORATION was and now is licensed by the Department of Real Estate of the State of California as a real estate broker corporation.

IV

PATRICK H. MILLER (hereinafter referred to as respondent MILLER) is presently licensed and/or has license rights under the Real Estate Law (Part 1 of Division 4 of the Business and Professions Code).

V

At all times herein mentioned, respondent MILLER was and now is licensed by the Department of Real Estate of the State of California as the designated licensed officer of respondent CORPORATION.

VI

At all times herein mentioned, Ralph T. and Martha Dennison and William and Clara Brausa (hereinafter referred to as Sellers) were the sellers of a certain real property located at 1369 Friends Way, Fallbrook, California (hereinafter referred to as the Property).

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VII

On or about September 5, 1982, Zenovic Realty, obtained a listing agreement on the Property.

VIII

On or about March 27, 1983, respondent MILLER procured an offer on the Property from Abbas and Aida Demetrias (hereinafter referred to as the Buyers). On or about March 28, 1983 the Sellers made a counter offer that the Buyers accepted.

IX

On or about June 10, 1983 Buyers told respondent MILLER that Buyers wanted to cancel the transaction and have their check returned.

X

On or about June 10, 1983, Sellers told respondent MILLER not to return the check and that they wanted Buyers' deposit.

XI

On or about June 10, 1983, respondent MILLER returned the deposit check to Buyers without Sellers' authorization and despite Sellers' demand.

XII

All acts of respondent MILLER herein mentioned were done for or in expectation of a compensation for performing acts for which a real estate license is required.

XIII

Respondent MILLER did not have written or other authorization from Sellers to return said or dispose of said money in any manner other than that required, authorized or permitted by

1 Section 2785(a)(10) of Title 10, California Administrative Code
2 and Section 10145 of the California Business and Professions Code.
3 The failure of respondent to handle said \$1,000 deposit in
4 accordance with Section 2785(a)(10) and Section 10145 constitutes
5 a basis for discipline of respondent's real estate license under
6 Section 10177(d) of the California Business and Professions Code.

7 XIV

8 Respondent MILLER negligently returned said deposit
9 money to the Buyer without authorization from the Sellers.
10 Said conduct constitutes a basis for discipline of respondent's real
11 estate license under California Business and Professions Code
12 Section 10177(g).

13 XV

14 Respondent's conduct hereinabove alleged subjects his
15 real estate license to suspension or revocation under the following
16 provisions of the Business and Professions Code:

- 17 1. Section 10177(g) for negligence; and/or
18 2. Section 10177(d) for willfully disregarding or
19 violating Regulation 2785(a)(10) of Title 10, California Admini-
20 strative Code and Section 10145 of the California Business and
21 Professions Code.

22
23 WHEREFORE, complainant prays that a hearing be conducted
24 on the allegations of this Accusation and, that upon proof thereof,
25 a decision be rendered imposing disciplinary action against all
26 licenses and license rights of respondents REAL PROPERTY INVESTMENTS,
27 INC., a corporation and PATRICK H. MILLER, individually and as

1 designated officer of Real Property Investments, Inc. and for such
2 other and further relief as may be proper under other applicable
3 provisions of law.

4 Dated at San Diego, California
5 this 20th day of September, 1984.

7 CARL LEWIS
8 Deputy Real Estate Commissioner

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cc: Real Property Investments, Inc.
Patrick H. Miller
Sacto
JCG