

FILED

DEC 17 2010

BEFORE THE  
DEPARTMENT OF REAL ESTATE  
STATE OF CALIFORNIA

DEPARTMENT OF REAL ESTATE

By R. Henry

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In the Matter of the Accusation of

SHERYLE LYNN McNAMARA,

Respondent

)  
) DRE No. H-5157 SAC  
)

) OAH No. 2010030486  
)  
)

DECISION

The Proposed Decision dated November 16, 2010, 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

JAN 06 2011

IT IS SO ORDERED

12/16/2010  
JEFF DAVIS  
Real Estate Commissioner

BEFORE THE  
DEPARTMENT OF REAL ESTATE  
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

SHERYLE LYNN McNAMARA,

Respondent.

Case No. H-5157 SAC

OAH No. 2010030486

**PROPOSED DECISION**

This matter was heard before Administrative Law Judge Dian M. Vorters, State of California, Office of Administrative Hearings, on August 30 and October 5, 2010, in Sacramento, California.

Daniel E. Kehew, Counsel, Department of Real Estate (Department), represented the complainant.

Sheryle Lynn McNamara appeared on her own behalf.

Evidence was received on October 5, 2010. The record was held open until October 16, 2010, for complainant to submit a written response to respondent's closing brief. No additional argument was received. The record was closed and the matter submitted for decision on October 16, 2010.

**FACTUAL FINDINGS**

1. Complainant, Joe M. Carillo, a Deputy Real Estate Commissioner of the State of California, filed the Accusation in his official capacity on February 18, 2009.
2. Sheryle Lynn McNamara, doing business as Madison Commercial Brokerage and Madison Pacific Properties, is presently licensed as a broker under the Real Estate Law, Part 1 of Division 4 of the Business and Professions Code. (Bus. & Prof. Code, § 10131.) Her broker license will expire on August 4, 2014, unless renewed.
3. Complainant seeks disciplinary action against respondent's broker license based upon her willful failure to comply with the terms of a valid purchase agreement, in that among other things, she failed to obtain escrow deposits from the buyer and timely open escrow. As a result, the transaction failed.

4. This matter concerns the sale of a commercial property located at 307 North Main Street, Ukiah, California. The property was owned by Richard Selzer, who is also a licensed real estate broker in the State of California. On May 15, 2007, Mr. Selzer received from respondent a bid to purchase the property on behalf of her client, Robert Gitlin, M.D.

5. A copy of the Commercial Property Purchase Agreement and Joint Escrow Instructions (Purchase Agreement) was received in evidence. The 10-page agreement constitutes an offer for Dr. Gitlin to purchase the commercial property for \$465,000. Close of escrow was to occur on August 1, 2007. Dr. Gitlin initialed all pages of the agreement where required. The signature page was signed but not dated by Dr. Gitlin. However, the top of each page is dated May 2, 2007, and according to respondent, the offer was delivered to Mr. Selzer on May 2, 2007.

6. Under "Finance Terms" (paragraph 2), of the Purchase Agreement, the buyer agreed to make the following deposits:

- A. Initial Deposit: Buyer has given a deposit in the amount of \$1,000.00 to the agent submitting the offer, ... by Personal Check, made payable to Fidelity National Title Company which shall be held uncashed until Acceptance and then deposited within 3 business days after Acceptance... with Escrow Holder ...
- B. Increased Deposit: Buyer shall deposit with Escrow Holder an increased deposit in the amount of \$9,000.00 within 21 Days After Acceptance, or prior to close of escrow.

7. Under "Time Periods; Removal of Contingencies; Cancellation Rights" (paragraph 17A and B), the agreement gave the seller "seven days after acceptance to deliver to the buyer all reports, disclosures and information for which seller is responsible." The buyer was given "17 days after acceptance ... to complete all buyer investigations; approve all disclosures, reports and other applicable information, which buyer receives from seller and approve all matters affecting the property ..."

8. Under "Other Terms And Conditions" (paragraph 36), of the Purchase Agreement, respondent added the following "as is" provision:

Buyer is aware of property condition based on prior transaction and accepts property in its present physical condition. There shall be no credits nor repairs requested during this transaction.

9. Mr. Selzer signed the "Acceptance Of Offer" page and initialed all pages of the agreement where required on May 15, 2007. Additionally, he signed and conveyed "Counter Offer No. 1" on that same date. His counter offer added language relative to cash or seller financing. The counter offer also stated, "Buyer is aware that Richard Selzer is a licensed real estate broker acting as a principle for profit." The counter offer was set to

expire at 5:00 p.m. on May 18, 2007, if not accepted. Dr. Gitlin "accepted" the counter offer by his signature on May 18, 2007, at 4:30 p.m. Respondent faxed Dr. Gitlin's acceptance to Mr. Selzer on May 21, 2007. Mr. Selzer then initialed the "Confirmation of Acceptance" section (line 8), of the Counter Offer. These acts created a legally valid real estate contract.

10. Because Dr. Gitlin accepted the seller's counter offer on Friday, May 18, 2007, respondent should have deposited an escrow check with the title company by close of business on May 23, 2007 (within three business days). She did not. All inspections, including structural, electrical, plumbing, and environmental assessments, should have been performed by June 5, 2007 (within 17 days). However, as this was an "as is" contract, the seller would not have been bound to fix any problems found.

11. Lee Enemark is a licensed real estate agent. He was asked by Mr. Selzer to assist him in processing this transaction. On June 8, 2007, Mr. Enemark became concerned because of an apparent lack of escrow. Mr. Enemark called all three title companies in Mendocino County and was unable to confirm that respondent had opened escrow and deposited funds per the agreement.

On June 13, Mr. Enemark telephoned respondent and asked to see a copy of the check. According to Mr. Enemark, respondent indicated "confusion" about what title company was going to be used. According to respondent, during the call, she told Mr. Enemark that escrow had not been opened and that she "had not intended to open escrow" because of contract language allowing escrow to be delayed until all inspections had been approved by the buyer, Dr. Gitlin. Not only was there no such contract language, the "as is" language of paragraph 36, contradicts her stated objective. Mr. Selzer testified that had he known respondent did not have in her possession, a \$1,000 check, ready to open escrow, he would not entered into the contract.

12. After the telephone call, respondent "hurriedly" prepared an "Extension of Contract Terms" (Extension) containing language that would allow for building inspections to occur before opening escrow. The Extension was not dated or signed by Dr. Gitlin. Respondent personally delivered this document to Mr. Enemark on June 13, 2007. She testified that she meant to include this "important language at the outset" so that if inspections were not approved by Dr. Gitlin within 21 days, he could ask for an extension or cancel the contract. This may have been her intent, but it was nowhere part of a signed agreement or counter offer. The parties were bound by the original contract terms.

13. On June 18, 2007, Mr. Selzer prepared and signed an Addendum to the Purchase Agreement changing the escrow holder to First American Title Company, Ukiah. As of June 20, 2007, respondent had not made any deposits to escrow. Mr. Enemark testified that they were "doing everything we could do to keep the contract going ... to open and close escrow." On or about July 2, 2007, Mr. Selzer accepted a back-up offer from a different buyer. It is noted that on June 29, 2007, respondent finally obtained a check from Dr. Gitlin in the amount of \$1,000. This check was reportedly deposited in an escrow account on July 11, 2007. This represented a delay of seven weeks.

14. The Purchase Agreement included a mechanism for the seller to cancel the contract for non-compliance by the buyer. Under "Continuation of Contingency or Contractual Obligation; Seller Right to Cancel" (paragraph 17C), the parties agreed that the seller could sign and deliver a written Notice to Perform, giving the buyer at least 72 hours to comply with contract terms. On July 5, 2007, Mr. Selzer signed a Notice to Perform demanding compliance with the following contract terms: Initial deposit (paragraph 2A), increased deposit (paragraph 2B), down payment verification (paragraph 2H), return of statutory disclosures (paragraph 5A(2)), receipt for increased deposit (paragraph 16), and opening escrow.

15. The Notice to Perform was received by respondent's son Casey McNamara, a licensed real estate agent, at Madison Pacific Properties, on Friday, July 6, 2007, at 2:35 p.m.<sup>1</sup> As of Tuesday, July 10 (three days later), respondent had not brought the contract into compliance and Mr. Enemark considered the contract to be "null and void." He testified that had respondent complied, she would have maintained her original position to purchase. Had she complied late, he would have held her contract as a back-up offer. She did not bring the contract into compliance. Consequently, Mr. Enemark opened a second escrow with First American Title for another buyer.

Respondent argued that the Notice to Perform should have been delivered directly to Dr. Gitlin and not to her real estate office because she was out of town at a convention. Her argument has no merit. Under "Notices" (paragraph 26), the Purchase Agreement stated:

Whenever notice is given under this Agreement, each notice shall be in writing, and shall be delivered personally, by facsimile, or by mail, postage prepaid. Notice shall be delivered to the address set forth below the recipient's signature of acceptance. Either party may change its notice address by providing notice to the other party.

Respondent failed to provide a direct address for Dr. Gitlin in the signature of acceptance area of the contract. Mr. Enemark personally delivered the Notice to Perform to a licensed real estate agent at Madison Pacific Properties. Respondent through her company, Madison Pacific Properties, represented the buyer. To place the onus on the seller to find Dr. Gitlin, when respondent did not list his address of record, is not reasonable or required.

16. In addition to respondent failing to timely obtain and deposit escrow funds, other deficiencies are noted. Respondent failed to ensure that the buyer "date" his signature on the last page of the Purchase Agreement. She failed to obtain the buyer's signature and date on the Extension of Contract Terms. (Factual Finding 12.) She failed to obtain an

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<sup>1</sup> Respondent submitted into evidence another copy of the Notice To Perform indicating that she received it on July 10, 2007, at 11:00 a.m. The evidence is that Madison Properties, care of Casey McNamara, received the document four days earlier, on July 6, 2007.

initial deposit check from the buyer by May 2, 2007. The check she finally obtained was dated June 29, 2007, almost two months delayed. She prepared an "as is" Purchase Agreement, but argued that she did not intend for the contract to be perfected until various inspections were completed and approved by the buyer. (Factual Finding 8.)

17. At hearing, respondent argued notions of good faith and fair dealing. She asserted that consideration in a real estate contract does not have to be money, but can be a "promise for a promise." She continued to argue that the two escrow deposits were intended to be submitted upon approval of inspections by Dr. Gitlin. She considered these inspections to be "hugely relevant to this particular building" because of undisputed structural flaws. If inspections were that important, respondent should have drafted appropriate language into the original Purchase Agreement.

Respondent referred to the inspection time as a "free look see period" during which an investor knows he has 21 days to work on the deal and get his money back if he disapproves of the inspection. Whether or not this is, in fact, an industry practice, respondent as the buyer's broker, had a duty to document desired terms in the offer. Her assertions do not excuse or explain her failure to obtain and timely deposit escrow funds as per a legally valid Purchase Agreement. Her handling of this purchase transaction was at best neglectful and it appears from her testimony, willful.

## LEGAL CONCLUSIONS

### *Applicable Law*

1. In an Accusation seeking to revoke, suspend, or otherwise discipline respondent's professional license, the complainant has the burden of proof to establish the allegations in the Accusation by "clear and convincing evidence." (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App. 3d 853, 856.) The burden of proof of establishing an affirmative defense is on the respondent. (*Whetstone v. Board of Dental Examiners* (1927) 87 Cal.App. 156, 164.) The standard of proof for establishing an affirmative defense is proof by a preponderance of the evidence. (Evid. Code, § 115.)

2. Business and Professions Code section 10176, provides that the real estate commissioner may suspend or revoke a real estate license when a real estate licensee has been guilty of: "(a) [m]aking any substantial misrepresentation, (b) [m]aking any false promise of a character likely to influence, persuade or induce, ... or (i) [a]ny other conduct, whether of the same or a different character than specified in this section, which constitutes fraud or dishonest dealing."

3. Respondent is alleged to have engaged in fraud and misrepresentation in the brokering of a real estate transaction. Misrepresentation may be intentional or negligent. (*Normal v. Praszker* (1994) 22 Cal.App.4th 1814, 1821.) "A negligent misrepresentation is a species of 'actual fraud' and a form of deceit." (*Ibid.*) One of the purposes of the Real

Estate Law, "is to insure ... that real estate licensees will be honest and truthful in their dealings with members of the public." (*Ibid.*) Accordingly, the real estate commissioner may discipline a licensed broker for failure to disclose even if the broker was not intentionally fraudulent or dishonest.

4. Clear and convincing evidence established cause to discipline respondent's license and licensing rights pursuant to Business and Professions Code section 10176, subdivisions (a) and (b), by reason of Factual Findings 3 through 15, and Legal Conclusions 1 through 3. Sufficient evidence did not establish cause to discipline respondent's license pursuant to Business and Professions Code section 10176, subdivision (i).

5. In consideration of all of the evidence, it is clear that respondent does not appreciate the seriousness of her failure to comply with several contract terms. She drafted a contract stating that she had collected a deposit from the buyer and would open escrow within three days of acceptance. This was a misrepresentation of fact. She continued to assert that her conduct was justified by contract terms that were not agreed to. She accepted no responsibility and acknowledged no personal wrongdoing. She did not acknowledge that she made any mistakes, let alone learned from them. There is no evidence that she would act differently were the same situation to occur.

Until respondent demonstrates and provides necessary assurances to the Department that her actions were not in keeping with the Real Estate Law and that she will not engage in similar conduct, she should not be licensed to practice as a real estate broker. However, it would not be contrary to the public interest and welfare to allow respondent to remain licensed as a real estate salesperson under restricted terms and conditions.

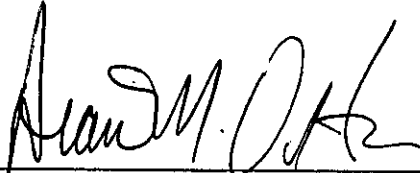
#### ORDER

All licenses and licensing rights of respondent Sheryle Lynn McNamara, as a broker under the Real Estate Law are revoked; provided, however, a restricted real estate salesperson license shall be issued to respondent pursuant to Section 10156.5 of the Business and Professions Code if respondent makes application therefore and pays to the Department of Real Estate the appropriate fee for the restricted license within 90 days from the effective date of this decision. The restricted license issued to respondent shall be subject to all of the provisions of Section 10156.7 of the Business and Professions Code and to the following limitations, conditions and restrictions imposed under authority of Section 10156.6 of that Code:

1. The restricted license issued to respondent may be suspended prior to hearing by Order of the Real Estate Commissioner in the event of respondent's conviction or plea of nolo contendere to a crime which is substantially related to respondent's fitness or capacity as a real estate licensee.

2. The restricted license issued to respondent may be suspended prior to hearing by Order of the Real Estate Commissioner on evidence satisfactory to the Commissioner that respondent has violated provisions of the California Real Estate Law, the Subdivided Lands Law, Regulations of the Real Estate Commissioner or conditions attaching to the restricted license.
3. Respondent shall not be eligible to apply for the issuance of an unrestricted real estate license nor for the removal of any of the conditions, limitations or restrictions of a restricted license until three (3) years have elapsed from the effective date of this decision.
4. Respondent shall submit with any application for license under an employing broker, or any application for transfer to a new employing broker, a statement signed by the prospective employing real estate broker on a form approved by the Department of Real Estate which shall certify:
  - (a) That the employing broker has read the decision of the Commissioner which granted the right to a restricted license; and
  - (b) That the employing broker will exercise close supervision over the performance by the restricted licensee relating to activities for which a real estate license is required.
5. Respondent shall, within nine months from the effective date of this decision, present evidence satisfactory to the Real Estate Commissioner that respondent has, since the most recent issuance of an original or renewal real estate license, taken and successfully completed the continuing education requirements of Article 2.5 of Chapter 3 of the Real Estate Law for renewal of a real estate license. If respondent fails to satisfy this condition, the Commissioner may order the suspension of the restricted license until the Respondent presents such evidence. The Commissioner shall afford respondent the opportunity for a hearing pursuant to the Administrative Procedure Act to present such evidence.

DATED: November 16, 2010

  
DIAN M. VORTERS  
Administrative Law Judge  
Office of Administrative Hearings



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FILED

FEB 18 2009

DEPARTMENT OF REAL ESTATE

By K. Centenas

8 BEFORE THE DEPARTMENT OF REAL ESTATE  
9 STATE OF CALIFORNIA

10 \* \* \*

11 In the Matter of the Accusation of )  
12 SHERYLE LYNN McNAMARA, ) NO. H-5157 SAC  
13 Respondent. ) ACCUSATION  
14 )

15 The Complainant, JOE M. CARILLO, a Deputy Real Estate Commissioner of  
16 the State of California, for cause of Accusation against Respondent SHERYLE LYNN  
17 McNAMARA ("Respondent"), is informed and alleges as follows:

18 1

19 The Complainant makes this Accusation against Respondent in his official  
20 capacity.

21 2

22 At all times herein mentioned, Respondent was and now is licensed by the  
23 Department of Real Estate ("Department") as a real estate broker.

24 3

25 At all times herein mentioned, Respondent engaged in the business of, acted in  
26 the capacity of, advertised, or assumed to act as a real estate broker within the State of  
27 California within the meaning of Section 10131(a) of the Code, including the operation and

1 conduct of a real estate resale brokerage with the public wherein, on behalf of others, for  
2 compensation or in expectation of compensation, Respondent sold or offered to sell, bought or  
3 offered to buy, solicited prospective sellers or purchasers of, solicited or obtained listings of, or  
4 negotiated the purchase, sale or exchange of real property or a business opportunity.

5 4

6 In the course of the activities described in Paragraph 3 above, on or about May 2,  
7 2007, Respondent on behalf of buyer Robert Gitlin ("Buyer") submitted an offer to seller  
8 Richard Selzer ("Seller") to purchase real property commonly known as 307 North Main Street,  
9 Ukiah, California.

10 5

11 The purchase offer described in Paragraph 4, above, included Respondent's  
12 representations on behalf of Buyer, that Buyer had given a deposit in the amount of \$1,000 to  
13 Respondent submitting the offer, such deposit made payable to Fidelity National Title Company  
14 and to be held uncashed until acceptance of the offer and then deposited within three business  
15 days after acceptance.

16 6

17 The representation made by Respondent to the Buyer set out in Paragraph 5,  
18 above, was false, and Respondent knew that it was false when the representation was made.  
19 The true facts were that Buyer had not given a deposit check to Respondent, made payable to  
20 any title company, and Respondent did not have such check to establish escrow should  
21 acceptance occur.

22 7

23 On or about May 18, 2007, Seller completed acceptance of the offer described in  
24 Paragraph 5, above.

25 8

26 Had Seller known the information provided by Respondent in Paragraph 5 to be  
27 false, Buyer would not have completed the transaction.

The facts alleged in Paragraphs 1 through 9 are grounds for the suspension or revocation of the licenses or license rights of Respondent under Sections 10176(a), (b), and/or (i) of the Code.

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 license rights of Respondent under the Code, and for such other and further relief as may be proper under other provisions of law.

  
JOE M. CARILLO  
Deputy Real Estate Commissioner

Dated at Sacramento, California,  
this 10 day of February, 2009.