

FILED
JUL - 2 2004

DEPARTMENT OF REAL ESTATE

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

By *Laurel B. [Signature]*

* * *

In the Matter of the Accusation of	)	
	)	NO. H-8633 SF
	)	
ROYAL DOCK KIRKLAND,	)	OAH NO. N-2004020600
	)	
	)	
Respondent.	)	

DECISION

The Proposed Decision dated June 11, 2004, 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 JULY 22, 2004.

IT IS SO ORDERED June 23, 2004.

JOHN R. LIBERATOR
Acting Real Estate Commissioner

John R. Liberator [Signature]

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of

ROYAL DOCK KIRKLAND,

Respondent.

Case No. H-8633 SF

OAH No. N2004020600

PROPOSED DECISION

Administrative Law Judge Cheryl R. Tompkin, State of California, Office of Administrative Hearings, heard this matter on May 11, 2004, in Oakland, California.

David Seals, Counsel, represented the complainant Les R. Bettencourt, Deputy Real Estate Commissioner of the State of California.

Lenora Roland Taylor, Attorney at Law, 109 Jackson Street, Suite 240, Hayward, California 94544, represented the respondent Royal Dock Kirkland, who was present at hearing.

The matter was submitted on May 11, 2004.

FACTUAL FINDINGS

1. Official notice is taken that complainant Les R. Bettencourt made the Accusation in his official capacity as a Deputy Real Estate Commissioner of the State of California.

2. Royal Dock Kirkland (respondent) is presently licensed and/or has license rights under the Real Estate Law as a real estate broker. Respondent's license will expire on June 14, 2007, unless renewed.

3. On or about June 18, 2001, Yolanda Lowery (Lowery), through respondent, her real estate agent, submitted an offer to purchase a residence located at 136 Marsala Court in Hercules, California. The property was owned by Ralph Hatch (Hatch). The offer was submitted on a California Association of Realtors form entitled "Residential Purchase

Agreement and Joint Escrow Instructions (and Receipt for Deposit)." Paragraph 2(A) of said document provided in pertinent part:

"BUYER HAS GIVEN A DEPOSIT TO THE AGENT SUBMITTING THE OFFER ... \$ 1000 (or to ☐ First American), made payable to _____ by Personal Check, or ☐ _____ which shall be held uncashed until Acceptance and then deposited within 3 business days after Acceptance"

The \$1,000.00 deposit amount and the words First American were written in by hand in paragraph 2(A).

4. Lowery's purchase offer was faxed to real estate broker Linnea Grebmeier, who represented the seller Ralph Hatch. Grebmeier presented Lowery's offer to Hatch, who accepted it. Based on paragraph 2(A) of the offer Grebmeier believed that a \$1,000.00 deposit was either being held by respondent or had been deposited with First American Title Guaranty Company (First American). Initially Grebmeier thought the deposit was being held by First American because respondent had written in the title company's name by hand on the contract. However, at some point Grebmeier contacted the title company and was told that it did not have the deposit. Grebmeier then assumed that respondent was holding the deposit since the title company did not have it and respondent had not checked the box in front of the words First American. She was never able to confirm this fact because respondent never returned any of several calls she placed to him after Hatch accepted Lowery's offer. Since Grebmeier could not get in contact with respondent she called the lender to make sure she "had a bona fide offer and a good loan." She was told by the lender that she did so and she assumed the transaction would go forward.

5. At some point following Hatch's acceptance of Lowery's offer First American called respondent and told him it had not received Lowery's deposit check. Respondent was not able to contact Lowery at any point after he wrote the offer. Respondent concluded Lowery did not want to follow through on the contract. Respondent did not advise Hatch or Grebmeier of his inability to contact Lowery, of Lowery's failure to submit a deposit to escrow or of his belief that Lowery did not intend to complete the purchase of Hatch's property.

6. On the designated Friday seller Hatch went to First American and signed the closing papers required for transfer of the property to Lowery. He was advised by the title company that Lowery would sign her closing papers on Monday. After several days passed without First American contacting him Hatch called the title company. He was advised at that time that Lowery had never shown up to sign the papers. Hatch then inquired "where's my \$1,000.00" because he believed he was entitled to the deposit he assumed Lowery had made. He was told no deposit had ever been made with the title company. Hatch was very surprised that there was no deposit. He testified that when he accepted Lowery's offer it

was his understanding, based on paragraph 2(A), that Lowery had put up a \$1,000.00 deposit to secure the right to purchase his property.

7. Respondent testified that after it became clear Lowery was not going to perform he attempted to locate another buyer for the Hatch property. On or about July 31, 2001, Lindsey Banducci (Banducci), through respondent, her real estate agent, submitted an offer to purchase Hatch's property located at 136 Marsala Court in Hercules, California. The offer was submitted on a California Association of Realtors document entitled Residential Purchase Agreement and Joint Escrow Instructions (and Receipt for Deposit). Paragraph 2(A) of the Banducci offer was the same as paragraph 2(A) of the Lowery offer in that the \$1,000.00 deposit amount and the words First American had both been written in by hand and the box in front of the words First American was not checked.

8. Despite the earlier problems with the Lowery offer Hatch accepted Banducci's offer. Hatch testified he did so because the offer contained a handwritten note from respondent stating that unlike the prior offer, this transaction should go smoothly. It did not. Although Banducci deposited a \$1,000.00 check with First American, at some point she stopped payment on the check and/or the check "bounced."¹ Hatch was advised of this fact when he contacted the title company regarding the status of the transaction. He subsequently received a letter from First American confirming the information he had received orally. Hatch contacted Grebmeier after learning Banducci had stopped payment on the check and they jointly called the title company to cancel the transaction.

9. Respondent learned Banducci had stopped payment on her check when First American advised him of this fact. Prior to being contacted by the title company respondent was not aware there was a problem with the purchase.

10. Respondent testified that all of the contracts he writes on behalf of buyers call for the deposit referred to in paragraph 2(A) to be sent directly to the title company/escrow. He does not maintain a broker trust account and has never collected a deposit in his name or that of a broker trust account. It is respondent's standard practice to advise buyers that once an offer is accepted they have to send a deposit to the title company, usually within three days. Respondent operates in this manner to avoid the potential problems related to commingling of funds.

11. With respect to the Lowery and Banducci offers respondent testified that he wrote in the words First American to specify that the deposit was to be made out to the title company and not to him. He also advised both Lowery and Banducci that each was to send

¹ A letter from the title company indicates the check was returned by Banducci's bank. Hatch testified the title company told him that Banducci stopped payment on the check. Grebmeier testified it was her understanding that the check had bounced. Under either scenario no deposit was available.

their deposit directly to the title company if the offer was accepted. Respondent denies he ever accepted a check from Lowery or Banducci.

12. Respondent admits that at the time he made both the Lowery and Banducci offers neither he nor the title company actually had a deposit in their possession. He also acknowledges that a deposit is required with a contract to make it a valid contract. However, respondent contends a deposit need not be tendered until an offer is accepted and that the contract only becomes "valid" or binding if the deposit is tendered. He notes that there is no time frame specified in the contract for tender of the deposit.

Respondent also expresses the belief that it is the obligation of the listing agent to follow-up after acceptance of an offer to ensure a deposit has been tendered, to demand tender if a deposit is not timely made and to cancel the escrow if no deposit is received. Respondent does not feel he has any obligation to inform the listing agent of the non-performance of his client.

13. Respondent denies any intent to mislead the listing agent or seller regarding the handling of the deposits in the Lowery and Banducci purchase offers. He maintains that at the time he submitted the offers on behalf of Lowery and Banducci he expected them to tender the deposit if their offers were accepted. Respondent notes that he pre-qualified both Lowery and Banducci through a lender prior to submitting their purchase offers and that he instructed them to tender their respective deposits to the title company. He also claims his failure to check the box in front of the words First American was a simple oversight. Although respondent acknowledges that under his current buyer deposit procedures he cannot assure the seller that the deposit will be tendered upon acceptance of an offer, he suggests the seller has adequate recourse through cancellation of escrow. However, respondent expresses a willingness to change his current buyer deposit procedures if they are not in compliance with applicable law.

14. Respondent began working in real estate in 1984 as an appraiser trainee for Home Savings. He worked his way up to chief appraiser, then was promoted to assistant underwriter and ultimately loan manager. Respondent was a loan manager at Home Savings for 3 to 4 years, which qualified him to apply for a broker's license even though he had never been a real estate agent. Respondent obtained his broker's license in 1995. Ninety-nine percent of respondent's business is representing buyers. Respondent represents he has submitted hundreds of purchase agreements since becoming a broker. Respondent has no prior history of license discipline.

LEGAL CONCLUSIONS

1. The Accusation alleges that cause for discipline of respondent's license exists under Business and Professions Code² sections 10176, subdivisions (a) and (i) and

² All citations are to the Business and Professions Code unless otherwise indicated.

10177, subdivisions (d). Section 10176, subdivision (a) authorizes license discipline for "[m]aking any substantial misrepresentation."

Section 10176, subdivision (i) authorizes license discipline for "[a]ny other conduct, whether of the same or a different character than specified in this section, which constitutes fraud or dishonest dealing."

Section 10177, subdivision (d) authorizes license discipline if a licensee has "[w]illfully disregarded or violated the Real Estate Law . . . or the rules and regulations of the commissioner for the administration and enforcement of the Real Estate Law . . ."

2. Respondent contends there was no misrepresentation, fraud, dishonest dealing or willful violation of the law because he directed the buyers to send their deposits to First American and it was his intent that the title company hold the deposits. He argues, without citation to authority, that there must be evidence of dishonesty, fraud or intent to deceive in order to impose license discipline pursuant to sections 10176, subdivisions (a) and (i) and 10177, subdivision (d).

3. Respondent's contention is not persuasive. Paragraph 2(A) of the purchase offer states "Buyer has given a deposit" to the agent submitting the offer (respondent) or First American (the title company) which is to be "held uncashed until Acceptance and then deposited within 3 business days after Acceptance." The clear import of the language in paragraph 2(A) is that a deposit has already been tendered, it is being held by a third party [not the buyer] and that it will be deposited by the third party upon acceptance of the offer. When respondent submitted the purchase offers he knew that the representation contained in paragraph 2(A) was not true and that neither he nor the title company had the deposit, yet he still conveyed the offers to Hatch and Grebmeier. This constituted misrepresentation even if respondent expected the buyer to tender the deposit to the title company upon the seller's acceptance of the purchase offer. Misrepresentation may be intentional or negligent. A negligent misrepresentation is a species of fraud and a form of deceit. (*Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1994) 22 Cal.App.4th 1814, 1821.)

Respondent contends that even if the information contained in paragraph 2(A) was a misrepresentation, it was not substantial or willful and therefore cannot form the basis for license discipline. This contention also fails. Respondent's misrepresentation was substantial in that it induced reliance by seller and the seller's real estate agent. Both Hatch and Grebmeier testified they relied on the representation in the purchase offer(s) that a \$1,000.00 deposit had been tendered to either respondent or the title company. Moreover, respondent knew or should have known Hatch and Grebmeier would rely on the information contained in the purchase offer. It is well established that a realtor has a fundamental duty of honesty, fairness and full disclosure toward all parties in a sales transaction. (*Id.* at p. 1820.)

Respondent's misrepresentation was also willful. In *Handeland v. Dept. of Real Estate* (1976) 58 Cal.App.3d 513, the court held that a real estate agent did not have to know he was violating the law in order for the conduct to be willful. The court noted that the purpose of disciplinary proceedings against real estate licensees is to protect the public not only from conniving real estate salesmen but also from the uninformed, negligent or unknowledgeable salesman. (See also *Chodur v. Edmonds* (1985) 174 Cal.App.3d 565 [no finding of fraud or deception required in order to find dishonest dealing and a violation of real estate law]; *Norman I. Krug Real Estate Investments, Inc. v. Praszker*, *supra*, 22 Cal.App.4th at p. 1822 [licensed broker may be disciplined for failure to disclose even if the broker was not intentionally fraudulent or dishonest].) Based on the foregoing analysis, it is found that respondent's failure to receive and forward the \$1,000 deposits from Lowery and Banducci specified in paragraph 2(A) of the purchase offers and/or his failure to ensure tender of the deposits by Lowery and Banducci with the title company upon submission of the offers constituted the making of a substantial misrepresentation, fraud or dishonest dealings and was willful.

4. Cause for license discipline exists pursuant to Business and Professions Code sections 10176, subdivision (a), 10176, subdivision (i) and/or 10177, subdivision (d) by reason of the matters set forth in Findings 3 through 10 and 12, and Legal Conclusion 3.

5. Discipline of respondent's license pursuant to Business and Professions Code section 10177, subdivision (g) is also warranted on the basis of negligence or incompetence in performing duties of a licensee. (See § 10177, subd. (g).) Respondent clearly acted with negligence and/or incompetence when he failed to receive and forward the \$1,000 deposits specified in paragraph 2(A) of the purchase offers from Lowery and Banducci and/or failed to ensure tender of the deposits by Lowery and Banducci with First American, and/or failed to check the box in front of the words First American, as set forth in Findings 3 through 10 and 12.

6. Notwithstanding respondent's failure to collect the deposits specified in the purchase offers from the buyers and/or his failure to completely fill out the purchase offers, it is determined that it would not be against the public interest to permit respondent to retain his real estate broker license upon appropriate terms and conditions. In this regard it is noted that that respondent has been a real estate broker for approximately nine years and has no prior history of license discipline. Respondent did not gain an economic advantage from his conduct and at hearing sincerely seemed to believe [mistakenly] that his method of handling deposits for purchase offers complied with applicable real estate law. Respondent also expressed a willingness to change his current buyer deposit procedures to ensure compliance with the law. These factors support the determination that respondent's conduct does not require revocation of his real estate broker license. However, respondent clearly would benefit from remedial education in real estate law. This remedial coursework can be accomplished, and the public interest guarded, during a period of probation.

ORDER

All licenses and licensing rights of respondent Royal Dock Kirkland under the Real Estate Law are revoked; provided, however, a restricted real estate broker license shall be issued to respondent pursuant to section 10156.5 of the Business and Professions Code if respondent makes application therefor 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. Within sixty (60) days of the effective date of this decision, respondent shall submit to the Department of Real Estate for its prior approval, an appropriate program of remedial education in an educational facility or program, which must also be approved by the Department. The remedial education program shall include coursework in real estate law. The exact number of hours and specific content of the program shall be determined by the Department or its designee. Respondent shall successfully complete the remedial education program and may be required to pass an examination(s) administered by the Department or its designee related to the program's content. Respondent shall pay all costs of the remedial education program. The period of probation will be extended, if necessary, until such remedial education is completed. Continuing education courses used for the renewal of licensure will not be used for remedial education.

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.
6. Respondent shall, within six (6) months from the issuance of the restricted license, take and pass the Professional Responsibility Examination administered by the Department including the payment of the appropriate examination fee. If respondent fails to satisfy this condition, the Commissioner may order the suspension of the restricted license until respondent passes the examination.

DATED: 6/11/04


CHERYL R. TOMPKIN
Administrative Law Judge
Office of Administrative Hearings

**BEFORE THE DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA**

FILED
MAR 15 2004

DEPARTMENT OF REAL ESTATE

In the Matter of the Accusation of

ROYAL DOCK KIRKLAND

By Shelly Ely
Case No. H-8633 SF

OAH No. N2004020600

Respondent

NOTICE OF HEARING ON ACCUSATION

To the above named respondent:

You are hereby notified that a hearing will be held before the Department of Real Estate at **THE OFFICE OF ADMINISTRATIVE HEARINGS, THE ELIHU HARRIS STATE BUILDING, 1515 CLAY STREET, SUITE 206, OAKLAND, CALIFORNIA 94612** on **TUESDAY--MAY 11, 2004**, at the hour of **9:00 A.M.**, or as soon thereafter as the matter can be heard, upon the Accusation served upon you. If you object to the place of hearing, you must notify the presiding administrative law judge of the Office of Administrative Hearings within ten (10) days after this notice is served on you. Failure to notify the presiding administrative law judge within ten days will deprive you of a change in the place of the hearing.

You may be present at the hearing. You have the right to be represented by an attorney at your own expense. You are not entitled to the appointment of an attorney to represent you at public expense. You are entitled to represent yourself without legal counsel. If you are not present in person nor represented by counsel at the hearing, the Department may take disciplinary action against you based upon any express admission or other evidence including affidavits, without any notice to you.

You may present any relevant evidence and will be given full opportunity to cross-examine all witnesses testifying against you. You are entitled to the issuance of subpoenas to compel the attendance of witnesses and the production of books, documents or other things by applying to the Department of Real Estate.

The hearing shall be conducted in the English language. If you want to offer the testimony of any witness who does not proficiently speak the English language, you must provide your own interpreter and pay his or her costs. The interpreter must be certified in accordance with Sections 11435.30 and 11435.55 of the Government Code.

DEPARTMENT OF REAL ESTATE

Dated: march 15, 2004

By David B. Seals
DAVID B. SEALS, Counsel

(S.E.)

1 DAVID A. PETERS, Counsel (SBN 99528)
2 Department of Real Estate
3 P. O. Box 187000
4 Sacramento, CA 95818-7000

5 Telephone: (916) 227-0789
6 -or- (916) 227-0781 (Direct)

FILED
JAN 20 2004

DEPARTMENT OF REAL ESTATE

Laurie R. Z...

8 BEFORE THE DEPARTMENT OF REAL ESTATE

9 STATE OF CALIFORNIA

10 * * *

11 In the Matter of the Accusation of)	No. H-8633 SF
12 ROYAL DOCK KIRKLAND,)	<u>ACCUSATION</u>
13 Respondent.)	
14)	

15 The Complainant, Les R. Bettencourt, a Deputy Real
16 Estate Commissioner of the State of California, for cause of
17 Accusation against ROYAL DOCK KIRKLAND (hereinafter
18 "Respondent"), is informed and alleges as follows:

19 I

20 The Complainant, Les R. Bettencourt, a Deputy Real
21 Estate Commissioner of the State of California, makes this
22 Accusation against Respondent in his official capacity.

23 II

24 Respondent is presently licensed and/or has license
25 rights under the Real Estate Law, Part 1 of Division 4 of the
26 California Business and Professions Code (hereinafter "the
27 Code"), as a real estate broker.

1 III

2 At all times herein mentioned, Respondent was
3 performing acts requiring a real estate license for or in
4 expectation of a compensation.

5 IV

6 On or about June 18, 2001, Yolanda Lowery (hereinafter
7 "Buyer Lowery") submitted an offer, by and through Respondent,
8 to purchase certain real property commonly known as 136 Marsala
9 Court, Hercules, California (hereinafter "the Subject Property")
10 owned by Ralph E. Hatch (hereinafter "the Seller"). Said offer
11 in the form of a Residential Purchase Agreement and Receipt for
12 Deposit provided that a \$1,000.00 deposit was being held
13 uncashed until acceptance and would be deposited with First
14 American the escrow holder within three (3) business days after
15 acceptance.

16 V

17 On or about June 18, 2001, the Seller accepted the
18 offer described in Paragraph IV above. Said \$1,000.00 deposit
19 was a material inducement to the Seller to agree to sell the
20 Subject Property to Buyer Lowery.

21 VI

22 On or about June 18, 2001, Respondent, in order to
23 induce the Seller into selling the Subject Property to Buyer
24 Lowery, falsely represented to the Seller the material fact that
25 Respondent had received a \$1,000.00 deposit from Buyer Lowery
26 and that said \$1,000.00 deposit from Buyer Lowery was being held
27 by Respondent pursuant to the terms of the purchase agreement.

1 In truth and in fact Respondent did not receive or hold said
2 deposit.

3 VII

4 Beginning on or about June 18, 2001 and continuing
5 thereafter Respondent failed to disclose to the Seller the
6 material fact well known to the Respondent, but unknown to the
7 Seller that Respondent had not received and forwarded the
8 \$1,000.00 deposit from the Buyer Lowery to escrow as required
9 pursuant to the purchase contract on the Subject Property.

10 VIII

11 On or about July 31, 2001, Lindsey Banducci
12 (hereinafter "Buyer Banducci") submitted an offer, by and
13 through Respondent, to purchase the Subject Property from the
14 Seller (hereinafter "the Second Offer"). Said offer in the form
15 of a Residential Purchase Agreement and Receipt for Deposit
16 provided that a \$1,000.00 deposit was being held uncashed until
17 acceptance and would be deposited with First American the escrow
18 holder within three (3) business days after acceptance.

19 IX

20 Beginning on or about July 31, 2001 and continuing
21 thereafter Respondent failed to disclose to the Seller the
22 material fact well known to the Respondent, but unknown to the
23 Seller that Respondent had not received and was not holding a
24 \$1,000.00 deposit from Buyer Banducci as described in the Second
25 Offer from Buyer Banducci.

26 ///

27 ///

1 X

2 The acts and omissions of Respondent set forth above
3 constitute the making of substantial misrepresentations, and
4 fraud or dishonest dealing, and are cause under Sections
5 10176(a), and 10176(i) of the Code in conjunction with Section
6 10177(d) of the Code for the suspension or revocation of all
7 licenses and license rights of Respondent under the Real Estate
8 Law. In the alternative, the acts and omissions of Respondent
9 set forth above constitute negligence or incompetence in
10 performing acts for which a real estate license is required, and
11 are cause under Section 10177(g) of the Code for suspension or
12 revocation of all licenses and license rights of Respondent
13 under the Real Estate Law.

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

21
22 
23 LES R. BETTENCOURT
Deputy Real Estate Commissioner

24 Dated at Oakland, California,
25 this 23rd day of December, 2003.