

FILED

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

MAR 26 2009

DEPARTMENT OF REAL ESTATE

By L. Henry

* * *

In the Matter of the Accusation of)
WILSON C. FANG,) NO. H-10537 SF
Respondent.) OAH NO. 2008110092

DECISION

The Proposed Decision dated February 19, 2009, 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 APR 16 2009.

IT IS SO ORDERED 3/25, 2009.

JEFF DAVI
Real Estate Commissioner

[Signature]

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

WILSON C. FANG,

Respondent.

Case No. H-10537 SF

OAH No. 2008110092

PROPOSED DECISION

Administrative Law Judge Mary-Margaret Anderson, Office of Administrative Hearings, State of California, heard this matter in Oakland, California, on January 22, 2009.

David B. Seals, Counsel, Department of Real Estate, represented Complainant E. J. Haberer II, Deputy Real Estate Commissioner.

Daniel Kaylor, Attorney at Law, represented Respondent Wilson C. Fang, who was present.

The record closed on January 22, 2009.

FACTUAL FINDINGS

1. Complainant E. J. Haberer II filed the Accusation in his official capacity as a Deputy Real Estate Commissioner for the Department of Real Estate, State of California.
2. Wilson C. Fang (Respondent) is licensed under the Real Estate Law as a real estate broker. As of November 2008, his broker license was scheduled to expire on November 17, 2009.
3. In 2005 Respondent operated under the fictitious business name "Help-U-Sell Westlake Realty." Respondent did not register the business name with the Department.
4. On September 20, 2005, Nathan and Debbie Akers listed their house on Halleck Drive in San Jose (the house) with Respondent for sale. In connection with the listing, Respondent filled out numerous disclosure forms, several of which were signed by the Akers and Respondent the same day. The Akers signed a two-page form entitled "PRDE Disclosure Regarding Real Estate Agency Relationships (As required by the Civil Code)" (Form A). Respondent signed the form in two places: under the Akers' signatures next to the

word "Agent," and next to the words "Buyer's Agent." The second form is entitled "Disclosure and Consent for Representation of More Than One Buyer Or Seller" (Form B). The Akers and Respondent signed underneath the words "Seller and/or Buyer acknowledges reading and understanding this [disclosure form] and agrees to the dual agency possibility disclosed." The third form is entitled "Advisory and Consent Regarding Multiple Agency And Dual Agency" (Form C). Sellers and Respondent signed this form underneath the statement "Client affirms that Client has read and considered the foregoing, and that Client expressly consents to, and hereby agrees to allow Agent and Agent's Broker to proceed on the basis of, Multiple Agency and Dual Agency on Client's behalf as explained herein." The fourth form is entitled "PRDS Real Estate Transfer Disclosure Statement" (Form D). Respondent and the Akers signed this form.

5. The Akers engaged in activities to ready the house for viewing by potential buyers, including making some repairs and improvements. An open house was scheduled for October 22, 2005. The Akers hired Yilda Alvarado, who owned a cleaning service, to clean the house. Alvarado told Ms. Akers that she was interested in buying the house. Ms. Akers referred Alvarado to Respondent, and Alvarado left him a voicemail message. Alvarado called a loan agent/real estate salesperson that she knew and he told her that she could qualify to borrow about \$650,000.

6. Later the same day, Respondent went to Alvarado's home and told her that the Akers wanted \$650,000 for the house, that they would not budge from that price, and that they wanted him to represent both sides to save money. When Alvarado asked if there was a problem with him representing both sides, he said that there was not and that it was done very often. Respondent had already prepared a written offer (on a purchase agreement form) on Alvarado's behalf that included a price of \$650,000 and other terms, including that the Akers pay for a pest inspection report and a property inspection report. The Akers accepted the offer the same day, converting the written offer into a purchase agreement (the Contract) between the Akers and Alvarado.

7. The Contract contains a clause that states "C. Confirmation: The following agency relationships are hereby confirmed for this transaction: Listing Agent [space] (print Firm Name) is the agent of (check one) [☐] the Seller exclusively; or [☐] both the Buyer and Seller." Respondent's name is typewritten in the blank and the box is checked next to the words "both Buyer and Seller."

8. On November 10, 2005, Respondent met with Alvarado at her home. He gave her Form C (advisory regarding multiple agencies), and told her it was part of the legal papers and she needed to sign it. Respondent also instructed Alvarado to sign Form D (a disclosure statement). He appeared to be in a hurry and did not discuss the papers with her. Alvarado signed the forms as Respondent instructed.

9. Alvarado never received a home inspection report. Respondent showed her a pest control report and at the time she thought it was the home inspection report. He told her that there was nothing wrong with the house's plumbing, that the roof "had a long life," and

that the house was in good condition. Alvarado believed that Respondent was acting as her agent in the transaction and relied on his representations in purchasing the house. Shortly after taking possession of the house, Alvarado discovered numerous problems with the house, including with the plumbing and the heating system.

Respondent's evidence

10. Respondent prepared the offer and delivered it to Alvarado. He also prepared the other documents, including the disclosure of the house's condition. For that document he relied on what he was told by the Akers: that the house was in good condition.

Nonetheless, Respondent maintains that he never intended to be and did not act as the agent for both the Akers and Alvarado. He asserts that Ms. Akers called him a day before the open house and said that she had found a buyer and that they had agreed on the price of \$650,000. Ms. Akers then instructed him to cancel the open house and meet with Alvarado to write up the offer.

11. Respondent asserts that the box on the Contract identifying him as the agent for both buyer and seller was checked erroneously. He used a computer program to create the documents and when an entry is made in one place the program automatically fills in information elsewhere. Respondent's explanation is contradicted by other forms that he completed by hand: Forms A, B, and C, as described above (Finding 4). In addition, Respondent testified that he did not see the error because escrow closed in less than one month and he did not have time to look at the documents before then.

12. Respondent asserts that the Akers had agreed to pay him a flat fee for his services concerning the transaction. He reasons that he therefore had no incentive to act as a dual agent as he would not make any more money by doing so.

Respondent further asserts that it made no difference whether another agent was involved because, given the flat fee arrangement, he was not subject to splitting his commission with anyone. But he also testified that he telephoned Alvarado's loan agent and told him that the Akers and Alvarado had agreed to go without a second agent in order to preserve the price. It was left unexplained why this telephone call was made given if the compensation arrangement was as he described.

13. As provided in the written offer, the Akers ordered and paid for a pest control inspection. Respondent testified that no home inspection report was procured. He said that he reminded Alvarado many times to procure a home inspection, including when he met with her on November 20, 2005. He said he told her she had to order it herself or it would be biased and that she told him she would take care of it. Respondent did not explain why the process was different for the two inspections.

14. Respondent presented three witnesses who testified regarding his character and professionalism.

Robert Calhoun is a licensed real estate broker who works for Sun Microsystems and works part time for Respondent. He has known Respondent for four or five years. Typically, they work as a team with Calhoun working on the weekends running open houses, keeping clients informed and regarding other matters. Calhoun has respect for Respondent's capabilities, particularly his business model, and the options he gives clients. The commission depends on who brings in a buyer and if the seller finds a buyer, Respondent charges a set fee. Calhoun also admires the training that Respondent provides for his associates concerning, for example, the disclosure forms he uses.

Ray Bezoni met Respondent in 2005 when Respondent sold Bezoni's house in San Jose. Respondent "took care of everything" and Bezoni was very happy with the service. He has since "sent everybody" to Respondent. Bezoni lives in Sacramento, and he traveled to Oakland to testify because he holds Respondent in high regard. Respondent handled the sale of Bezoni's mother's house in 2006. Although Respondent found a buyer the sale did not go through. Respondent was entitled to a commission, but he never asked for it because of the difficult family circumstances. Bezoni greatly appreciated this.

Michael Savko initially engaged Respondent to help him sell a house in San Jose. Savko drove to Oakland from El Dorado Hills to testify about Respondent's sincerity and honesty. Both the sale of the house and the sale of a commercial building that Respondent helped him with "went perfectly."

The civil litigation

15. Alvarado filed a civil lawsuit in the San Jose Superior Court against the Akers and Respondent. Akers and Respondent filed a demurrer to the complaint that was sustained with leave to amend. The Contract, however, contains an arbitration clause that is mandatory for parties and voluntary for brokers. Respondent agreed to participate in the arbitration. On May 2, 2007, Hon. Robert A. Baines (Ret.), acting as arbitrator, issued a Final Award which contains factual findings (including that Respondent committed fraud) and legal analysis. The arbitrator awarded Alvarado \$50,670 in actual damages (jointly and severally against Respondent and the Akers) and \$50,000 in punitive damages against Respondent.

The Award was not reduced to a Judgment. Respondent and the Akers paid Alvarado in full and she dismissed the lawsuit.

LEGAL CONCLUSIONS

1. Complainant contends that the doctrine of collateral estoppel should be applied to the findings of fact by the arbitrator. It is particularly asserted that the finding that Respondent committed fraud should be sufficient to establish that fact in this proceeding.

Under the doctrine of collateral estoppel, a party may be prevented from re-litigating an issue that has been previously litigated in a prior proceeding if all of the criteria are

satisfied and public policy supports the estoppel. The criteria are listed by the court in *Gikas v. Zolin* (1993) 6 Cal.4th 841, 849:

First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.

The purposes of the doctrine include "preserving the integrity of the judicial system, promoting judicial economy, and protecting litigants from harassment by vexatious litigation." (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 343.)

2. In *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815 the court held that even if judicially confirmed, a private arbitration is not a former proceeding so as to support estoppel unless the parties to the arbitration agree that it may be so used. In addition, the court noted:

The very fact that arbitration is by nature an informal process, not strictly bound by evidence, law, or judicial oversight, suggests reasonable parties would hesitate to agree that the arbitrator's findings in their own dispute should thereafter bind them in cases involving different adversaries and claims . . . [¶] . . . [¶] . . . Moreover, because private arbitration does not involve the use of a judge and a courtroom, later relitigation does not undermine judicial economy by requiring duplication of judicial resources to decide the same issue.

(*Id.* at. pp. 832-833.)

3. In this case, Respondent paid the awarded amount and Alvarado dismissed the lawsuit. Hence, there was no judicial action concerning the award and it was not a final judgment so as to satisfy that criterion of the doctrine. In addition, there was no agreement that the arbitration award would have such an effect. It is therefore concluded that the doctrine of collateral estoppel does not apply to the arbitration award against Respondent.

4. Pursuant to Business and Professions Code section 10177, subdivision (d), in conjunction with Business and Professions Code section 10159.5 and California Code of Regulations, title 10, section 2731, real estate licensees who operate under a fictitious business name are required to register the name with the Department. Cause exists to discipline Respondent's license for violating these provisions as he failed to register the fictitious business name "Help-U-Sell Westlake Realty" with the Department (Finding 3).

5. Business and Professions Code section 10176, subdivision (a), provides that a real estate license may be suspended or revoked where it is proven that while acting in his capacity as a licensee the licensee has made any substantial misrepresentation. It was not demonstrated to the required legal standard of clear and convincing evidence that Respondent made substantial misrepresentations to Alvarado. Cause for discipline does not exist pursuant to this section.

6. Business and Professions Code section 10176, subdivision (i), provides that a real estate license may be suspended or revoked where it is proven that while acting in his capacity as a licensee the licensee has engaged in conduct that constitutes fraud or dishonest dealing. It was not demonstrated to the required legal standard of clear and convincing evidence that Respondent's actions in this matter rose to the level of fraud or dishonesty. Cause for discipline does not exist pursuant to this section.

7. Business and Professions Code section 10177, subdivision (g), provides that a real estate license may be suspended or revoked where it is proven that a licensee demonstrated negligence or incompetence in performing an act for which he is required to be licensed. Cause for discipline exists pursuant to this section by reason of the matters set forth in Findings 4 through 14. Respondent was clearly negligent and/or incompetent while acting in his capacity as a broker and dual agent in the Alvarado-Akers transaction.

8. Real estate brokers are fiduciaries, and it is important that they be persons of good character and pay close attention to the real estate laws and to the details of transactions that they agree to conduct. It was not proven in this matter that Respondent was deliberately dishonest or sought intentionally to mislead or harm Alvarado. But she was harmed by his negligence and incompetence. Respondent rushed through a transaction with little regard to the rights and needs of Alvarado, who thought that he was representing her. Respondent, however, has no other record of negligent or intentional misconduct and he presented three persuasive witnesses regarding his professionalism and good character. It is therefore concluded that the public interest will be protected by the issuance of a restricted real estate broker license to Respondent.

ORDER

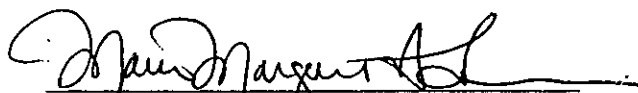
All licenses and licensing rights of Respondent Wilson C. Fang under the Real Estate Law are revoked; provided, however, a restricted real estate broker license shall be issued to Respondent pursuant to section 10156.5 of the Business and Professions Code if Respondent makes application therefore and 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 or for the removal of any of the conditions, limitations or restrictions of a restricted license until three years have elapsed from the effective date of this Decision.
4. 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.
5. Respondent shall, within six months from the effective date of this Decision, 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 suspension of Respondent's license until Respondent passes the examination.
6. Respondent shall report in writing to the Department of Real Estate as the Real Estate Commissioner shall direct by his Decision herein or by separate written order issued while the restricted license is in effect such information concerning Respondent's activities for which a real estate license is required as the Commissioner shall deem to be appropriate to protect the public interest.

Such reports may include, but shall not be limited to, periodic independent accountings of trust funds in the custody and control of Respondent and periodic summaries of salient information concerning each real estate

transaction in which the Respondent engaged during the period covered by the report.

DATED: February 19, 2009



MARY-MARGARET ANDERSON

Administrative Law Judge

Office of Administrative Hearings

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Department of Real Estate
FEB 23 2009
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DEPARTMENT OF REAL ESTATE

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8 BEFORE THE DEPARTMENT OF REAL ESTATE

9 STATE OF CALIFORNIA

10 * * *

11 In the Matter of the Accusation of

No. H-10537 SF

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13 } ACCUSATION
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17 WILSON C. FANG,

18 Respondent.

19 The Complainant, E. J. HABERER II, a Deputy Real Estate Commissioner of the
20 State of California, for cause of Accusation against Respondent WILSON C. FANG (hereinafter
21 "Respondent"), is informed and alleges as follows:

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23 The Complainant makes this Accusation in his official capacity.

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25 At all times herein mentioned, Respondent was and now is licensed and/or has
26 license rights under the Real Estate Law (Part 1 of Division 4 of the Business and Professions
27 Code) (herein "the Code") as a real estate broker dba Help-U-Sell Westlake Realty.

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On or about October 22, 2005 Respondent, on behalf of Yilda Medina Alvarado (hereinafter the "Buyer"), presented a California Residential Purchase Agreement (hereinafter the "Agreement") to Nathan and Debbie Akers (hereinafter the "Sellers") as an offer to purchase the real property located at 5772 Halleck Drive, San Jose (hereinafter the "Property").

The Agreement provided at Paragraph 27 C. that the "... list agent Wilson C. Fang is the agent of both the Buyer and Seller", at Paragraph 4.A.(1) that the "... Seller shall pay for an inspection and report for wood destroying pests and organisms...", at Paragraph 4.B.(4) that the "... Seller shall pay for the ... Property Inspection Report" and at Paragraph 25, that the Buyer's Inspection Advisory was an attached supplement with other terms and conditions and the Property was to be sold in an "as-is" condition..

The Sellers accepted the Buyer's offer on or about October 22, 2005.

Respondent pursuant to the Agreement ordered a pest control report and inspection on the Property but failed to order a home inspection as was required by the Agreement.

On or about November 10, 2005 Buyer received and acknowledged receipt of a Real Estate Transfer Disclosure Statement on the Property in which the Sellers indicated that there were no significant defects or malfunction on the Property and in which Respondent indicated that based on the Sellers disclosures as to the condition of the Property and his "... reasonably competent and diligent visual inspection of the accessible areas of the Property..." that he had no items to disclose.

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In truth and in fact, Respondent was aware of a 2002 termite inspection and report on the Property which disclosed significant problems with the Property and he was aware of the 2005 termite and inspection report he ordered on the Property pursuant to the Agreement which also noted damage.

Respondent failed to disclose the true facts regarding the Property and failed to obtain a property inspection report as required by the Agreement to induce the Buyer to purchase the Property, which she did, in reasonable reliance on the false representations and failures of Respondent.

In November 2005 escrow closed on the Property.

Upon moving into the Property in November 2005 the Property was found to have significant plumbing problems, inadequate water pressure, and grossly deteriorated pipes throughout the Property, major roof and attic problems, and missing gutters and down spouts.

On or about February 23, 2006, the Buyer filed a lawsuit in the Superior Court of the State of California, County of Santa Clara, Case No. 1-06-CV-058590, against Respondent and Sellers regarding the Property which included causes of action for fraud, misrepresentation, and rescission, among others.

As a result of the lawsuit discussed above and pursuant to the arbitration clause contained in the Agreement, an Arbitration Hearing was conducted on January 30, 31, and February 1, 5, and 6 of 2007 before the Honorable Robert A. Baines, retired Judge of the Superior Court of the State of California, regarding the claims made in the lawsuit.

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On or about May 2, 2007 a Final Award (hereinafter the "Award") was granted in favor of the Buyer and against Respondent and the Seller. The Award contained factual findings and conclusions of law including, but not limited to, the finding that (1) "...[g]iven the totality of these circumstances, there is no doubt that Fang breached many, if not all, the fiduciary and statutory duties he owed [sic] to his buyer/client, Ms. Alvarado. As such, he was both in breach of contract and guilty of professional negligence as to Alvarado" (pg. 15 of the Award); (2) "There is also no doubt that Fang was guilty of fraud and intentional misrepresentation in his dealings with Alvarado, especially with regard to his representation regarding the existence and contents of the non-existent property inspection report." (pg. 15 of the Award); and (3) Respondent was entitled to \$50,000 in punitive damages and \$50,670 in actual damages against Respondent.

At all times mentioned herein Respondent was performing activities for which a real estate license is required dba Help-U-Sell Westlake Realty. However, at no time mentioned herein was Help-U-Sell Westlake Realty registered as a fictitious business name with the Department in violation of Section 10159.5 of the Code and Section 2731, Title 10, California Code of Regulations (hereinafter the "Regulations").

The facts alleged above are grounds for the suspension or revocation of the licenses and license rights of Respondent under Sections 10176(a), 10176(i), and 10177(g) of the Code and Section 10177(d) of the Code in conjunction with Section 10159.5 of the Code and Section 2731 of the Regulations.

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

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E. J. HABERER II
Deputy Real Estate Commissioner

9 Dated at Oakland, California,
10 this 10th day of October, 2008.
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