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DEC 12 2011

DEPARTMENT OF REAL ESTATE

By R. Jones

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of

NANCY JOSEPHINE KENDALL,

Respondent.

)
) NO. H-11143 SF

)
) OAH NO. 2011061252

DECISION

The Proposed Decision dated November 1, 2011, 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 **JANUARY 3, 2012**

IT IS SO ORDERED 12/7/11

BARBARA J. BIGBY
Acting Real Estate Commissioner

Barbara J. Bigby

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of:

NANCY JOSEPHINE KENDALL,

Respondent.

Case No. H-11143 SF

OAH No. 2011061252

PROPOSED DECISION

Administrative Law Judge David L. Benjamin, State of California, Office of Administrative Hearings, heard this matter in Oakland, California, on September 15, 2011.

Real Estate Counsel II Kenneth C. Espell represented complainant E. J. Haberer II, a Deputy Real Estate Commissioner of the State of California.

Respondent Nancy Josephine Kendall appeared on her own behalf. She was assisted by her daughter, Arminda Fisher.

The matter was submitted on September 15, 2011.

FACTUAL FINDINGS

1. At all relevant times, respondent Nancy Josephine Kendall was licensed under the Real Estate Law as a real estate broker. (The Real Estate Law is found at Business and Professions Code section 10000 et seq.) Respondent was first licensed as a real estate salesperson in 1978, and has been licensed as a real estate broker since 1981.

2. On May 18, 2011, complainant E. J. Haberer II, acting in his official capacity as a Deputy Real Estate Commissioner of the State of California, filed an accusation against respondent. The accusation, which arises out of an audit of respondent's records, alleges that respondent failed to comply with the laws that govern the handling of trust funds. Respondent filed a notice of defense.

Department audit

3. Between January 5, 2011, and January 25, 2011, Auditor Susie Hsueh examined the accounting and other records of respondent for the period October 1, 2008, through November 30, 2010. The audit arose out of a complaint by a former tenant-in-common in one of the properties that respondent managed. The purpose of the audit was to

determine whether respondent handled and accounted for trust funds in accordance with the Real Estate Law and the department's regulations. On January 6, 2011, Hsueh held an entrance conference with respondent. Also present at the conference was respondent's daughter, real estate broker Arminda Fisher, who works for respondent and is responsible for the day-to-day management of respondent's property management activities.

4. During the audit period, respondent, for compensation or in expectation of compensation, engaged in the business of, acted in the capacity of, advertised, or assumed to act as a real estate broker with the State of California within the meaning of Business and Professions Code section 10131, including, but not limited to, operating a property management business with the public on behalf of others. Respondent manages two properties for approximately 22 owners, and collects approximately \$1.3 million in rent annually.

5. In acting as a real estate broker, respondent accepted or received funds in trust and from time to time made disbursements of trust funds.

6. Trust funds accepted or received by respondent were deposited into one or more bank accounts maintained by respondent, including the following:

a. Bank Account #1, titled "Kendall Fisher Real Estate Monroe Drive Arminda Fisher Nancy J. Kendall," maintained at Mechanics Bank in El Cerrito, account number XXXX5880. This account was used for rent, security deposits and disbursements for the property located at 240 Monroe Drive in Mountain View, California, known as the "Monroe Drive" property.

b. Bank Account #2, titled "Kendall Fisher Real Estate Ananda Lane Arminda S. Fisher Nancy J. Kendall," maintained at Mechanics Bank in El Cerrito, account number XXXX5902. This account was used for rent, security deposits and disbursements for the property known as the "Ananda Lane" property.

c. Bank Account #3, titled "Nancy J. Kendall or Kevin Ananta McSweeney or Matt Stickney," maintained at JPMorgan Chase Bank in San Antonio, Texas. This account was used to make small disbursements for the Ananda Lane property; deposits included transfers from Bank Account #2.

7. Auditor Hsueh found the following violations of the Real Estate Law and the department's regulations:

a. Respondent failed to designate Bank Account #1 as a trust account under the name of respondent as trustee.

b. A reconciliation of Bank Account #1 revealed a shortage of \$8,284.12. The adjusted bank balance for this account on May 28, 2010, was determined to be \$78,295.57 and the accountability was determined to be \$86,579.69. The auditor found that the shortage

was caused by two inadvertent electronic funds transfers of \$4,142.06 each to Richard Lane, a former tenant-in-common of the Monroe Drive property. There was no evidence that the owners of the trust funds had given their written consent allowing respondent to reduce the balance in Bank Account #1 to an amount less than the existing aggregate trust fund liabilities.

c. Respondent failed to designate Bank Account #2 as a trust account under the name of respondent as trustee.

d. Respondent failed to designate Bank Account #3 as a trust account under the name of respondent as trustee.

e. For Bank Account #3, there were entries in the control record for three checks that were inaccurate. For check no. 2211, the amount listed in the control record was \$40.30, but check no. 2211 cleared for \$45. For check no. 2252, the amount listed in the control record was \$65.13, but check no. 2252 cleared for \$45. For check no. 2280, the control record stated that it was disbursed on November 12, 2010, but the check was written on October 12, 2010.

f. Two unlicensed individuals, Matt Stickney and Kevin Ananta McSweeney, were signatories on Bank Account #3. Respondent did not maintain fidelity bond coverage for these individuals in an amount at least equal to the maximum amount of trust funds to which they would have access.

g. Respondent failed to maintain a separate record of the receipt and disposition of all trust funds deposited into Bank Account #3 in that, on November 4, 2010, the account contained \$6.10 in unidentified and/or unaccounted for funds.

h. Respondent failed to maintain copies of both sides of cancelled checks from Bank Account #1, Bank Account #2, and Bank Account #3.

8. The accusation alleges that, as to Bank Account #3, "the adjusted bank balance was \$1,571.23 and the accountability . . . was \$1,565.13 which resulted in a shortage of -\$6.10 in violation of [Business and Professions Code] Section 10145 . . . and Section 2831.1 and 2832.1 of the Commissioner's Regulations. The shortage was due to unidentified and/or unaccounted for funds[.]"¹

The evidence does not support this allegation. The auditor did not identify a shortage in Bank Account #3 in her work papers, in her non-compliance summary, or in her audit report. The auditor found that the adjusted bank balance in Bank Account #3 was \$6.10 greater than its accountability. There was an overage, not a shortage, in the account

¹ The Commissioner's regulations are found at title 10 of the California Code of Regulations.

consisting of \$6.10 in unidentified funds. Auditor Hsueh concluded that the difference between the adjusted bank balance and the accountability was "\$0.00."

Respondent's evidence

9. Respondent does not contest any of the audit findings. If anything, she is embarrassed that the audit findings make her appear to be negligent or incompetent because, in her view, that is not an accurate picture of how she has done business for the past 30 years. Respondent prides herself on doing things "exactly right." She has never been the subject of disciplinary action before and has never been the subject of legal action.

10. Respondent and Fisher explained to Auditor Hsueh, and explained at hearing, the events that led to the May 2010 shortage in Bank Account #1.

Richard Lane and the other owners of the Monroe Drive property received monthly distributions from respondent. These distributions, paid out of Bank Account #1, were made by electronic fund transfers; these transfers would continue from month to month unless modified or stopped. Beginning in November 2009, Lane's monthly distribution was \$4,142.06. On April 1, 2010, Lane sold his interest in the property. Fisher should have stopped his monthly electronic funds transfers, but did not. As a result, Lane received two transfers he should not have received, at the end of April and the end of May.

Fisher, who was expecting a baby on April 2, planned to stop Lane's electronic distributions as soon as his sale closed on April 1. Fisher, however, gave birth on March 31. After the birth of her child on March 31, both she and the baby developed sudden and severe medical complications for which they were both hospitalized for over a month. It was, in respondent's words, the most difficult time in her life and her daughter's life. Fisher acknowledges that, before March 31, she had not clearly communicated with respondent or their new bookkeeper to remind them that electronic distributions to Lane needed to be stopped. At hearing, Fisher testified that while she does not claim to have never made a mistake, she and respondent keep books "to the penny" and they have never before paid someone after he or she has "sold out" of the property.

When Lane contacted respondent about the two distributions, respondent informed him that they had been paid in error and asked him to return the money. Lane refused, and submitted a complaint to the department about the improper payments. (It was Lane's complaint that led to the department's audit.) Respondent informed all of the owners of the Monroe Drive property about the improper distributions and the owners, without respondent's participation, agreed to absorb the loss.

11. Respondent corrected all of the audit violations when the auditor brought them to her attention.

Bank Account #1 and Bank Account #2 have been designated as trust fund accounts. Respondent sought legal advice when she first created the three bank accounts. She was

informed at that time that since she was also one of the owners of the properties, she did not need to designate the accounts as trust accounts. Respondent now understands that advice was not correct.

Respondent has closed Bank Account #3. It was this account for which the control records were inaccurate and for which no separate record of receipts and disbursements was maintained, leading to unidentified and/or unaccounted for funds in the amount of \$6.10. It was also this account that had nonlicensed signators.

Respondent is retaining copies of both sides of cancelled checks.

12. The testimony of respondent and Fisher was credible and uncontradicted.

LEGAL CONCLUSIONS

1. Under Business and Professions Code section 10177, subdivision (d), the Real Estate Commissioner may suspend or revoke the license of a real estate licensee who has "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 deposited trust funds in Bank Account #1, but failed to designate Bank Account #1 as a trust account under the name of respondent as trustee, as required by Business and Professions Code section 10145 and section 2832 of the commissioner's regulations.

3. Respondent made two disbursements from Bank Account #1 that reduced the balance of funds in the account to an amount less than the existing aggregate trust fund liability of respondent to all owners of the funds, without the written consent of every principal who was an owner of the funds in the account, in violation of Business and Professions Code section 10145 and section 2832.1 of the commissioner's regulations.

4. Respondent failed to designate Bank Account #2 as a trust account under the name of respondent as trustee, as required by Business and Professions Code section 10145 and section 2832 of the commissioner's regulations.

5. Respondent failed to designate Bank Account #3 as a trust account under the name of respondent as trustee, as required by Business and Professions Code section 10145 and section 2832 of the commissioner's regulations.

6. In three instances, respondent made inaccurate entries in the control records for Bank Account #3, in violation of section 2831 of the commissioner's regulations.

7. Respondent failed to secure fidelity bond coverage at least equal to the maximum amount of the trust funds within Bank Account #3, to which unlicensed employees

of respondents had access, in violation of section 2834, subdivision (a), of the commissioner's regulations.

8. Respondent failed to maintain a separate record of receipt and distribution of all trust funds deposited into Bank Account #3, in violation of Business and Professions Code section 10145, subdivision (g), and section 2831.1 of the commissioner's regulations.

9. Respondent failed to retain copies of both sides of canceled checks for Bank Account #1, Bank Account #2 and Bank Account #3, in violation of Business and Professions Code section 10148.

10. Cause for discipline exists pursuant to Business and Professions Code section 10177, subdivision (d), by reason of the matters set for in Legal Conclusions 2 through 9.

11. The accusation alleges, as a separate cause for discipline, that the violations set forth above demonstrate "negligence and/or incompetence." The accusation does not identify, as required by Government Code section 110503, the statute or rule that supports discipline against respondent for negligence or incompetence. Cause for discipline on the grounds of negligence and/or incompetence was not established.

12. The accusation alleges that there was a shortage of \$6.10 in Bank Account #3 in violation of Business and Professions Code section 10145 and sections 2831.1 and 2832.1 of the commissioner's regulations. For the reasons stated in Finding 8, the evidence failed to establish a shortage in Bank Account #3. No cause for discipline was established with respect to this alleged violation.

13. Cause for license discipline having been established, the issue is the level of discipline to impose. The purpose of license discipline is not to punish the licensee, but to protect the public.

The audit revealed several violations of the laws that govern the handling of trust funds. The two unauthorized disbursements of trust funds to Lane, and the failure to properly title the trust accounts, appear on their face to be particularly serious violations. There are mitigating circumstances in both instances. The improper disbursements to Lane would not have occurred had it not been for the sudden, serious medical conditions of Fisher and her newborn baby, conditions which disabled Fisher and distracted respondent for over a month. And respondent, who was also a part owner of the Monroe Drive and Ananda Lane properties, received incorrect advice on how to title the accounts that held trust funds for these properties. There is no suggestion of dishonesty. Respondent, who prides herself on doing things correctly, is embarrassed by the violations. She has been licensed for over 30 years and has never before been the subject of license discipline. When the auditor brought the violations to respondent's attention, she corrected them. Complainant candidly acknowledged in closing argument that the evidence does not support revocation of respondent's license. Under these circumstances, the public interest will be adequately protected by a stayed suspension subject to the conditions (among others) that respondent

pay the reasonable cost of the 2011 audit, and that she submit to, and pay the reasonable cost of, a subsequent audit.

ORDER


All licenses and licensing rights of respondent Nancy Josephine Kendall under the Real Estate Law are suspended for a period of 20 days from the effective date of this decision; provided, however, that the suspension shall be stayed for one year upon the following terms and conditions:

a. Respondent shall obey all laws, rules and regulations governing the rights, duties and responsibilities of a real estate licensee in the State of California.

b. The Commissioner may, if a final subsequent determination is made, after hearing or upon stipulation, that cause for disciplinary action occurred during the term of the suspension provided for herein, vacate and set aside the stay order including any further stay imposed pursuant to Section 10175.2. Should no order vacating the stay be made pursuant to this condition or condition 1c, below, the stay imposed herein shall become permanent.

c. Pursuant to section 10148 of the Business and Professions Code, Respondent shall pay the Commissioner's reasonable cost for: a) the audit which led to this disciplinary action and, b) a subsequent audit to determine if respondent has corrected the trust fund violations found in Legal Conclusions 2 through 9, above. In calculating the amount of the Commissioner's reasonable cost, the Commissioner may use the estimated average hourly salary for all persons performing audits of real estate brokers, and shall include an allocation for travel costs, including mileage, time to and from the auditor's place of work and per diem. Respondent shall pay such cost within 60 days of receiving an invoice from the Commissioner detailing the activities performed during the audit and the amount of time spent performing those activities. The Commissioner may, in his or her discretion, vacate and set aside the stay order, if payment is not timely made as provided for herein, or as provided for in a subsequent agreement between respondent and the Commissioner. The vacation and the set aside of the stay shall remain in effect until payment is made in full, or until respondent enters into an agreement satisfactory to the Commissioner to provide for payment. Should no order vacating the stay be issued, either in accordance with this condition or condition 1b, above, the stay imposed herein shall become permanent.

DATED: November 1, 2011



DAVID L. BENJAMIN
Administrative Law Judge
Office of Administrative Hearings

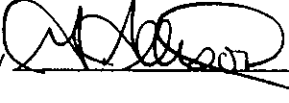
1 KENNETH C. ESPELL, (SBN 178757)
2 Real Estate Counsel II
3 Department of Real Estate
4 P. O. Box 187007
5 Sacramento, CA 95818-7007

FILED

May 24, 2011

DEPARTMENT OF REAL ESTATE

6 Telephone: (916) 227-0789
7 -or- (916) 227-0868 (Direct)

8 By 

9 BEFORE THE DEPARTMENT OF REAL ESTATE

10 STATE OF CALIFORNIA

11 * * *

12 In the Matter of the Accusation of)
13 NANCY JOSEPHINE KENDALL,) NO. H-11143 SF
14 Respondent.) ACCUSATION
15)

16 The Complainant, E. J. HABERER II, in his official capacity as Deputy Real
17 Estate Commissioner of the State of California, for cause of Accusation against NANCY
18 JOSEPHINE KENDALL (hereinafter "KENDALL" and/or "Respondent") is informed and
19 alleges as follows:
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22 At all times relevant herein, Respondent NANCY JOSEPHINE KENDALL was
23 and now is licensed and/or has license rights under the Real Estate Law (Part 1 of Division 4 of
24 the Business and Professions Code) (herein "the Code") as a real estate broker and is doing
25 business under the registered doing business as Kendall Fisher Real Estate.

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Whenever reference is made in an allegation in this Accusation to an act or omission of KENDALL, such allegation shall be deemed to mean that KENDALL, her employees, agents and/or real estate licensees employed by or associated with KENDALL committed such act or omission while acting within the course and scope of their authority and employment with KENDALL and in the furtherance of the business or operations of KENDALL.

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At all times herein mentioned, KENDALL for compensation, or in expectation of compensation, engaged in the business of, acted in the capacity of, advertised, or assumed to act as a real estate broker within the State of California within the meaning of Section 10131 of the Code, including, but not limited to, the operation and conduct of a mortgage loan brokerage with the public wherein, on behalf of others, KENDALL solicited borrowers or lenders for or negotiated loans, loan modifications or collected payments or performed services for borrowers or lenders or note owners in connection with loans secured directly or collaterally by liens on real property or on a business opportunity and/or for residential property resale and/or operated a property management business with the public on behalf of others.

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Intermittently between January 6, 2011 and January 25, 2011, an audit was conducted at KENDALL's branch office located 1011 King Drive, El Cerrito, California wherein the Department's auditor examined KENDALL's records for the period October 1, 2008 to November 30, 2010 (the audit period).

FIRST CAUSE OF ACTION

Audit Violations

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Each and every allegation in Paragraphs 1 through 6 above, is incorporated by this reference as if fully set forth herein.

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In acting as a real estate broker, KENDALL accepted or received funds in trust (herein "trust funds") including, but not limited to, trust funds received from or on behalf of lenders, investors, borrowers and others in connection with the mortgage loan brokerage activities, loan servicing, in-house escrow services and/or resale activities as described in Paragraph 5, above, and thereafter from time to time made disbursements of the trust funds.

The aforementioned trust funds accepted or received by KENDALL were deposited or caused to be deposited by KENDALL into one or more bank accounts maintained by KENDALL, including, but not necessarily limited to, the following account maintained by KENDALL:

(a) Bank Account #1 – deposited with the Mechanics Bank, 9996 San Pablo Avenue, El Cerrito, California 94530; titled: "Kendall Fisher Real Estate Monroe Drive Arminda Fisher Nancy J. Kendall" account number XXXX5880;

(b) Bank Account #2 – deposited with the Mechanics Bank, 9996 San Pablo Avenue, El Cerrito, California 94530; titled: "Kendall Fisher Real Estate Ananda Lane Arminda S. Fisher Nancy J Kendall" account number XXXX5902; and

(c) Bank Account #3 – deposited with JPMorgan Chase Bank, NA, P.O. Box 659754, San Antonio, Texas 78265-9754; titled: "Nancy J. Kendall or Kevin Ananta McSweeney or Matt Stickney."

In the course of the activities described in Paragraph 5, above, for the audit period KENDALL:

(a) Failed to designate Bank Account #1 as trust account under the name of KENDALL as trustee in violation of Section 10145 of the Code and Section 2832, Chapter 6, Title 10, California Code of Regulations (hereinafter "the Commissioner's Regulations);

///

1 (b) A reconciliation for Bank Account #1 was prepared and as of May 28,
2 2010, the adjusted bank balance was \$78,295.57 and the accountability for Bank Account #1
3 was \$85,579.69 which resulted in a shortage of -\$8,284.12 in violation of Section 10145 of the
4 Code and Sections 2831.1 and 2832.1 of the Commissioner's Regulations. This shortage was,
5 at least in part, attributed to two (2) unauthorized distribution of trust funds;

6 (c) Failed to designate Bank Account #2 as trust account under the name of
7 KENDALL as trustee in violation of Section 10145 of the Code and Section 2832 of the
8 Commissioner's Regulations;

9 (d) Failed to designate Bank Account #3 as trust account under the name of
10 KENDALL as trustee in violation of Section 10145 and 10146 of the Code and Section 2832 of
11 the Commissioner's Regulations;

12 (e) A reconciliation for Bank Account #3 was prepared and as of
13 November 4, 2010 the adjusted bank balance was \$1,571.23 and the accountability for Bank
14 Account #3 was \$1,565.13 which resulted in a shortage of -\$6.10 in violation of Section 10145
15 of the Code and Section 2831.1 and 2832.1 of the Commissioner's Regulations. The shortage
16 was due to unidentified and/or unaccounted for funds;

17 (f) For Bank Account #3 there are at least three (3) inaccurate check entries
18 in the control records wherein the amount indicated in the control records for each check and
19 the amount of each check as cleared by the bank differed all in violation of Section 2831 of the
20 Commissioner's Regulations;

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Check Number	Amount listed on Control Record	Amount As Cleared by Bank	Difference	Check Signatory
22 2211	\$40.30	\$45.00	\$4.70	Matt Stickney
23 2252	\$65.13	\$45.00	\$20.13	Matt Stickney
24 2280	\$50.00	\$50.00 (Incorrectly Dated)	\$50.00	Matt Stickney

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1 (g) As the signature card for Bank Account #3 was not made available to the
2 auditor, the bank provided a letter listing the individuals who were signatories on Bank Account
3 #3. In addition, KENDALL confirmed that Matt Stickney and Kevin Ananta McSweeney, both
4 of whom are not licensed by the Department in any capacity, were signatories on Bank Account
5 #3. Mr. Stickney is solely an employee of the Master Tenant. Mr. McSweeney's relationship to
6 KENDALL is uncertain. As Mr. Stickney and Mr. McSweeney lacked a real estate license a
7 fidelity bond was required to permit these individuals to be signatories on Bank Account #3.
8 Kendall failed to maintain fidelity bond coverage in an amount at least equal to the maximum
9 amount of trust funds to which Mr. Stickney and/or Mr. McSweeney had access to at any time.
10 KENDALL's failure to have a fidelity bond is a violation of Section 2834 of the
11 Commissioner's Regulations;

12 (e) In connection with the collection and distribution of trust funds, Kendall
13 failed to maintain a separate record of receipt and disposition of all trust funds deposited into
14 Bank #3 in violation of Section 10145(g) of the Code and Section 2831.1 of the
15 Commissioner's Regulation; and

16 (f) KENDALL failed to retain copies of both sides of canceled checks for
17 Bank Account #1, Bank Account #2, and Bank Account #3 in violation of section 10148 of the
18 Code.

19 9

20 The acts and/or omissions of KENDALL as alleged above violated Sections
21 10130, 10139, 10085, 10185.5, 10145, 10146, and 10160 of the Code; and Sections 2753,
22 2831.2, 2832, 2834, and 2970 of the Commissioner's Regulations each of which jointly and
23 severally constitutes grounds for discipline under Section 10177(d) of the Code.

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