

FILED

BEFORE THE BUREAU OF REAL ESTATE

STATE OF CALIFORNIA

* * *

FEB 01 2017

BUREAU OF REAL ESTATE

By B. Nicholas

In the Matter of the Accusation of
EVEREST MWAMBA INVESTMENTS
INC., and EVEREST MWAMBA ,
Respondent.

) CalBRE No. H-11771 SF

) OAH No. 2016070495

DECISION

The Proposed Decision dated January 4, 2017, 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.

The Decision suspends or revokes one or more real estate licenses, but the right to a restricted salesperson license is granted to Respondent.

Pursuant to Government Code section 11521, the Bureau of Real Estate may order reconsideration of this Decision on petition of any party. The Bureau's power to order reconsideration of this Decision shall expire 30 days after mailing of this Decision, or on the effective date of this Decision, whichever occurs first. The right to reinstatement of a revoked real estate license or to the reduction of a penalty is controlled by Section 11522 of the Government Code. A copy of Sections 11521 and 11522 and a copy of the Commissioner's Criteria of Rehabilitation are attached hereto for the information of respondent.

FEB 22 2017

This Decision shall become effective at 12 o'clock noon on _____

IT IS SO ORDERED

1/30/2017
WAYNE S. BELL

REAL ESTATE COMMISSIONER



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True
9-Jan-17

BEFORE THE
BUREAU OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

EVEREST MWAMBA INVESTMENTS,
INC., and EVEREST MWAMBA,

Respondents.

Case No. H-11771 SF

OAH No. 2016070495

PROPOSED DECISION

Administrative Law Judge Karen Reichmann, State of California, Office of Administrative Hearings, heard this matter on December 6 and 7, 2016, in Oakland, California.

Truly Sughrue, Real Estate Counsel, represented complainant.

Edward McCutchan, Attorney at Law, represented respondents Everest Mwamba Investments, Inc., and Everest Mwamba, who was present.

The matter was submitted for decision on December 7, 2016.

FACTUAL FINDINGS

1. Complainant Robin S. Tanner made the statement of issues in her official capacity as a Deputy Real Estate Commissioner for the State of California.
2. Respondent Everest Mwamba is presently licensed under the Real Estate Law, Part 1 of Division 4 of the Business and Professions Code, as a real estate broker. He has been a real estate licensee since 2006. Respondent Everest Mwamba Investments, Inc.(EMI), is presently licensed under the Real Estate Law, Part 1 of Division 4 of the Business and Professions Code, as a real estate broker corporation. Respondent Mwamba was the designated officer at the time the corporation license was issued in 2009 until April 15, 2016. At that time, respondent's wife, Maureen Barbara Kenney, became the designated officer. There have been no prior disciplinary actions against respondent Mwamba or respondent EMI.

3. Kon K. Naly, an auditor for the Bureau, was assigned to perform an audit of EMI, to determine whether EMI was in compliance with the laws and regulations governing the handling of trust funds. EMI was randomly selected for the audit; there had been no allegations of impropriety raised by any clients. Naly met with respondent at the EMI office on May 8, 2014, to commence the audit process. Respondent was fully cooperative. At the conclusion of the audit, Naly authored a report dated August 28, 2014. Naly's findings were based on the documents provided by respondent. The audit pertained to the property management activities of EMI and not to any other licensed activity. The audit examined a one-year period, April 1, 2013 through March 31, 2014.

In performing the audit, Naly discovered that EMI managed approximately 30 single-family homes for 30 different property management clients. EMI maintained two bank accounts at California Bank and Trust to hold funds received on behalf of the clients, consisting mainly of rent payments and security deposits. Both accounts were held in the name of the business and were not designated as client trust fund accounts. Mwamba signed a declaration, dated August 12, 2014, in which he certified that the two California Bank and Trust accounts were the only trust accounts or bank accounts used to deposit trust funds during the audit period. These accounts are referred to in Naly's audit report as account #1 and account #2. Naly noted that the majority of rent receipts were deposited into account #1 and then transferred into account #2. The majority of disbursements to the property owners were made from account #2.

Naly discovered that EMI failed to maintain separate beneficiary records for the two accounts used to manage client trust funds. Instead, EMI maintained one set of records combining the transactions of both accounts. Naly also discovered that the two accounts were used for general business operations and personal use in addition to EMI's property management operations. The disbursements during the audit period included \$15,400.02 used for personal and general business use from account #1; \$87,980 from account #2 for purchase of a property in San Francisco; and \$233,500, which was transferred from the two accounts into Mwamba's personal investment account at Fidelity. Naly also noted that funds from Fidelity were transferred back into account #1 in March 2014.

Naly performed a bank account reconciliation of the two accounts for the date of March 31, 2014. Naly discovered that there was a shortage of \$99,224.67, compared to trust fund liabilities. Naly concluded that the shortage was attributable in part to \$74,464.01 which had been transferred from the two client accounts into respondent's Fidelity account. Naly could not identify the cause of the remaining \$24,760.66 shortage. Naly did not take into account the balance in the Fidelity account when reaching his conclusion that there was a shortage, because respondent had informed him that this was a personal account and that he only used the two client accounts to handle client funds. Naly found no evidence that trust fund beneficiaries consented in writing to allowing the balance of funds in the accounts to be reduced to an amount less than the liabilities.

4. In his report, Naly made the following conclusions: 1) there was a shortage of \$99,224.67 on March 31, 2014, which was due in part to unauthorized disbursements to

Mwamba and EMI; 2) respondents failed to deposit trust funds into trust accounts; 3) respondents failed to keep accurate separate beneficiary records for the two accounts; 4) respondents failed to perform the required monthly reconciliation comparing the control record of trust funds to the total balance of the beneficiary records for the two accounts; 5) respondents commingled client funds with funds belong to respondents; and 6) respondents converted and/or commingled \$74,464.01 of trust funds for respondents' own use or benefit.

Respondent's evidence

5. Respondent Mwamba is a native of the Democratic Republic of Congo. He attended university in Europe and then immigrated to the United States in 1997. His wife is a third-generation real estate professional. Mwamba operated a fitness center for several years before entering the real estate profession. When he was first licensed, he worked under his wife's broker's license and worked mainly in residential sales. When he became a broker, he focused on leasing and sales. After being asked by numerous clients for help managing their properties, he somewhat reluctantly began work in property management. He explained that property management is not a very lucrative line of work.

6. Mwamba acknowledged that at the time of the audit, he was not properly handling the funds of his property management business. He admits maintaining one set of records for both accounts. He also admits that he used the two accounts for business and personal expenses and that he moved money back and forth from the two accounts into his own personal accounts.

As a result of the audit, Mwamba made changes in his business practices. He hired a real estate consultant, Pam Strickland, who helped him establish proper procedures and assisted him in communicating with the auditor.

Mwamba testified that he is no longer involved in property management. EMI has only five or six remaining property management clients and his wife is responsible for handling these accounts. There is a trust account with his wife as trustee. Mwamba does not maintain a trust account because he is not doing any trust activity.

As noted above, respondent is no longer the designated broker of EMI. His wife has taken over that responsibility and respondent is working under her license.

7. Respondent hired Certified Public Accountant A. Christine Davis to review his records and the Bureau's audit report. Davis authored two reports and testified at the hearing. In Davis's opinion, Mwamba's Fidelity account should be considered when performing an audit of respondents' property management activities, because it was also used to operate the property management business. Taking into consideration the Fidelity account, and taking into account what she described as deposits in transit, Davis concluded that there was no shortage on the audit reconciliation date of March 31, 2014. She concluded that all rents collected were paid to the property owners during the audit period and she saw

no evidence of misappropriation or fraud. Davis believes that Naly's audit report is misleading and gives a false impression that respondents engaged in misappropriation.

Davis does not dispute Naly's other conclusions, such as the fact that respondents failed to deposit funds into a client trust account and that client funds were commingled with business and personal funds.

8. Davis's colleague, Leonore Ralston, is a forensic accounting litigation consultant with specialized training in fraud investigation. She reviewed respondents' records for evidence of conversion or misappropriation of funds. Ralston reviewed records for two full calendar years, from January 1, 2013, through December 31, 2014. She concluded that there was no misappropriation of funds belonging to respondents' property management clients. Ralston saw no evidence that respondents took money that belonged to clients. In her opinion, all owners were properly paid what was owed to them.

9. Harold Justman testified on behalf of respondent. Justman has been a member of the California State Bar since 1976 and practiced as a real estate attorney for 36 years. He currently teaches classes in real estate at Menlo College. Justman has represented real estate licensees numerous times and has been retained as an expert witness more than 200 times.

Mwamba hired Justman for a personalized tutoring session. Justman reviewed the Accusation in this matter and prepared an educational program for Mwamba. The goal was for Mwamba to internalize the real estate rules so that he would be in compliance. Justman met with Mwamba in July and Justman provided Mwamba with study materials. He prepared a 30-question test which he administered and Mwamba missed only three. Mwamba was an "avid, eager student" and accepted responsibility for his actions. He directed Mwamba to take an online continuing education course in trust fund management.

Justman believes that Mwamba was not willfully out of compliance with the real estate laws. In his opinion, Mwamba had a lack of knowledge and understanding of the law. Justman believes that Mwamba is an honest person. Mwamba did not understand at the time of his misconduct that he was violating the law. He believed that as long as he was not cheating his clients, his conduct was lawful. In Justman's opinion, Mwamba does not pose a risk of harm to the public.

Ultimate Finding

10. The testimony of Naly was persuasive and largely uncontroverted. Respondents only contest his conclusion that there was a shortage of funds at the time of the reconciliation, and that respondents converted funds for their own behalf. Respondents' expert, Davis, reached her contradictory conclusion because she treated Mwamba's personal account at Fidelity as a business account. Davis's view is rejected. By respondent's own representation, the Fidelity account was a personal account. The evidence established that there was a shortage of funds on the date of the reconciliation, as compared to trust fund liabilities. Although it was not established that any clients were permanently deprived of

funds, it was established that funds were transferred to respondent's personal account during the audit period. This constitutes conversion of client funds.

Costs

11. In connection with the investigation and prosecution of this Accusation, the Bureau has incurred expenses of \$8,963.21. These costs reflect \$5,871.96 in audit costs, \$799.50 in investigation costs and \$2,291.75 for legal services. The costs are supported by certifications signed by Supervising Auditor II Tom Cameron, complainant Robin S. Tanner, and Real Estate Counsel Truly Sughrue. These costs are deemed to be reasonable.

LEGAL CONCLUSIONS

1. Business and Professions Code sections 10145 and 10177, subdivision (d), in conjunction with California Code of Regulations, title 10, section 2832.1, authorize the Real Estate Commissioner to discipline a licensee who fails to secure written consent from trust fund beneficiaries prior to making a disbursement that reduces the funds in the account to less than the existing trust fund liability to all owners of the funds. Cause exists to suspend or revoke respondents' licenses pursuant to these provisions, in light of the matters set forth in Findings 3, 4, and 10.
2. Business and Professions Code sections 10145 and 10177, subdivision (d), in conjunction with California Code of Regulations, title 10, section 2832, authorize the Real Estate Commissioner to discipline a licensee who fails to deposit funds held on behalf of another into a trust account or escrow account. Cause exists to suspend or revoke respondents' licenses pursuant to these provisions, in light of the matters set forth in Findings 3, 4, and 10.
3. Business and Professions Code section 10177, subdivision (d), in conjunction with California Code of Regulations, title 10, section 2831.1, authorizes the Real Estate Commissioner to discipline a licensee who fails to keep separate records regarding each beneficiary and each transaction of trust accounts. Cause exists to suspend or revoke respondents' licenses pursuant to these provisions, in light of the matters set forth in Findings 3, 4, and 10.
4. Business and Professions Code section 10177, subdivision (d), in conjunction with California Code of Regulations, title 10, section 2831.2, authorizes the Real Estate Commissioner to discipline a licensee who fails to reconcile the balance of trust accounts. Cause exists to suspend or revoke respondents' licenses pursuant to these provisions, in light of the matters set forth in Findings 3, 4, and 10.
5. Business and Professions Code section 10176, subdivision (e), authorizes the Real Estate Commissioner to discipline a licensee who commingles funds. Cause exists to

suspend or revoke respondents' licenses for commingling funds, in light of the matters set forth in Findings 3, 4, and 10.

6. Business and Professions Code sections 10176, subdivisions (e) and (i) and 10177, subdivision (g), authorize the Real Estate Commissioner to discipline a licensee who commingles or converts trust funds for his own use. Cause exists to discipline respondents for converting client trust funds by depositing them into a personal account, as set forth in Findings 3, 4, and 10.

7. Business and Professions Code sections 10159.2 and 10177, subdivisions (d), (g) and (h), authorize the Real Estate Commissioner to discipline a licensee who fails to exercise reasonable control over the real estate activities being performed by a corporate licensee. Respondent Mwamba, as the designated officer of Everest Mwamba Investments, Inc., failed to exercise reasonable control of client trust funds. Cause exists to discipline respondent Mwamba, in light of the matters set forth in Findings 3, 4, and 10.

8. Respondents committed numerous violations of the laws governing the management of client trust funds. These violations were discovered during a random audit and not as the result of complaints from trust fund beneficiaries. The audit revealed that respondents failed to adhere to basic procedures for handling client funds that are well-known and required of all licensees. Respondents failed to deposit client funds into a trust account, commingled client funds with business and personal funds, failed to maintain proper records, and transferred client funds into a private bank account.

The evidence established that the violations were caused by ignorance or lack of diligence on the part of respondent Mwamba rather than any dishonest or fraudulent intent. It was not established that any clients were deprived of funds.

Respondent Mwamba acknowledged his wrongdoing and was contrite. He acted quickly to correct his business practices by hiring a consultant and arranging for a tutoring session. He is not currently managing client funds and he is not currently the designated officer of EMI. Mwamba has not previously been disciplined by the Commissioner.

Given the severity of the violations, revocation of Mwamba's real estate broker license and of the corporate license is warranted for the protection of the public. It would not be against the public interest, however, to issue respondent Mwamba a restricted real estate salesperson's license.

9. Business and Professions Code section 10148, subdivision (b), authorizes the Real Estate Commissioner to charge for the costs of an audit, if the licensee is found to have violated Business and Professions Code section 10145. Respondents shall be ordered to pay the costs of the audit.

Business and Professions Code section 10106 authorizes the Real Estate Commissioner to recover in disciplinary proceedings its reasonable costs of investigation and

enforcement. In *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court set forth factors to be considered in determining the reasonableness of costs sought pursuant to statutory provisions such as Business and Professions Code section 10106. These factors include: (a) whether the licensee has been successful at hearing in getting charges dismissed or reduced; (b) the licensee's subjective good faith belief in the merits of his position; (c) whether the licensee has raised a colorable challenge to the proposed discipline; (d) the financial ability of the licensee to pay; and (e) whether the scope of the investigation was appropriate in light of the alleged misconduct.

Taking these factors into consideration, no cause to reduce costs has been established. Respondents will be ordered to pay the Bureau's audit, investigation, and enforcement costs, totaling \$8,963.21, pursuant to Business and Professions Code sections 10148, subdivision (b), and 10106.

ORDER

Respondent Everest Mwamba Investments, Inc.

All licenses and licensing rights of respondent Everest Mwamba Investments, Inc., under the Real Estate Law are revoked.

Respondent Everest Mwamba

All licenses and licensing rights of respondent Everest Mwamba 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 therefor and pays to the Bureau 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. Conviction or Plea to a Crime

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. Violation of Law

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. Application for Unrestricted License

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 two years have elapsed from the effective date of this Decision.

4. Notification to Employing Broker

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 Bureau 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. Continuing Education Requirement

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 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. Professional Responsibility Condition

Respondent shall, within six months from the effective date of this Decision, take and pass the Professional Responsibility Examination administered by the Bureau 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.

7. Reporting Condition

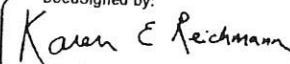
Respondent shall report in writing to the Bureau of Real Estate as the Real Estate Commissioner shall direct by his Decision herein or by separate written order issued while the restricted license is in effect such information concerning respondent's activities for which a real estate license is required 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 respondent engaged during the period covered by the report.

8. Cost Recovery

Respondents Everest Mwamba Investments, Inc. and Everest Mwamba shall pay the Bureau costs associated with the audit, investigation, and enforcement of this matter pursuant to Business and Professions Code section 10106, in the amount of \$8,963.21.

DATED: January 4, 2017

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KAREN REICHMANN
Administrative Law Judge
Office of Administrative Hearings