

FILED

OCT 17 2016

BUREAU OF REAL ESTATE

By Cal Delouis

BEFORE THE BUREAU OF REAL ESTATE

STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of

GERMAN NEFTALI RUEDA,

Respondent.

CalBRE No. H-40126 LA

OAH No. 2016041080

DECISION

The Proposed Decision dated September 8, 2016, 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.

Pursuant to Section 11517 (C) (2) of the Government Code, the following corrections are made:

Findings, Page 1, Paragraph 2, Line 2: "2010" shall read: "2006".

Findings, Page 2, Paragraph 7, Line 1: "Mr. Gonzalez", only once.

Findings, Page 3, Paragraph 11, Line 2: "book" shall read: "books".


The Decision suspends or revokes one or more real estate licenses.

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.

This Decision shall become effective at 12 o'clock noon on NOV 04 2016.

IT IS SO ORDERED 10/12/2016

REAL ESTATE COMMISSIONER



WAYNE S. BELL

BEFORE THE
BUREAU OF REAL ESTATE
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

GERMAN NEFTALI RUEDA,

Respondent.

Case No. H-40126 LA

OAH No. 2016041080

PROPOSED DECISION

This matter came on regularly for hearing before Carla L. Garrett, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, on August 15, 2016, at Los Angeles, California.

James R. Peel, Staff Counsel for the Bureau of Real Estate (the Bureau), represented Complainant Maria Suarez, a Supervising Special Investigator of the State of California.

German Neftali Rueda (Respondent) appeared at hearing and represented himself.

Oral and documentary evidence was received, the record was closed, and the matter was submitted for decision on August 15, 2016.

FINDINGS OF FACT

1. On February 2, 2016, Complainant Maria Suarez, a Supervising Special Investigator of the State of California, filed Accusation No. H-40126-LA in her official capacity.
2. On June 10, 1999, the Bureau issued salesperson's license number 01260656 to Respondent. On January 5, 2010, the Bureau issued broker's license number 01260656 to Respondent, which will expire on January 4, 2018, unless renewed.
3. Respondent and Martin Rodriguez knew each other socially, as they frequented the same gym. In 2012, Mr. Rodriguez owned commercial property, specifically a restaurant (Maria's Mexican Restaurant), but had fallen behind on his mortgage payments and faced foreclosure. Mr. Rodriguez became concerned he would lose the property, so he

approached Respondent and asked if Respondent could negotiate a loan modification on Mr. Rodriguez's behalf. Respondent agreed.

4. Respondent attempted to renegotiate Mr. Rodriguez' loan, but he was unsuccessful. With the permission of Mr. Rodriguez, Respondent put the property on the market. Respondent fielded offers on Mr. Rodriguez's behalf.

5. Raul Gonzalez approached Respondent and expressed interest in leasing the property as opposed to purchasing it. Thereafter, Mr. Rodriguez and Mr. Gonzalez struck a deal in which Mr. Gonzalez agreed to give Mr. Rodriguez a total of \$7,000 for his first and last month's rent. In that regard, on December 9, 2013, Mr. Gonzalez wrote a check in the amount of \$3,000, made payable to Respondent, to serve as a deposit on the property, which Mr. Rodriguez was to use to cease foreclosure proceedings against the property. Respondent provided Mr. Gonzalez with a receipt written on his employer's letterhead (i.e., Prudential California Realty), indicating that Respondent had received from Mr. Gonzalez "the amount of \$3,000.00 for deposit on Commercial Lease Agreement between Martin Rodriguez and Raul Gonzalez [regarding] Maria's Mexican Restaurant," and also stated, "[i]n the event that buyer/or seller decide to cancel Escrow for any reason Deposit will be 100% refundable." Thereafter, Mr. Gonzalez began making improvements on the property.

6. On December 13, 2013, Respondent negotiated the check. Respondent did not maintain a client trust account and did not deposit the funds into a trust account. Respondent misappropriated those funds for his own use and benefit without the knowledge or permission of Mr. Gonzalez.

7. On January 22, 2014, Mr. Gonzalez Mr. Gonzalez wrote a check in the amount of \$4,000, made payable to Respondent, representing the remaining balance of his first and last month's rent. In return, Respondent provided Mr. Gonzalez with a receipt, written on his employer's letterhead (i.e., Prudential California Realty), indicating that Respondent had received from Mr. Gonzalez "the amount of \$4,000.00 for deposit on 1st and last month Rent on Commercial Lease Agreement dated December 6, 2013 [regarding] Maria's Mexican Restaurant," and also stated, "[i]n the event that buyer/seller decide to cancel Escrow for any Reason Deposit for 1st and last month rent will be 100% refundable."

8. On January 22, 2014, Respondent negotiated the check. Respondent did not maintain a client trust account and did not deposit the funds into a trust account. Respondent misappropriated those funds for his own use and benefit without the knowledge or permission of Mr. Gonzalez.

9. Three or four months later, the bank foreclosed on Mr. Rodriguez's property. Consequently, Mr. Gonzalez requested the return of his \$7,000 deposit.

10. On May 8, 2014, Respondent wrote a personal check from his Wells Fargo account to Mr. Gonzalez in the amount of \$7,000. Mr. Gonzalez deposited the check into his

bank account, but, on May 21, 2014, the bank returned the check for insufficient funds. Consequently, Mr. Gonzalez filed a complaint with the Bureau.

Audit

11. As a result of Mr. Gonzalez's complaint, the Bureau assigned Anna Hartoonian (General Auditor II) to perform an audit examination of Respondent's book and records to determine whether he handled trust funds properly. The audit period was from July 1, 2013 to Jun 30, 2015.

12. Ms. Hartoonian subpoenaed and reviewed records from Respondent's Wells Fargo checking account, and determined Respondent used the account for general expenses. The account was not a trust account, nor was it used in that capacity.

13. On August 27, 2015, Ms. Hartoonian subpoenaed Respondent's records, books, and accounts for examination, inspection, and copying. Respondent failed to comply with the subpoena and produced no bank statements, deposit records, cancelled checks, records of receipts and disbursements, or transactions records. Respondent advised Ms. Hartoonian that his wife had thrown out all of his records when she cleaned out their garage.

14. Respondent told Ms. Hartoonian that he eventually returned \$2,800 to Mr. Gonzalez, but did not get a receipt.¹ To date, Respondent has yet to pay any portion of the amount he claims he owes Mr. Gonzalez, to wit, \$4,800.

Mitigation

15. At the time Respondent misappropriated the funds, his wife was divorcing him. Additionally, his brother in Texas was suffering the effects of diabetes and facing the amputation of his legs. Respondent used the funds to pay for his brother's medical bills and medications.

16. In his testimony, Respondent demonstrated contrition and remorse for his past actions.

Costs of Audit and Prosecution

17. The Bureau incurred \$2,836.80 in audit costs. These costs, established by declarations executed under penalty of perjury, were reasonable pursuant to Business and Professions Code section 10148.

18. The Bureau incurred \$1,710.30 in costs for investigating this matter, and \$445 in enforcement costs, for a total of \$2,155.30 in prosecution costs. These costs, established

¹ Neither party presented any evidence showing whether Mr. Gonzalez did, in fact, receive \$2,800 from Respondent.

by declarations executed under penalty of perjury, were reasonable pursuant to Business and Professions Code section 10106.

LEGAL CONCLUSIONS

1. Complainant has the burden of proving cause for discipline by clear and convincing evidence to a reasonable certainty. (*The Grubb Co., Inc. v. Dept. of Real Estate* (2011) 194 Cal.App.4th 1494, 1505; *Ettinger v. Board of Med. Quality Assurance* (1982) 135 Cal.App.3d 853, 857.)

2. Cause exists to discipline Respondent's broker's license, pursuant to Business and Professions Code sections 10145, subdivision (a)(1), 10176, subdivision (i), and 10177, subdivision (d), in that Respondent failed to deposit in a trust account the funds given to him by Mr. Gonzalez, but misappropriated those funds for his own use and benefit, as set forth in Factual Findings 3-10.

3. Cause exists to discipline Respondent's broker's license, pursuant to Business and Professions Code sections 10148, subdivision (a), and 10177, subdivision (d), in that Respondent failed to retain for three years copies of all listings, deposit receipts, canceled checks, trust records, and other documents executed by him or her or obtained by him or her in connection with any transactions for which a real estate broker license is required, evidenced by his admission he no longer possessed the documents requested by the Bureau, as set forth in Factual Findings 3 and 14.

4. The statutes relating to real estate licenses are designed to protect the public from any potential risk of harm. (*Lopez v. McMahon* (1988) 205 Cal.App.3d 1510, 1516; *Arneson v. Fox* (1980) 28 Cal.3d 440.) While Respondent demonstrated contrition and remorse for his actions, revocation of Respondent's license is warranted here in order to protect the public, particularly given the seriousness of Respondent's actions, and the right of the public to have confidence in the integrity of licensees.

Costs

5. Under Business and Professions Code section 10106, the Bureau may request the administrative law judge to direct a licentiate found to have committed violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case. These reasonable costs are \$2,155.30, as set forth in Factual Finding 18.

6. Under *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.App.4th 32, 45, the Board must exercise its discretion to reduce or eliminate cost awards so as to prevent cost award statutes from deterring licensees with potentially meritorious claims or defenses from exercising their right to a hearing. "Thus the [Board] may not assess the full costs of investigation and prosecution when to do so will unfairly penalize a

[licensee] who has committed some misconduct, but who has used the hearing process to obtain dismissal of other charges or a reduction in the severity of the discipline imposed.” (Id.) The Board, in imposing costs in such situations, must consider the licensee’s subjective good faith belief in the merits of his or her position and the Board must consider whether or not the licensee has raised a colorable defense. The Board must also consider the licensee’s ability to make payment.

7. Respondent did not challenge the costs of the investigation and enforcement, and presented no evidence indicating he was unable to pay them. Respondent also did not challenge the audit costs of \$2,836.80. As such, Respondent shall pay the Bureau its reasonable costs for investigation (\$1,710.30) and enforcement (\$445) in the total amount of \$2,155.30, and its reasonable audit costs of \$2,836.80, for an overall total of \$4,992.10.

ORDER

All licenses and licensing rights of Respondent German Neftali Rueda under the Real Estate Law are revoked. Respondent shall pay the audit costs of \$2,836.80, investigation costs of \$1,710.30 and enforcement costs of \$445, for total costs in the amount \$4,992.10.

Date: September 8, 2016

DocuSigned by:

Carla L. Garrett

40D88C3B896043D...

CARLA L. GARRETT
Administrative Law Judge
Office of Administrative Hearings