

FILED

NOV 14 2017

BUREAU OF REAL ESTATE

By *Alouid*

BEFORE THE BUREAU OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of)
) CalBRE No. H-40671 LA
)
 THOMAS RICHARD D' ARCO,)
) OAH No. 2017071155
)
 Respondent.)

DECISION

The Proposed Decision dated October 11, 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.

Pursuant to Section 11517 (c) (2) of the Government Code, the following correction is made:

Proposed Decision, Page 1, Paragraph 2, Line 3: "October 2, 2014" shall read: "October 2, 2017".

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 party seeking reconsideration shall set forth new facts, circumstances, and evidence, or errors in law or analysis, that show(s) grounds and good cause for the Commissioner to reconsider the Decision. If new evidence is presented, the party shall specifically identify the new evidence and explain why it was not previously presented. 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.

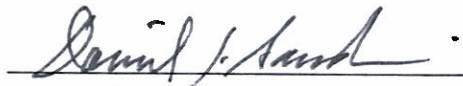
The right to reinstatement of a revoked real estate license or to the reduction of a

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 12/4/17.

IT IS SO ORDERED 11/7/17

WAYNE S. BELL
REAL ESTATE COMMISSIONER



By: DANIEL J. SANDRI
Chief Deputy Commissioner

BEFORE THE
BUREAU OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

THOMAS RICHARD D'ARCO,

Respondent.

DRE No. H-40671 LA

OAH No. 2017071155

PROPOSED DECISION

Administrative Law Judge David B. Rosenman (ALJ), Office of Administrative Hearings, State of California, heard this matter in Los Angeles, California on September 14, 2017. Steve Chu, Staff Counsel, represented Maria Suarez (complainant), a Supervising Special Investigator of the Bureau of Real Estate (Bureau), State of California. Thomas Richard D'Arco (respondent) was present and represented himself.

Oral and documentary evidence was received. The record remained open for complainant to submit additional evidence by September 25, 2017, and for respondent to submit any objections to the new evidence by October 2, 2014. On September 25, 2017, Complainant submitted a motion to introduce additional evidence, with several exhibits attached relating to licensed salesperson Terri Lynn Spletstoeser. Respondent did not submit any objections. The following documents were marked for identification and received in evidence: license history certification, exhibit 9; Salesperson Change Application, date 7/9/14, exhibit 10; Salesperson Change Application, date 2/3/15, exhibit 11; Salesperson Change Application, date 7/5/15, exhibit 12; Salesperson Change Application, date 6/3/16, exhibit 13; and, Salesperson Change Application, date 6/21/16, exhibit 14.

The matter was submitted for decision on October 2, 2014.

Respondent is licensed by the Bureau as a real estate broker and is also licensed as a lawyer by the State Bar of California. The State Bar disciplined respondent's lawyer's license for violation of laws relating to loan modifications. The Bureau now seeks discipline of respondent's real estate broker license based on the State Bar discipline. Respondent admits the State Bar discipline and offers evidence in support of retention of his real estate license. The Administrative Law Judge makes the following factual findings, legal conclusions and order.

FACTUAL FINDINGS

1. Complainant brought the Accusation in her official capacity.

2. The then Department of Real Estate (now, Bureau) issued a real estate broker license (broker license) to respondent on March 7, 1979. He received an Individual Loan Originator License Endorsement, approved November 19, 2010, which expired January 1, 2015. The broker license expires March 6, 2019, unless renewed. Respondent was a licensed officer of six corporations for various periods under his broker license; however, none is presently active under that license. No evidence of any prior discipline imposed against respondent's broker license was offered at the hearing.

3. a. Respondent was licensed as a lawyer by the State Bar of California (lawyer license) on June 23, 1978. On October 6, 2015, the State Bar Court filed an Order Approving Stipulation of Facts, Conclusions of Law and Disposition (Stipulation). Based on the Stipulation, on February 17, 2016, the Supreme Court of California, in case number S231088, filed its Order suspending respondent from the practice of law in California for one year. The suspension was stayed and respondent's lawyer license was placed on probation for two years, subject to conditions, including, among other things, that he attend ethics school, pass the Multistate Professional Responsibility Examination, and pay costs.

b. The Stipulation includes respondent's admissions that, in 2010 and 2014, he received advanced fees for loan modification services before he performed the services for which the fees were paid, and that these and other related actions violated Civil Code section 2944.7, subdivision (a)(1). Respondent also admitted that he failed to provide a written statement required under Civil Code section 2944.6, and that he failed to properly supervise his employees in one of the matters.

c. The Stipulation cites as a factor in aggravation that there were multiple acts of misconduct. The Stipulation cites as factors in mitigation respondent's 37 years of practicing law without any State Bar discipline, and that he entered into the Stipulation before a notice of disciplinary charges was filed. The Stipulation also notes that respondent had refunded the illegal fees to his clients.

d. The Stipulation includes respondent's agreement to pay costs of \$4,044 to the State Bar.

e. Respondent signed the Stipulation on September 24, 2015.

4. The Bureau incurred costs in the investigation and enforcement of this matter: \$534 for attorney's fees/enforcement costs and \$630.35 for investigation costs, for a total of \$1,164.35.

5. At the hearing, respondent accepted some responsibility for his actions. He explained that his office accepted the mortgage loan modification fees, but added that there was other legal work performed for the clients. Respondent claimed he was unaware of the acceptance of fees because he was incapacitated due to his medical conditions, including kidney stones, stress, diabetes, high blood pressure and arthritis. As he put it, the operations of his office "got away from me." Respondent acknowledged and accepted that he was ultimately responsible for the actions of his office staff.

6. Respondent is 76 years old. He has closed his law practice. He is unsure whether any costs have been paid to the State Bar. He declared bankruptcy in February 2016. He therefore contends it would be difficult to pay costs to the Bureau. He has otherwise complied with the Supreme Court Order, including completion of ethics courses.

7. Respondent testified that he does not actively practice under his broker license but that he does supervise the activities of licensed real estate salesperson Gerald Abes. Respondent and Mr. Abes speak by telephone many times each week to discuss real estate in general and transactions in which Mr. Abes is involved. Mr. Abes' licensing history (ex. 7) includes several disciplinary matters in the period from 1982 to 2005, including revocation of his real estate broker license and three instances when petitions to reinstate his broker license were denied. (On the first petition for reinstatement, Mr. Abes was given the right to a restricted license.) Mr. Abes' unrestricted salesperson license was issued in 2011. Respondent stated he was aware generally that there was prior discipline, but not the details, and that they were all "removed." Respondent could not recall when he became Mr. Abes' employing broker. Respondent could not recall whether he or Mr. Abes had mortgage loan originator endorsements.

8. Respondent is also the employing broker of licensed real estate salesperson Terri Lynn Splettstoesser, although he believed that he had ended that relationship in 2016 by submitting information to the Bureau's internet website. Ms. Splettstoesser's license history and other exhibits (exs. 9-14) establish that she was first activated in the employ of respondent as of July 9, 2014, the employing broker was changed as of February 13, 2015, and that she was again activated in the employ of respondent as of June 21, 2016. There are no subsequent employing broker changes. Her license expires February 24, 2020, unless renewed.

9. Respondent would like to remain licensed by the Bureau. He cites his long period of licensure with no discipline, and he does not want a "black mark" on his broker license. He acknowledges that he should have been more up to date on the activities of his law office. Respondent would consider accepting a restricted broker license.

10. Respondent has been married for 40 years. He has a 37-year-old son. Respondent has cared for his brother, who suffers from a developmental disability, since his brother was ten years old. Respondent is a member of the Optimists Club Riverside, and he participates in its activities to collect donations to provide youth scholarships. Respondent practiced law in Michigan for seven years and he has no history of discipline there.

LEGAL CONCLUSIONS AND DISCUSSION

Based on the foregoing factual findings, the Administrative Law Judge makes the following legal conclusions:

1. The standard of proof for the Bureau to prevail on the Accusation is clear and convincing evidence to a reasonable certainty. (See *Borror v. Dept. of Real Estate* (1971) 15 Cal.App.3d 531; *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853.)

2. Under Business and Professions Code section 10177, subdivision (f), a real estate licensee may have his license suspended or revoked if he had a license issued by another state agency that was revoked or suspended for acts that, if done by a Bureau licensee, would be grounds for suspension or revocation of a real estate license.

3. There is cause to suspend or revoke respondent's real estate broker license pursuant to Business and Professions Code section 10177, subdivision (f), because respondent's lawyer's license was suspended for acts that were grounds for suspension or revocation of a real estate licensee, as set forth in Factual Finding 3.

4. The Bureau has developed criteria to evaluate the rehabilitation of a licensee who has committed a crime. Although respondent has not committed a crime, it is not inappropriate to evaluate his rehabilitation by reference to the applicable criteria. These criteria, found at title 10, California Code of Regulations, section 2912, are summarized, and applied to respondent, as follows:

Subdivision (a), elapsed time of at least two years since the act or offense, which can be increased by considering the nature and severity of the crime and the licensee's history of criminal convictions that are "substantially related" to the qualifications, functions, or duties of a real estate licensee.

The actions underlying the discipline against respondent's lawyer license occurred in 2010 and 2014. More than two years have elapsed. Whether the time period should be increased is affected by the nature and severity of the acts, which were moderate and mitigated by the refunds of fees that were improperly collected. On balance, the nature and severity of the acts do not serve to increase the "elapsed time" criterion of rehabilitation under this subsection. The two-year time period unaffected by any history of other bad acts, as there was none.

Subdivision (b), restitution. Respondent refunded fees that were improperly collected

Subdivision (c), expungement of the conviction. Not applicable.

Subdivision (d), expungement of the requirement to register as a sex offender.
Not applicable.

Subdivision (e), completion of, or early discharge from, the criminal probation. Respondent has not paid costs to the State Bar but is otherwise in compliance with all terms of the Supreme Court Order.

Subdivision (f), abstinence from drugs or alcohol that contributed to the crime.
Not applicable.

Subdivision (g), payment of any criminal fines or penalties. Although there were no fines or fees, respondent has filed for bankruptcy and, as a result, has not paid costs to the State Bar.

Subdivision (h), correction of any business practices causing responsibility for the crimes. Respondent did not correct his business practice after the 2010 incident, as there was a similar incident in 2014. Respondent subsequently closed his law practice.

Subdivision (i), new and different social and business relationships from those when the crimes occurred. Respondent has closed his law practice.

Subdivision (j), stability of family life and fulfillment of parental and familial responsibilities. Respondent has a stable family life and he fulfills his familial responsibilities.

Subdivision (k), enrollment in or completion of educational or training courses for economic self-improvement. Respondent completed the courses required to maintain his real estate license as well as courses required under the Stipulation.

Subdivision (l), significant, conscientious involvement in community, church or private programs for social betterment. Respondent is involved in the Optimists Club.

Subdivision (m), change in attitude from the time of the criminal acts to the present, evidenced by: (1) evidence of rehabilitation from respondent; (2) evidence from family members, friends or others familiar with his previous conduct and subsequent attitudes and behavior patterns; (3) evidence from probation or parole officers or law enforcement officials regarding respondent's social adjustments; (4) evidence from psychiatrists, psychologists, sociologists or other persons competent to testify with regard to neuropsychiatric or emotional disturbances; and (5) absence of subsequent convictions or other conduct which reflect an inability to conform to societal rules when considered in light of the conduct in question.

Respondent submitted no evidence from sources other than himself.
"Favorable testimony of acquaintances, neighbors, friends, associates and employers with reference to their observation of the daily conduct and mode of living" can be helpful in

determining whether a person seeking licensure is rehabilitated. (See *In the Matter of Brown* (1993) 2 Cal. State Bar Ct. Rptr. 309, 317 – 318.)

Several written opinions address significant aspects of rehabilitation. Rehabilitation is a state of mind and the law looks with favor upon one who has achieved reformation and regeneration with the reward of the opportunity to serve. (*Pacheco v. State Bar* (1987) 43 Cal.3d 1041, 1058.) Fully acknowledging the wrongfulness of past actions is an essential step towards rehabilitation. (*Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933, 940.) The evidentiary significance of misconduct is greatly diminished by the passage of time and by the absence of similar, more recent misconduct. (*Kwasnik v. State Bar* (1990) 50 Cal.3d 1061, 1070.) Mere remorse does not demonstrate rehabilitation. A truer indication of rehabilitation is sustained conduct over an extended period of time. (*In re Menna* (1995) 11 Cal.4th 975, 991.) Respondent bears the particular burden of establishing rehabilitation sufficient to compel his licensure. (*In the Matter of Brown* (1993) 2 Cal. State Bar Ct. Rptr. 309.)

Rehabilitation depends upon a track record of conduct that convinces the Bureau that that the public would be safe in granting privileges of licensure to respondent. A respondent must establish a track record of reliable, responsible and consistently appropriate conduct.

5. Under Business and Professions Code section 10177, subdivision (h), and title 10, California Code of Regulations, section 2725, a broker is required to exercise reasonable supervision over the activities of his salespersons, and the broker's license can be disciplined for any failure to exercise reasonable supervision.

6. Respondent's continued, unrestricted licensure would not be in the public interest. The acts underlying discipline of respondent's lawyer license are directly related to the kinds of activities in which he may engage as a licensee of the Bureau. Further, respondent is charged with providing supervision to salespersons operating under his license. His lack of awareness of the details of Mr. Abes' history of discipline is troubling, as he may not be providing proper supervision if he is not aware of the actions that resulted in prior discipline of Mr. Abes' license. Further, respondent was unaware that he had not properly terminated Ms. Splettstoesser as a salesperson under his employ.

7. Respondent demonstrated a relative lack of concern over his duties and responsibilities as a real estate broker to supervise the activities of salespeople under his license. The bases for the discipline of his lawyer license also included lack of supervision, as well as violation of laws related to the real estate loan transactions. These circumstances warrant revocation of his real estate broker license with a right to a restricted salesperson license. Under that license, respondent may perform real estate activities under the supervision of another. The public interest would be adequately protected by the issuance of a restricted license for three years.

8. Costs of investigation and enforcement can be recovered by the Bureau under Business and Professions Code section 10106. In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the Supreme Court rejected a constitutional challenge to a cost recovery provision similar to Code section 10106. In so doing, however, the Court directed the administrative law judge and the agency to evaluate several factors to ensure that the cost recovery provision did not deter individuals from exercising their right to a hearing. Thus, the Bureau must not assess the full costs where it would unfairly penalize the respondent who has committed some misconduct, but who has used the hearing process to obtain the dismissal of some charges or a reduction in the severity of the penalty; the Bureau must consider a respondent's subjective good faith belief in the merits of his or her position and whether the respondent has raised a colorable challenge; the Bureau must consider a respondent's ability to pay; and the Bureau may not assess disproportionately large investigation and prosecution costs when it has conducted a disproportionately large investigation to prove that a respondent engaged in relatively innocuous misconduct. (*Zuckerman, supra* at 45.)

In this case, the actual costs of investigation and enforcement of this matter are \$1,164.35, as set forth in Factual Finding 4. These costs are reasonable. Respondent's bankruptcy was the subject of his testimony, but he submitted no supporting documentation. Just as the State Bar costs are a subject of the bankruptcy proceedings, respondent may subject any costs awarded to the Bureau to those proceedings.

ORDER

All licenses and licensing rights of respondent, Thomas Richard D'Arco, under the Real Estate Law are revoked; provided, however, a restricted real estate salesperson license shall be issued to respondent pursuant to Business and Professions Code section 10156.5, if respondent makes application therefore 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 Business and Professions Code section 10156.7 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 years have elapsed from the effective date of this Decision.

4. Respondent shall submit with any application for licensure 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. 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. Respondent shall pay costs of investigation and enforcement in the amount of \$1,164.35 to the Bureau during the period of restricted licensure under a schedule established by the Bureau. Respondent's failure to pay costs shall constitute an independent violation of the terms of the restricted license and shall be grounds for the suspension or revocation of the restricted license.

DATED: October 11, 2017

DocuSigned by:
David B. Rosenman
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DAVID B. ROSENMAN
Administrative Law Judge
Office of Administrative Hearings