

The OTSC alleges that the Respondent committed the following violations of the New Jersey Real Estate Brokers and Salespersons Act, N.J.S.A. 45:15-1 to -42 (“Act”):

The Respondent failed to deal fairly with all parties when he gave a buyer access to a property prior to closing having taken place, in violation of N.J.A.C. 11:5-6.4(a); and

The Respondent demonstrated unworthiness, incompetency, bad faith, or dishonesty when he provided the access code to a home to a buyer and left her unattended at a property prior to the closing of title, in violation of N.J.S.A. 45:15-17(e).

In response to the OTSC, the Respondent filed an Answer dated December 4, 2019, wherein he explained his actions and denied committing any violations.

Accordingly, on January 14, 2020, the Commission reviewed the pleadings, and deemed this matter contested and directed that a hearing be scheduled. A hearing before the Commission was conducted on June 8, 2021.²

At the hearing, the following documents were submitted by the REC and entered into evidence as Exhibits S-1 and S-2 without objection:

- S-1 Email correspondence between Investigator Robert Spillane and Berkshire Hathaway salesperson Adam Topham June 4, 2019 with text messages between Adam Topham and David Beach attached and ALTA closing statement for 41 Cedar Grove Road, Sicklerville, N.J;
- S-2 Email correspondence between Investigator Spillane and ReMax Connection broker manager David McNally dated September 17, 2019 with ReMax key and lockbox policy attached.

² The hearing was originally scheduled on February 23, 2020 but was adjourned at the Respondent’s request because his attorney was ill.

Additionally, the following documents were submitted by Beach and entered into evidence as Exhibits R-1 and R-2, without objection:

- R-1 Photograph of house at 41 Cedar Grove, Sicklerville, New Jersey; and
- R-2 Contract of sale for 41 Cedar Grove Road, Sicklerville, New Jersey between Nicholas Punch and Ryan Fonash (sellers) and Joseph and Jill DeMarco (buyers).

TESTIMONY OF THE WITNESSES

Robert Spillane

REC Investigator Robert Spillane (“Spillane”) testified on behalf of the REC. Spillane testified that he has been a REC investigator for nine years. He testified that he conducted an interview with Ryan Fonash (“Fonash”), one of the sellers of 41 Cedar Grove, Sicklerville, New Jersey (“the Property”). Spillane testified that Fonash stated that he had arrived at the Property at 11:50 a.m. on May 31, 2019, when he saw buyer Jill DeMarco (“DeMarco” or “buyer”) entering the Property without her agent. Fonash also stated that he had left behind a safe and some high value items in the garage. Spillane further testified that Fonash stated that the only way to get into the garage was through the house, as there were no physical keys to the Property and only an electronic lock with an access code. Fonash also stated that the buyer was moving items into the Property prior to closing, so he asked her to remove them, and she did so.

Spillane testified that he also conducted an interview with the Respondent in September 2019. He testified that the Respondent stated that the buyer’s husband was in the hospital and so she and her husband signed the closing documents on May 30, 2019, the day before the scheduled closing. Spillane testified that the Respondent further stated that he met the buyer in the morning, at about 8:00 a.m., on May 31, 2019 for the final walkthrough, and saw three boxes left in the

garage. Spillane testified that the Respondent stated that he left the Property approximately an hour later after arriving.

Spillane further testified that he conducted an interview with the office supervisor at ReMax Connection, David McNally, and received from him for a copy of the agency's policies regarding property access. The agency's policies state "under no circumstances should unaccompanied access be granted without the seller's full knowledge and consent." See Exhibit S-2.

Spillane testified that he also interviewed the closing agent at Brennan Title Abstract LLC ("Brennan"), who confirmed that the closing did proceed as scheduled at 1:00 p.m. on May 31, 2019.

Spillane testified that he did not interview the buyer as he did not feel it was necessary based upon the information obtained through his interview with the Respondent.

David Beach

The Respondent testified on his own behalf. He testified that he has been a real estate agent for almost 21 years following his retirement in good standing from the Lindenwold police force after 14 years of service. He testified that he has had no prior complaints or disciplinary actions. The Respondent testified that he met the buyer at the Property in the morning of May 31, 2019 for a final walkthrough. He testified that at the time of the walkthrough, the buyer and her husband, Joseph DeMarco (collectively "the buyers"), had signed all the closing documents and remitted the purchase money for the Property the day before. The Respondent testified that the only items he saw during the walkthrough were some old paint cans and an old tire in the garage. He testified that he showed the buyer how to work everything in the Property, including how to reprogram the electronic lock. The Respondent testified that the Property did not have any physical keys, but

only the electronic lock which he then showed the buyer how to reprogram so that she would be able so do it herself once she took possession of the Property.

The Respondent testified that he subsequently received a frantic telephone call from the buyer advising that she had been confronted by one of the sellers while at the Property. He further testified that he was not at the Property at the time of the incident between the seller and buyer but had left the buyer at the Property after the walkthrough was completed.

Jill DeMarco

Jill DeMarco was called to testify by the Respondent. DeMarco testified that she was the buyer of the Property and had signed the closing documents, paid all the required funds, and insured the Property the day before the scheduled closing because her husband was hospitalized and would be not available on the day of the closing. DeMarco testified that she met the Respondent at the Property early on the day of the closing to conduct the final walkthrough. She testified that there were some plants and paint cans left in the house, but that she did not see any safe or boxes during her walkthrough. DeMarco testified that she was in the Property's driveway when one of the sellers approached her. She testified that the seller drove recklessly up into the driveway, ignoring the stop sign nearby, and exited the vehicle with another male, and started yelling at her. DeMarco testified that the two men caused such a commotion at the Property that a delivery driver stopped his truck and came to stand in between her and the two men during the altercation.

DeMarco further testified that she never moved anything into the Property before the closing was complete.

DeMarco also testified that after the walkthrough, she did re-enter the Property to retrieve some personal possessions.

DeMarco testified that she eventually left the Property and went back to her own house that she was selling to conduct a walkthrough to make sure it was empty, and then later returned to the Property with the movers about an hour after the scheduled closing.

FINDINGS OF FACT

Based on the pleadings, the testimony of the witnesses, and the documentary evidence duly admitted into the record, the Commission makes the following findings of fact:

1. The Respondent is a licensed New Jersey real estate broker-salesperson currently licensed with Maurvino Realty Group LLC, d/b/a ReMax Community, a licensed New Jersey real estate broker with its principal office located at 100 North Black Horse Pike, Williamstown, N.J. 08094. At all times relevant hereto, the Respondent was employed with CC Dahms LLC, d/b/a ReMax Connection and worked out of the branch office of ReMax Connection located at 5100 Route 42, Turnersville, N.J.
2. The Respondent was the buyers' agent for their purchase of the Property.
3. The closing for the Property was scheduled for 1:00 p.m. on May 31, 2019.
4. The closing agent for the transaction was Brennan Title Abstract LLC ("Brennan"). The buyer's husband was hospitalized and a representative from Brennan brought the buyers' closing documents to the hospital on May 30, 2019 for the buyers to sign.
5. On May 31, 2019 at 8:00 a.m., the Respondent met the buyer at the Property, gave her the access code to the electronic keypad and then left the buyer unattended at the Property.
6. Buyer entered the Property unaccompanied by the Respondent after the walkthrough was completed.
7. Closing of title took place at 1:00 p.m. on May 31, 2019 when the sellers signed the closing documents, delivered the deed and received the purchase money.

CONCLUSIONS OF LAW

In light of the above findings of fact, the Commission makes the following conclusions of law with regard to the allegations contained in the OTSC as summarized above:

1. The Respondent violated N.J.S.A. 45:15-17(e) by providing the access code to the buyer and leaving her unattended at the property prior to the closing of title, which demonstrates incompetency.
2. The Respondent violated N.J.A.C. 11:5-6.4(a) by failing to deal fairly with all parties to the transaction by allowing the buyer to enter the property of another prior to closing, unaccompanied and without a real estate licensee or other authorized person.

DETERMINATION

At the conclusion of the hearing in this matter, the Commission voted in favor of finding that the Respondent had committed the above referenced violations and imposed the sanctions described in this Final Order of Determination. In arriving at its determination, the Commission considered the testimony of the witnesses and the documentary evidence admitted into the record concerning the nature of and circumstances surrounding the Respondent's conduct.

Allegations Against the Respondent

The REC bears the burden of proving the allegations in the OTSC by a preponderance of the competent, relevant, and credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962); In re Polk, 90 N.J. 550, 560 (1982). The evidence must be such as would "lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro Bottling Co., 26 N.J. 263, 275 (1958). Preponderance may be described as "the greater weight of credible evidence in the case. It does not necessarily mean evidence of the greater number of witnesses but means that evidence which carries the greater convincing power." State v. Lewis, 67 N.J. 47, 49 (1975).

The OTSC alleges that the Respondent violated N.J.S.A. 45:15-17(e) and N.J.A.C. 11:5-6.4(a) when he provided the electronic lock code to the Property to the buyer and then left the buyer unattended at the Property prior to closing of title, without authorization or supervision. In his testimony, the Respondent admits that prior to the closing, he gave the buyer the access code purportedly so that she could reprogram the electronic lock after taking possession of the Property. The Respondent further testified that after completing the walkthrough, he left the buyer at the Property. The buyer testified that she re-entered the property unaccompanied by the Respondent, which was witnessed by the seller.

In this case, the Respondent disputes that his admitted conduct violates N.J.S.A. 45:15-17(e). That statute subjects a real estate licensee to suspension, revocation, or probation for “any conduct which demonstrates unworthiness, incompetency, bad faith or dishonesty.” Here, the Respondent contends that although he provided the code to the electronic lock to the buyer and allowed the buyer unsupervised access to the Property prior to closing, it was not a violation because the buyers had already signed the closing documents, provided him with the required purchase funds, and obtained insurance on the Property. Notwithstanding taking these actions in advance of the closing, the buyers still had not consummated their purchase of the Property. Indeed at that point in time, the sellers still had not delivered the Deed to the buyers and the buyers still had not transferred the purchase money to the sellers. The closing was scheduled for 1pm and until that was completed, the buyers had no right to enter the Property unaccompanied by the licensee. The Respondent’s belief to the contrary demonstrates a serious error in judgment and incompetency. In light of the undisputed testimony, the Commission finds that the Respondent has violated N.J.S.A. 45:15-17(e) and his license is thereby subject to suspension, revocation, or probation.

Additionally, the Respondent's conduct violates N.J.A.C. 11:5-6.4(a), which provides that "all licensees are subject to and shall strictly comply with the laws of agency and the principles governing fiduciary relationships." Under N.J.A.C. 11:5-6.4(a), by accepting employment as an agent, a licensee pledges to protect and promote, as he would his own, the interests of the client he has undertaken to represent; this obligation of absolute fidelity to the client's interests is primary but does not relieve the licensee from the obligation of dealing fairly with all parties to the transaction. Here, the Respondent failed to deal fairly with all parties to the transaction, namely the homeowners. The regulations apply to all transactions, and agents are not relieved of their duties simply because their client may take certain actions prior to closing. The transaction is not deemed complete until closing has taken place, and here closing had not taken place at the time the buyer had unauthorized and unaccompanied access to the Property. In light of these facts, the Respondent has also violated N.J.A.C. 11:5-6.4(a).

Disciplinary Action Against the Respondent

The Act charges the Commission with the "high responsibility of maintaining ethical standards among real estate brokers and sales[persons]" in order to protect New Jersey real estate consumers. Goodley v. New Jersey Real Estate Commission, 29 N.J. Super. 178, 181-182 (App. Div. 1954). The Commission is empowered to suspend and revoke the licenses of, and impose fines against, brokers and salespersons that violate any of the offenses enumerated in N.J.S.A. 45:15-17 or the real estate regulations. Maple Hill Farms, Inc. v. New Jersey Real Estate Commission, 67 N.J. Super. 223, 232 (App. Div. 1961); Division of New Jersey Real Estate Commission v. Ponsi, 39 N.J. Super. 526, 527 (App. Div. 1956). Courts have long recognized that the real estate sales industry should exclude individuals who are incompetent, unworthy, and

unscrupulous, in order to protect the public interest. See Div. of New Jersey Real Estate Commission v. Ponsi, supra at 532-533.

Thus, the Commission has the power to suspend, revoke, or place on probation the license of any licensee for “any conduct which demonstrates unworthiness, incompetency, bad faith or dishonesty.” N.J.S.A. 45:15-17(e). Here, the buyer was left unattended at the Property prior to the closing. Although this occurred only a few hours before the closing, the regulations are still applicable and must be enforced. The sales transaction is not deemed complete and property ownership is not deemed transferred until closing has taken place, and here the buyer had unauthorized and unaccompanied access to the Property prior to that point in time. The Respondent’s conduct demonstrated a lack of good judgment, and to correct his behavior and prevent further misconduct going forward, within six months of the issuance of this Final Order of Determination, the Respondent shall complete an additional six hours of continuing education courses in the area of agency (three hours) and ethics (three hours) which shall not count towards the continuing education requirement for the next license renewal term. Additionally, given the seriousness of the Respondent’s actions and lack of judgment, the Commission determined that it is necessary and appropriate that the Respondent’s real estate salesperson license or any license thereafter issued be held on a probationary basis for one (1) year and a monetary penalty be assessed as set forth below.

Holding the Respondent’s license for a probationary period, requiring additional education courses and assessing a monetary penalty are disciplinary actions consistent with the Commission’s decisions in similar matters. See e.g., NJREC v. Belgrave, Final Order of Determination, Dkt. No. REC-20-003 (06/17/21) (for violation of N.J.S.A. 45:15-17(e), the Commission suspended the licensee’s real estate salesperson license for thirty days, held the

license on six months' probation, and imposed a \$2,000 fine after the Respondent had purposefully left potential buyers at a property unaccompanied by a real estate licensee or other authorized person); NJREC v. Santiago, Final Order of Determination, Dkt. No. CAM-19-008 (07/23/20) (for violations of N.J.S.A. 45:15-17(e) and N.J.A.C. 11:5-6.4(a), the Commission suspended the licensee's real estate salesperson license for thirty days, imposed a \$1,500 fine, and required six additional hours of continuing education courses after the Respondent allowed his clients to enter the property of another unaccompanied and without a real estate licensee or other authorized person and caused the property to no longer be available to the buyers); NJREC v. Piacentine, Final Order of Determination, Dkt. No. CAP-16-028 (07/12/17) (for violations of N.J.S.A. 45:15-17(e) and N.J.A.C. 11:5-6.4(a), the Commission suspended the licensee's real estate salesperson license for forty-five days, imposed a \$2,500 fine, and required six additional hours of continuing education courses after the Respondent provided clients with electronic lock codes to allowed them to enter the property of another unaccompanied and without a real estate licensee or other authorized person).

Monetary Penalty Against the Respondent

Pursuant to N.J.S.A. 45:15-17, the Commission may impose "a penalty of not more than \$5,000 for the first violation" of the Act, and a "penalty of not more than \$10,000 for any subsequent violation." In Kimmelman v. Henkels & McCoy, Inc., 108 N.J. 123 (1987), the Supreme Court established the following seven factors that must be considered in evaluating the imposition of fines in administrative proceedings and these factors are applicable to this matter which seeks the imposition of penalties under the Act: (1) the good or bad faith of the respondent; (2) the respondent's ability to pay; (3) the amount of profits obtained from the illegal activity; (4)

the injury to the public; (5) the duration of the illegal activity or conspiracy; (6) the existence of criminal or treble actions; and (7) any past violations. Id. at 137-139.

The first Kimmelman factor is whether the Respondent acted in good or bad faith. The Respondent testified that he never allowed the buyer access to the Property without proper authorization or supervision. Instead, the Respondent contends that allowing the buyers to have unaccompanied access to the Property prior to closing was permissible because the buyer and her husband had already completed signing the closing documents, providing the required funds, and obtained insurance on the Property. However, the Respondent's testimony was inconsistent with the account offered by Spillane and the fact that the Respondent knew that the parties still needed to complete the closing with Brennan at 1pm. The Respondent's conduct was not meant to be deliberately nefarious, but nevertheless he knew that providing the buyer access to the Property without supervision or permission prior to the completion of the sales transaction was improper. This factor weighs in favor of a monetary penalty.

The second factor of the Kimmelman analysis is the Respondent's ability to pay the fines assessed. Here, no evidence was presented as to the Respondent's ability or inability to pay the fines being assessed, and thus this factor is neutral.

The third factor of the Kimmelman analysis is the amount of profits obtained from the illegal activity. In this case, the Respondent did not receive any monetary benefit by providing the buyer with unauthorized access to the Property. However, by giving the electronic lock code in advance to the buyer, the Respondent relieved himself of the obligation of having to go back to the Property after the closing and show the buyer how to change the locks once she had, in fact, consummated the purchase. While this was a benefit to the Respondent, this factor does not weigh in favor of a monetary penalty.

The fourth factor of the Kimmelman analysis is to determine whether the licensee's conduct caused injury to the public. The public is harmed whenever licensed professionals fail to maintain the level of trustworthiness demanded under the laws of this State. It is the responsibility of the Commission to ensure that individuals who hold licenses demonstrate behavior which instills the utmost public trust. Licensees are responsible for the homes of the seller, which includes supervising the conduct of potential buyers who enter the premises and survey their property. In this matter, there has been conflicting testimony presented about whether the sellers still had personal property on site at the time of the buyer's walkthrough just prior to closing. And while there were ultimately no allegations of theft made against the Respondent or the buyer, the Respondent's decision to allow his client unauthorized access to the Property without the supervision of a real estate licensee is still impermissible under the Act. This conduct erodes the level of trust that all sellers have in real estate professionals to protect their investment. This factor weighs in favor of a monetary penalty.

The fifth factor in a Kimmelman analysis is the duration of the illegal conspiracy or scheme. The evidence presented indicates that the Respondent's conduct was an isolated, one-time occurrence and not part of an ongoing scheme. This factor does not weigh in favor of a monetary penalty.

The existence of criminal actions and whether a civil penalty may be unduly punitive if other sanctions have been imposed is the sixth factor. The Supreme Court held in Kimmelman that a lack of criminal punishment weighs in favor of a more significant civil penalty because the defendant cannot argue that he or she has already paid a price for his or her unlawful conduct. Kimmelman, 108 N.J. at 139. Here, the Respondent has not faced any criminal punishment for his actions. As such, this factor does weigh in favor of a monetary penalty.

The seventh and final factor takes into consideration the Respondent's past violations, of which there are none. No evidence of past violations was presented at the hearing. This factor does not weigh in favor of a monetary penalty.

In light of these factors, the Respondent shall pay a fine in the total amount of \$3,250. This fine is in consistent with the Commission's determination in similar matters. See e.g., NJREC v. Piacentine, Final Order of Determination, Dkt. No. CAP-16-028 (02/28/17) (for violations of N.J.S.A. 45:15-17(e) and N.J.A.C. 11:5-6.4(a), the Commission imposed a \$2,500 fine)., The fine is fully warranted, not excessive or unduly punitive, and is necessary to demonstrate the appropriate level of opprobrium for the Respondent's conduct.

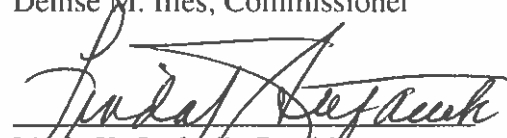
Accordingly, and pursuant to N.J.S.A. 45:15-17, the Commission imposes the following sanctions:

1. Respondent Beach shall pay a fine of \$3,250.
2. The real estate license issued to Respondent Beach shall be held on probation for a period of one year. During the period of probation, the following conditions shall apply: 1) the Respondent shall inform his employing broker that his license is currently on probation; and 2) the Respondent's broker shall notify the Commission within 72 hours if he or she receives any information indicating that the Respondent may have violated the Act or corresponding regulations.
3. Within six months of the date of this order, Respondent Beach shall complete six hours of continuing education courses in the areas of agency (three hours) and ethics (three hours) which shall not count towards the continuing education requirement for the next renewal term. Respondent Beach is required to provide proof of completion to the Commission.

SO ORDERED this 1st day of October, 2021.

By: Linda K. Stefanik, President
Eugenia K. Bonilla, Vice President
Christina Banasiak, Commissioner
Darlene Bandazian, Commissioner

Jacob S. Elkes, Commissioner
William Hanley, Commissioner
Denise M. Illes, Commissioner



Linda K. Stefank, President
New Jersey Real Estate Commission

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