

**STATE OF MICHIGAN
DEPARTMENT OF CONSUMER AND INDUSTRY SERVICES
BUREAU OF HEARINGS**

In the matter of

Docket No. 2001-1783

Bureau of Commercial Services,
Petitioner

Agency No. 65-00-4907-00

v
Kevin H. Elumbaugh,
Respondent

Agency: Bureau of Commercial
Services

Case Type: Sanction

Issued and entered
this 27th day of September, 2002
by Lauren G. Van Steel
Administrative Law Judge

AMENDED HEARING REPORT

PROCEDURAL HISTORY

Appearances: Tracey L. Hampton, Attorney at Law, appeared on behalf of Petitioner Bureau of Commercial Services. Kevin H. Elumbaugh appeared on his own behalf.

This proceeding commenced with the filing of a Notice of Hearing dated October 16, 2001, scheduling hearing for November 26, 2001. The Notice of Hearing was issued pursuant to a Formal Complaint issued on August 9, 2001, which alleged noncompliance with the Michigan Occupational Code, 1980 PA 299, as amended, MCL 339.101 *et seq.* (Code), specifically Sections 604(b) & (c) and 2512(b), as well as Rule 333(1) of the Board of Real Estate Brokers and Salespersons General Rules, being 1991 MR

4, R339.22333(1). [Note: The Formal Complaint cites Rule 333(1) as "1991 AACS R338.22333(1)" in error].

The hearing was held as scheduled on November 26, 2001. Jennifer C. Tappen, Complainant, testified for Petitioner. The following exhibits were offered by Petitioner and accepted into the record as evidence:

Petitioner's Exhibit 1 Letter from Jeff Hugo to Jennifer Tappen, dated 10/20/00

Petitioner's Exhibit 2 Letter from Darrell Zolton to Kevin Elembaugh [sic], dated 12/16/99

Petitioner's Exhibit 3 Seller's Disclosure Statement, dated 9/4/98

Respondent testified on his own behalf. Respondent offered the following exhibits, which were accepted into the record as evidence:

Respondent's Exhibit A Sales Contract, dated 6/30/99

Respondent's Exhibit B Sales flier for 7606 State Road, Millington, MI

On January 14, 2002, the hearing transcript was received in the Bureau of Hearings. The record was closed after that date.

ISSUES AND APPLICABLE LAW

The issues in this matter are whether Respondent has violated Sections 604(b) & (c) and 2512(b) of the Code, and/or Rule 333(1) of the Board of Real Estate Brokers and Salespersons General Rules, being 1991 MR 4, R339.22333(1), which provide in pertinent part as follows:

Sec. 604 A person who violates 1 or more of the provisions of an article which regulates an occupation or who commits 1 or more of the following shall be subject to the penalties prescribed in section 602:

* * *

(b) Practices fraud, deceit, or dishonesty in practicing an occupation.

(c) Violates a rule of conduct of an occupation [MCL 339.604(b) & (c)].

Sec. 2512 A licensee who commits 1 or more of the following is subject to the penalties set forth in article 6:

* * *

(b) Fails to provide a written agency disclosure to a prospective buyer or seller in a real estate transaction as defined in section 2517 [MCL 339.2512(b)].

Rule 333(1) A licensee shall not, directly or indirectly, misrepresent material facts [1991 MR 4, R339.22333(1)].

FINDINGS OF FACT

The following facts are found as established by a preponderance of the evidence in the record:

1. Respondent resides in Millington, Michigan and has been a licensed real estate salesperson in Michigan since 1997 [Tr, 41-42].

2. When first licensed in 1997, Respondent worked for J. McLeod Realty in Millington, Michigan. Within the past year, he changed employers to a Century 21 realty in Millington [Tr, 43].

3. In or around August 1997, Respondent drove down State Road in Millington and noticed a house for sale by owner. The home was owned by Randy Esterline and had been newly built in or around 1995. Mr. Esterline was living in the home [Tr, 44, 46, 60; Resp. Exh. B].

4. Respondent walked through the home himself, but did not hire an inspector. The issue of a certificate of occupancy never came up between Mr. Esterline and Respondent. At the time, Respondent had not yet sold a newly constructed home as a real estate salesperson [Tr, 46, 59-60].

5. In or around August 1997, Respondent entered into a land contract with Mr. Esterline to purchase the home located at 7606 State Road in Millington for \$105,000.00 [Tr, 44-45].

6. At the time of the land contract purchase, Respondent understood that the home was an unfinished dwelling “and anything from that point on would be my responsibility as far as finishing the house” [Tr, 45].

7. Mr. Esterline gave Respondent a Seller’s Disclosure Statement, which indicated that the home’s heating system was unfinished [Tr, 45].

8. The Seller’s Disclosure Statement that Respondent received did not make any disclosures regarding electrical, plumbing or mechanical permits that might need to be pulled [Tr, 45].

9. There was a furnace in the home at the time of Respondent’s purchase. It was an open furnace, which Respondent described as: “you left the door of the basement open to heat the upstairs of the house.” He did not know at the time that the furnace had been pulled from another property and put into the home. It was a 1983 furnace [Tr, 45-46; Statement of Complaint].

10. In April 1999, Respondent purchased the home outright and took a mortgage on the property through Mayville State Bank. No issue of a certificate of occupancy or permits was raised at the time of his April 1999 closing [Tr, 60-61].

11. Respondent did not check with local authorities about permits or a certificate of occupancy. It was not a topic covered at the time of his real estate salesperson training [Tr, 61-62].

12. Respondent lived at the State Road home for between August 1997 and September 1999. He lived alone at first and later had a roommate [Tr, 47].

13. During the years that Respondent lived in the home, he operated the furnace without a problem. He made no mechanical changes to the home [Tr, 47-48].

14. In May 1998, Respondent had an LP (liquid petroleum) gas company, Thermogas, come to his home for the purpose of seeing whether the furnace was capable of heating the entire home. Respondent explained: “[Y]ou could see it was a smaller furnace and it didn’t have anything on top, it was open. So I wanted them to come out and tell me if I could put ductwork throughout the house” [Tr, 54].

15. Thermogas inspected the furnace and did not inform Respondent that the furnace was unsafe [Tr, 47, 53].

16. Respondent did not know that anything needed to be brought up to Code on the home [Tr, 54].

17. Also in May 1998, Respondent decided to sell the home because he wanted to purchase a piece of land to build on. He offered the property for sale himself, not

through J. McLeod Realty. It was the first time he had offered for sale a home that he himself owned [Tr, 49, 56].

18. The first individual who came along to look at the property was Merle Tappen, uncle of Complainants, David and Jennifer Tappen [Tr, 34, 49].

19. A first purchase agreement was drawn up in September 1998. Merle Tappen signed a Seller's Disclosure Statement that had been dated April 28, 1998 on September 4, 1998. The April 1998 Seller's Disclosure Statement does not list any plumbing or electrical problems, but states under "Heating System" that "Heating not complete, needs duct work" [Pet. Exh. 3; Tr, 50].

20. Merle Tappen was supposed to be "coming into money" from a lawsuit with GM (General Motors) and Respondent "had just purchased the [new] property so I was in no big hurry to move" [Tr, 50].

21. Approximately eight months elapsed, after which time Merle Tappen informed Respondent that he would buy the property without further delay [Tr, 51].

22. In May 1999, Merle Tappen gave Respondent a non-refundable one-thousand dollar (\$1,000.00) deposit on the purchase of the home [Tr, 34, 49, 51].

23. Merle Tappen then brought Complainants out to the property to look over the landscaping [Tr, 51].

24. About a week later, Merle Tappen informed Respondent that he was going to let Complainants buy the property instead [Tr, 51].

25. Merle Tappen allowed Complainants to apply the \$1,000.00 deposit, to be used toward the sale of the house, in exchange for allowing him to take some dirt from the property [Tr, 35].

26. On June 30, 1999, Complainants signed a purchase agreement with Respondent to buy the State Road home for \$118,000.00 (\$3,000.00 of which was closing costs paid by Respondent) [Tr, 22, 35; Resp. Exh. A].

27. Complainants did receive a Seller's Disclosure Statement from Respondent prior to the closing; it was the same Seller's Disclosure Statement, dated April 28, 1998, that had been signed by Merle Tappen on September 4, 1998. Complainants did not ask for a separate or updated Seller's Disclosure Statement [Tr, 23-24; Pet. Exh. 3; Resp. Exh. B].

28. Respondent thinks that the Complainants may have signed a separate Seller's Disclosure Statement, but he was still trying to find the record at the time of hearing. Respondent testified that the advertising flier that he had available during the showing of the house had a copy of the April 1998 Seller's Disclosure Statement on the back; Jennifer Tappen denied that the flier she received had the Statement on the back [Tr, 24-28, 35-36, 56; Resp. Exh. B; Pet. Exh. 3].

29. The purchase agreement signed by Complainants on June 30, 1999, contains checked-off boxes, as follows: "BUYER acknowledges that prior to signing this Buy Sell Agreement, BUYER has received a copy of the following attached documents: Lead Based Paint Sellers Disclosure Form; Seller's Disclosure Statement; Disclosure Regarding Real Estate Agency Relationships." Complainant Jennifer Tappen denied at the hearing ever

receiving the lead paint disclosure form, but did not dispute that the purchase agreement had the item checked. Mrs. Tappen also did not dispute that in the purchase agreement she and her husband had acknowledged receipt of a disclosure regarding real estate agency relationships [Tr, 23-24; Resp. Exh. A].

30. Respondent also gave Complainants an appraisal of the property that he had done when he paid off the land contract “to show that I was selling it to them at a discounted price” [Tr, 55].

31. The Complainants were given several opportunities to inspect the property prior to closing. They came out three or four times to walk through the house. They did not have a professional inspection of the home done [Tr, 28-29, 53].

32. Prior to closing, Respondent made the Complainants aware that ductwork that needed to be done on the furnace. He did not inform them that permits needed to be pulled for electrical, plumbing or mechanical work. The subject of permits or inspections did not come up [Tr, 29-30, 40].

33. Respondent credibly testified that he understood the following about permits:

I was aware of what I was told when I bought the house, that the house was unfinished, and any permits that would come up down the road would be at my expense to finish. What that constituted of, I mean I didn't know. I had no idea of the mechanical, plumbing [Tr, 53].

34. Complainants were not aware that Respondent had purchased the home on a land contract prior to the closing [Tr, 30, 37].

35. Complainants closed on the purchase of the State Road home in August 1999, and moved in about 30 days later [Tr, 34].

36. When Complainant Jennifer Tappen called the local building authority to inquire into when a permit was pulled on the furnace, she learned that permits had not been pulled on other aspects of the home, and that a final occupancy permit had not been issued. Mrs. Tappen became concerned that the county could “red tag” her home and hired an attorney to pursue restitution with Respondent through civil litigation [Tr, 11-13, 17; 32].

37. On or about September 14, 2000, Complainants also filed a Statement of Complaint, dated August 20, 2000, with the Department of Consumer and Industry Services [Tr, 15-16].

38. On or about October 20, 2000, Jeff Hugo, apparently a building official with Tuscola County, sent a letter to Complainant Jennifer Tappen listing items on the home found in violation of the 1990 State of Michigan Construction Code [Pet. Exh. 1].

39. Also on October 20, 2000, an inspection was conducted by Jerry Peruski, Electrical Inspector, and Thomas Eckel, Plumbing and Mechanical Inspector. A Special Inspection Report listing items not in compliance with code or to be corrected was admitted as Petitioner’s Exhibit 2.

40. In April 2001, Complainants sold the house for \$125,000.00 and netted “a little over” \$3,000.00, after commission costs [Tr, 30, 33].

41. There has been no showing made that the local governing authority, Tuscola County, or state law requires that a property be brought up to applicable building

codes at the time of sale. As a real estate salesperson, Respondent is aware that there are many properties sold in the same locality without being brought up to code [Tr, 48, 57].

42. If a seller is aware that a home does not have an occupancy permit, Respondent testified that “it is something the seller needs to tell the buyer.” Respondent denied, however, that he was aware that an occupancy permit had not been issued to the home’s prior owner, Mr. Esterline [Tr, 58].

43. The record does not show that Respondent was ever informed by local authorities that he could not occupy the property when he lived in the home, between August 1997 and September 1999 [Tr, 48, 57].

44. At the time of hearing, civil litigation between Complainants and Respondent was still pending [Tr, 6].

CONCLUSIONS OF LAW

The principles that govern judicial proceedings also apply to administrative hearings [8 Callaghan’s Michigan Pleading and Practice, §60.48, at 230 (2d ed. 1994)]. The burden of proof in this matter is upon Petitioner to prove, by a preponderance of the evidence, that grounds exist for the imposition of sanctions upon Respondent.

Petitioner has alleged in the Formal Complaint that Respondent’s failure to disclose the absence of required building permits and inspections for the residence located at 7606 State Road in Millington to Complainants as purchasers constitutes the misrepresentation of material facts, contrary to Rule 333(1) and 604(c) of the Code and “fraud, deceit or dishonesty in the practice of an occupation,” contrary to Section 604(b) of the Code.

Petitioner has failed to show by a preponderance of the record evidence, however, that Respondent knew or should have known that required building permits and inspections were not in place on the home prior to its sale to Complainants. When Respondent purchased the home in August 1997, it had been lived in since being built in or about 1995. He was not informed of any permit or occupancy permit problems at the time of his initial land contract purchase or later full purchase through mortgage. Respondent himself lived in the home between August 1997 and September 1999, apparently without an occupancy permit issue being raised by the local authority.

Respondent credibly testified that the only aspect of the home that he was aware of not being complete was the furnace and ductwork; this aspect of the home was listed on the Seller's Disclosure Statement, April 28, 1998, which Complainants received prior to purchase of the home. Accordingly, Petitioner has failed to prove that Respondent acted fraudulently, deceitfully or dishonestly in violation of Section 604(b) of the Code and/or misrepresented material facts in violation of Rule 333(1) and 604(c) of the Code.

Further, Petitioner has alleged that Respondent failed to provide a written agency disclosure to Complainants as prospective purchasers, contrary to Section 2512(b) of the Code. Complainant Jennifer Tappen admitted at the hearing, however, that she had received a Seller's Disclosure Statement, dated in April 1998. It is true that the Statement was signed by Merle Tappen, rather than Complainants. However, Complainants signed an acknowledgment of receipt of the Seller's Disclosure Statement on the purchase agreement form, thus accepting the Statement as part of their purchase of the property, and applied the \$1,000.00 deposit paid by Merle Tappen toward their purchase. In addition, the Statement

signed by Merle Tappen appears to be identical in all material respects to the Statement copied on the back of the advertising flier that Respondent used in offering the property [Resp. Exh. B].

Finally, the Seller's Disclosure Statement states that "Seller is licensed real estate agent". Respondent sold the property individually, not through any other real estate agency or relationship. Petitioner has not shown that any further agency disclosure would have been required by law. Complainants acknowledged receipt of a disclosure of "Real Estate Agency Relationships" when they signed the purchase agreement. Accordingly, Petitioner has not shown, by a preponderance of the evidence, that Respondent failed to provide a written agency disclosure to Complainants in violation of Section 2512(b) of the Code.

In summary, it is concluded that Petitioner has not proven by a preponderance of the evidence that Respondent violated Sections 604(b) & (c) and 2512(b) of the Code, and/or Rule 333(1) of the Board's General Rules, being 1991 MR 4, R339.22333(1).

ORDER

Based upon the above findings of fact and conclusions of law, **IT IS HEREBY ORDERED** that the Formal Complaint issued on August 9, 2001 in this matter is **DISMISSED with prejudice**. Accordingly, this file shall be closed and returned to the Bureau of Commercial Services.

Lauren G. Van Steel
Administrative Law Judge