

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

In the matter of

Docket No. 2002-1230

Bureau of Commercial Services,
Petitioner

Agency No. 65-01-6266-00

v

Agency: Bureau of Commercial Services

Heritage Homes Realty, Ltd.,
Respondent

Case Type: Sanction

Issued and entered
this 28th day of October, 2002
by James L. Karpen
Administrative Law Judge

HEARING REPORT

PROCEDURAL HISTORY

Appearances: Lisa Funkhouser, Attorney at Law, appeared on behalf of Petitioner, Bureau of Commercial Services. Neither Heritage Homes Realty, Ltd., nor an attorney or representative on Respondent's behalf, appeared at the hearing.

This proceeding commenced with the filing of a Notice of Hearing dated August 28, 2002, scheduling a hearing for October 11, 2002. The Notice of Hearing was mailed to the parties' last known addresses, and informed the parties that if they failed to appear at the scheduled hearing, a default might be entered, pursuant to Sections 72 and 78 of the Administrative Procedures Act of 1969, 1969 PA 306, as amended, MCL 24.201 *et seq.* (APA).

The Notice of Hearing was issued pursuant to a Formal Complaint dated May 6, 2002, which alleged noncompliance with the Occupational Code, 1980 PA 299, as amended, MCL 339.101 *et seq.* (Code), specifically, Sections 604(c), (h); 2512(j)(i), (iii), (iv), (v); and 2512c(2), as well as 1991 AACS, R 339.22311(1) and 1991 AACS, R 339.22313(1), (4)(a) and (b).

The hearing was held as scheduled on October 11, 2002. At the hearing Petitioner's counsel requested to be allowed to proceed in Respondent's absence pursuant to Section 72 of the APA. Petitioner's counsel also requested that a default be granted pursuant to Section 78 of the APA. Petitioner's counsel also requested that a default be granted pursuant to Section 78 of the APA.

Section 72 of the APA states, in pertinent part:

(1) If a party fails to appear in a contested case, after proper service of notice, the agency, if no adjournment is granted, may proceed with the hearing and make its decision in the absence of the party.

Further, Section 78 of the APA states, in pertinent part:

(2) Except as otherwise provided by law, disposition may be made of a contested case by... default... .

Petitioner's motion for default was granted. As a result of the default, the factual allegations contained in the Petitioner's Formal Complaint are taken as true.

ISSUES AND APPLICABLE LAW

The issues in this matter are whether Respondent has violated Sections 604(c), (h); 2512(j)(i), (iii), (iv), (v); and 2512c(2) of the Code and Rules 339.22311(1) and 339.22313(1), (4)(a) and (b), which provide 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:

* * *

(c) Violates a rule of conduct of an occupation.

* * *

(h) Violates any other provision of this act or a rule promulgated under this act for which a penalty is not otherwise prescribed.

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

* * *

(j) Except in the case of property management accounts, fails to deposit in a custodial trust or escrow account money belonging to others coming into the hands of the licensee in compliance with the following:

(i) A real estate broker shall retain a deposit or other money accepted by a person, partnership, corporation, or association holding a real estate broker's license under this article pending consummation or termination of the transaction involved and shall account for the full amount of the money at the time of the consummation or termination of the transaction.

* * *

(iii) A real estate broker shall not permit an advance payment of funds belonging to others to be deposited in the real estate broker's business or personal account or to be commingled with funds on deposit belonging to the real estate broker.

(iv) A real estate broker shall deposit, within 2 banking days after the broker has received notice that an offer to purchase is accepted by all parties, money belonging to others in a separate custodial trust or escrow account maintained by the real estate broker with a bank, saving and loan association, credit union, or recognized depository until the transaction involved is consummated or terminated, at which time the real estate broker shall account for the full amount received.

(v) A real estate broker shall keep records of funds deposited in a custodial trust or escrow account, which records shall indicate clearly the date and from whom the money was received, the date deposited, the date of withdrawal, and other pertinent information concerning the transaction, and shall show clearly for whose account the money is deposited and to whom the money belongs. The records shall be subject to inspection by the department. A separate custodial trust or escrow account shall designate the real estate broker as trustee, and the custodial trust or escrow account shall provide for withdrawal of funds without previous notice. This article and the rules promulgated pursuant to this article do not prohibit the deposit of money accepted under this section in a noninterest bearing account of a state or federally chartered savings and loan association or a state or federally chartered credit union.

Sec. 2512c.

* * *

(2) A real estate broker who engaged in property management shall maintain property management accounts separate from all other accounts. Except as provided in this section, a property management account shall be managed in accordance with the property management employment contract.

Rule 311. (1) The broker or associate broker who is involved at the closing of a real estate or business opportunity transaction shall furnish, or cause to be furnished, to the buyer and seller, a complete and detailed closing statement signed by the broker or associate broker showing each party all receipts and disbursements affecting that party. If the closing is conducted at a bank or other closing entity, the broker or associate broker is still responsible for the content of the closing statement and shall sign the final closing document.

Rule 313. (1) Trust or escrow accounts shall be maintained in demand accounts only. Checks drawn on the trust or escrow accounts shall be signed by a broker or an associate broker. Cosignatories may be used; however, this signature shall be accompanied by the signature of a broker or associate broker.

* * *

(4) A broker shall maintain a bookkeeping system in the office. At a minimum, the system shall consist of the following:

(a) A permanent record book or record, called a journal, which shows

the chronological sequence in which funds are received and disbursed. For funds received, the journal shall include the date of receipt and date of deposit, the name of the party who is giving the money, the name of the principal, and the amount. For disbursements, the journal shall include the date, the payee, the check number, purpose of the disbursement, and the amount. A running balance shall be shown after each entry, both for receipt and disbursement. If separate journals are maintained for one trust account, then a combined balance shall be maintained.

(b) A ledger, a record book, or record which shows receipts and disbursements as they affect a single, particular transaction between a buyer and seller or a landlord and tenant. The ledger shall include the names of both parties to a transaction, property address or brief legal description, and the dates and amounts received. When disbursing funds, the date, payee, check number, and amount shall be shown. The ledger shall segregate one transaction from another transaction.

FINDINGS OF FACT

1. Respondent, Heritage Homes Realty, Ltd., is licensed as a real estate broker under the Code.
2. From on or around December, 2001 through on or around February, 2002, an examination and audit of the books, records, and accounts of Heritage Homes Realty Ltd. was conducted by Department of Consumer & Industry Services personnel for the audit period of November 1, 2000 through October 31, 2001.
3. Respondent failed to retain money in a trust or escrow account pending consummation or termination of transactions.
4. Respondent failed to deposit monies belonging to others within two banking days after she received notice of accepted offers to purchase and failed to maintain funds in a custodial or trust account until transactions were

consummated or terminated in that at the end of the audit period, the trust account of Heritage Homes Realty Ltd. indicated a deficit balance in excess of \$2,689.00.

5. Respondent permitted payments of funds belonging to others to be commingled with funds on deposit belonging to the broker.
6. Respondent failed to keep records of funds deposited in a custodial trust or escrow account which indicated clearly from whom the money was received and to whom the money belonged.
7. Respondent failed to maintain property management accounts separate from all other accounts.
8. Respondent failed to ensure that all checks drawn on the trust or escrow account were signed by a broker or associate broker.
9. Respondent failed to maintain a journal showing the chronological sequence of funds received which included deposit dates.
10. Respondent failed to maintain a ledger showing receipts and disbursements as they affected single transactions between buyers and sellers or landlords and tenants, which included receipt dates.
11. Respondent failed to furnish or cause to be furnished to buyers and sellers, completed detailed closing statements which were signed by a broker or associate broker.
12. Respondent has violated a provision or rule for which a penalty is not otherwise prescribed.
13. Respondent has violated a rule of conduct in practicing an occupation.

CONCLUSIONS OF LAW

The principles that govern judicial proceedings also apply to administrative hearings 8 Callaghan's Michigan Pleading and Practice (2d ed) Section 60.48, page 230. The burden of proof is upon the Petitioner to prove, by a preponderance of the evidence, that grounds exist for the imposition of sanctions upon the Respondent. Under Section 72 of the APA, there is no requirement to provide a full evidentiary hearing when all alleged facts are taken as true. Smith v Lansing School District, 428 Mich 248; 406 NW2d 825 (1987).

Based upon the above findings of fact and the default granted against Respondent, Petitioner has proven by a preponderance of the evidence that Respondent violated Sections 604(c), (h); 2512(j) (i), (iii), (iv), (v); and 2512c(2) of the Code and Rules 339.22311(1) and 339.22313(1), (4) (a) and (b), as alleged in the Formal Complaint.

RECOMMENDATION

I concur with counsel for Petitioner's recommendation that a \$1,000.00 civil fine be assessed against Respondent and that Respondent's real estate broker's license be revoked.

James L. Karpen
Administrative Law Judge