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

In the matter of	**Docket No. 2001-83**
Bureau of Commercial Services, Petitioner	**Agency No. 65-00-0009-00**
v	**Agency: Bureau of Commercial Services**
Ralph D. Glenn, Respondent	
_____/	**Case Type: Sanction**

Issued and entered
this 9th day of August, 2001
by Erick Williams
Administrative Law Judge

HEARING REPORT

PROCEDURAL HISTORY

A complaint dated August 14, 2000, charged Ralph Glenn, a real estate salesperson, with misconduct in a real estate transaction. A hearing convened on May 25, 2001. D. Lynn Morrison represented the Bureau of Commercial Services. Edward G. Lennon, of Plunkett and Cooney, represented Mr. Glenn. This opinion finds Mr. Glenn responsible for innocent misrepresentation and recommends restitution.

ISSUES AND APPLICABLE LAW

The complaint alleges that Mr. Glenn violated MCL 339.604; MSA 18.425(604), which reads:

> 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....

(g) Commits an act which demonstrates incompetence.

and 1991 AACS R 339.22307 reads:

> A licensee shall deliver to an offer or a signed copy of the offer to purchase immediately after it has been signed by the offer or. A licensee shall promptly tender all written offers to purchase to the seller upon receipt. Upon obtaining a proper acceptance of the offer to purchase, signed by the seller, the licensee shall promptly deliver true executed copies of the acceptance to the purchaser and seller. A licensee shall make certain that all terms and conditions of the real estate transaction are included in the offer to purchase. A licensee shall not be subject to disciplinary action for failing to submit to the seller any additional offers to purchase which are received after the seller has accepted an offer and the sales agreement is fully executed, unless a listing agreement requires that subsequent offers be presented.

FINDINGS OF FACT

Ray Cogo conducted business in the name of Masterblend Corporation, which he owned 100%. Masterblend was a soil-less farming (hydroponic) operation; it also designed and sold equipment for soil-less farming. Masterblend tax returns (IRS form 1120S, line 21) report the following ordinary income:

Year	Income	Exhibit
1993	$1,601	20
1994	$4,194	21
1995	$3,657	22
1996	$9,616	23
1997	$6,575	24
Average	$5,129	

Masterblend Products ceased business in 1997. In 1998 and 1999, Mr. Cogo did not operate business because he was moving; he had plans to start again at a new location.

Ray Cogo lives with his wife, Laura Cogo, who is a cosmetologist. Before 1999, they lived near Webberville, Michigan. In 1999, they bought a house near Stockbridge. Laura Cogo bought the house through Glenn-Brooke Realty, Ltd., and Ralph D. Glenn was the agent. Ralph Glenn has been licensed as a real estate salesperson since 1978. He has lived in Stockbridge all his life. Glenn-Brooke Realty specializes in selling real estate in Stockbridge Township and the Stockbridge School District. Deborah Marshall was the broker in charge of Glenn-Brooke Realty, Ltd. She reviewed documents, scheduled closings, and got title work.

Laura Cogo told Mr. Glenn that she wanted a place where she and her husband could operate the soil-less farming business, which involved, among other things, a greenhouse equipped for hydroponic agriculture.

Laura Cogo recalls that she explicitly asked for a clause in the sales contract making the sale contingent on zoning that would accommodate the business.

Ralph Glenn showed Ms. Cogo a property on Highway M-36. It was farmland. The listing realtor had left copies of the listing agreement in the house, Exhibit 1. The listing agreement advertised that the property was zoned agricultural. The listing agreement also contained a disclaimer, saying, “Not responsible for accuracy of information nor its compliance with any law.”

The house happened to be one that Ralph Glenn had built in 1994, so he was familiar with it. When he built the house, Mr. Glenn had obtained a zoning permit for the property. The zoning permit, Exhibit B, signed by the Stockbridge zoning administrator, listed the property as agricultural. Mr. Glenn, who does business only in Stockbridge and keeps track of the local zoning changes in Stockbridge, recalled that no zoning changes had occurred since 1994. There had been no intervening sales. When Mr. Glenn talked to the listing broker, the listing broker told Glenn that he had talked to the zoning administrator who confirmed that the land was agricultural. There was an appraisal; the appraisal listed the property as agricultural. Accordingly, Mr. Glenn was sure that the property was zoned agricultural.

The only thing Mr. Glenn did not check was the zoning map. A copy of the current zoning map, dated 1990, was in the Glenn-Brooke office. Unfortunately, the zoning map listed the property as rural-residential, not agricultural, and the zoning map is the only authoritative evidence of a property's zoning status.

Evidently, the 1994 zoning permit had been mistaken, the appraisal had been mistaken, the listing broker had been mistaken, and the zoning administrator had been mistaken. So, Mr. Glenn's belief that the property was zoned agricultural was mistaken.

Laura Cogo made an offer on the property. When Mr. Glenn prepared the contract, Exhibit 2, he did not include a clause making the deal contingent on agricultural zoning. Mr. Glenn was quite sure that the property was agricultural. He assured Ms. Cogo that her husband could operate the hydroponic business on that land.

After they moved in, a zoning officer visited the Cogos and told them they could not operate an agricultural business on the land; it was zoned residential. The Cogos applied for a zoning variance, for which they had to pay $375. The variance was denied. They did not get their application fee back. Exhibits 10 and 11. Glenn-Brooke Realty has also made attempts to get the zoning changed, without success.

The Cogos currently have their house on the market. Both Mr. Glenn and the Cogos believe the house can be sold for more than the Cogos paid.

CONCLUSIONS OF LAW

In short, the facts demonstrate that Mr. Glenn knew Mr. and Ms. Cogo wanted property zoned for agricultural use so that they could operate a soil-less farming business. Mr. Glenn sold them a piece of property, telling them, mistakenly, that the land was agricultural.

This is a case of innocent misrepresentation. In *USF&G v Black*, the Michigan Supreme Court described the rule of innocent misrepresentation:

> ... where an action is brought to recover for false and fraudulent misrepresentations made by one party to another [1] in a transaction between them, [2] any representations which are false in fact [3] and actually deceive the other, and [4] are relied on by him to his damage, are actionable, irrespective of whether the person making them acted in good faith in making them, [5] where the loss of the party deceived inures to the benefit of the other.[1]

First , there was a transaction in which Mr. Glenn and Glenn-Brooke Realty assumed a duty of care to Mr. and Ms. Cogo. Although, as Mr. Glenn points out, the purchase

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[1] *USF&G v Black*, 412 Mich 99, 117; 313 NW2d 77, 84 (MI Sup Ct 1981).

agreement shows Ms. Cogo was the only buyer, and her husband did not sign the contract, the real transaction was broader than the formal documents might indicate. As Judge Hillman held in *Green Construction v Williams Form Engineering*, 506 F Supp 173, 177 (WD Mich,1980), a party to a contract may be under a duty of reasonable care not only to the signatories, but also to third parties whose interests are expected to be affected. Mr. Glenn and Laura Cogo certainly intended to affect the interests of Ray Cogo in this transaction. Mr. Glenn knew the Cogos needed agricultural zoning so that Mr. Cogo could operate his business. Mr. Glenn assumed a duty toward Ray Cogo when he told Laura Cogo she did not need to put a zoning clause in the contract and assured her that her husband could operate his hydroponic business on the property.

Second, Mr. Glenn made a representation of a material fact, and it was false. Mr. Glenn had information from various sources suggesting that the land was agricultural, including an appraisal and a 1994 permit issued by the township zoning administrator both asserting that the land was zoned agricultural. However, the authoritative source was the 1990 map that accompanied the township zoning ordinance and regulations. MCL 125.277 to 125.281. Mr. Glenn did not consult the map. Had he done so, he would have learned that the land was zoned rural residential. Third, both Mr. and Ms. Cogo relied on Mr. Glenn's assurance. The Cogos needed agricultural zoning so that Mr. Cogo could operate his hydroponic business. Had they known the land was zoned residential, they would not have bought it.

Fourth, while Mr. and Ms. Cogo suffered a loss, Mr. Glenn and Glenn-Brooke Realty benefitted from the transaction. Glenn-Brooke Realty received a $4,725 commission.

Mr. and Ms. Cogo are victims of innocent misrepresentation; they deserve relief.

Fister v Henschel[2] was an action by a real estate agent for future commissions when a developer with whom he had an exclusive listing agreement wrongfully terminated it. After finding a breach of the listing agreement, the Court of Appeals discussed damages:

> ... The remaining question involves the measure of damages, if any, which is to be employed with reference to this breach and whether the award of the trial court is in accord with the appropriate standard selected. More specifically, defendants argue that plaintiff was not entitled to "lost profits" as awarded by the trial court, but only to actual damages such as costs and expenses incurred and proved.
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> Judicial pronouncements on lost profits as a measure of damages in contract cases are in abundant supply in Michigan case law. Broadly put, awards of lost profits are permissible where they can be seen as within the contemplation of the parties at the time of the execution of the contract, spring from the breach thereof, and are subject to determination with a "reasonable" degree of certainty as opposed to being "conjectural or speculative"....
>
> The facts of this case, viewed from the perspective of established precedent, present no obstacles to an award of lost profits with reference to the criteria of contemplation or connection with the breach of the contract. The requirement of reasonable certainty rather than conjecture or speculation, however, presents greater difficulty because no clear-cut line of demarcation between the 2 categories has been or can be developed accommodating the varied factual elements encountered from case to case. Employment of the general test

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[2] *Fister v Henschel*, 7 Mich App 590; 152 NW2d 555 (MI Ct of App 1967)

of reasonable certainty is retained then for the simple reason that we have nothing better.... In the last analysis, each case must be judged on its individual merits in light of the general principle and its past application by the courts.

The opinion of the trial court on the question of lost profits finds, as a matter of fact, that plaintiff would have sold lots with sufficient frequency to extend the sales agreement until substantially all of the lots in the subdivision had been allocated. The court further found that:

> After taking into consideration the number of lots which the defendants would have retained for their own development, and on which no commission would accordingly have been paid, the number of lots on which a 10% commission would have been paid; the number of lots on which a 5% commission would have been paid; the expenses the plaintiff would have incurred in earning such commission; any duty on the part of the plaintiff to mitigate damages; and after discounting such loss of future commission income at the rate of 5% per year to arrive at the present value thereof, the court finds that the plaintiff is entitled to damages in the amount of $6,100.

... That the data employed and computations made [by the trial court] in reaching the award of lost profits in the instant case lack the precision and exactitude of an accountant's balance sheet is admitted. But such exactitude is not demanded. "The rule does not require that such data be furnished that they can be computed with mathematical exactness." ...

To say here ... that:

> The difficulty of ascertaining with reasonable certainty plaintiffs' damages under this testimony would be no greater than it frequently is in determining future damages in personal injury cases or how much an employee has been

> > damaged by reason of being wrongfully discharged
>
> would constitute something of a landmark in understatement....
>
> A long standing concept in Michigan law which can be applied to the realty business deserves repeating here in words from well-reasoned cases likewise dealing with the award of damages in the form of lost profits:
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> > The law is not so blind to justice as not to require the defendant to respond in damages, if there is any reasonable basis for their ascertainment....[3]

On the other hand, there are limits. *Denha v Jacob*, 179 Mich App 545, 549; 446 NW2d 303, 305 (MI Ct of App 1989), was a suit by a grocery store owner against his landlord. The landlord allegedly blocked his plans to sell his store. The store owner sued for lost profit on the sale, lost interest on financing the sale price, and lost profit on the new store he planned to buy. On appeal, the court held that the store owners claim for lost profit on the new store he planned to buy was too speculative. Not only were the amounts of future profits uncertain, but the very possibility of future profits was uncertain. The Court of Appeals ordered a new trial on damages.

In my view, Ms. Cogo is entitled to restitution of the commission she paid Glenn-Brooke Realty, the fee she paid for the zoning variance application, and one year of lost profits on the soil-less farming business. In my view, one year of lost profits is appropriate since Mr. Cogo voluntarily did not operate the business during 1999; he was moving. But he would

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[3] *Fister v Henschel*, 7 Mich App 590, 595-599; 152 NW2d 555, 557-559 (MI Ct of App 1967).

probably have operated the business in 2000 were it not for the zoning problem. The amount of lost profits can be estimated; the mean of the profits reported on the Masterblend tax returns for 1993 through 1997 is a reasonable estimate; it is $5,129.

I would not recommend more than one year lost profits, since that would bring us into the realm of future profits, and future profits may not be impaired. The Cogos have their house on the market. It has not lost any value. They might sell the property at any time, and then Mr. Cogo could resume his business at a different location. So lost profits in future years are too distant a possibility to be included in a restitution award.

DECISION

The zoning status of the property was a crucial element of this transaction, since the Cogos wanted to operate an agricultural business. Mr. Glenn mistakenly believed that the property was zoned agricultural; acting on that belief, he did not put a protective clause about the zoning status of the property in the purchase agreement. His failure to do so amounts to innocent misrepresentation and violates 1991 AACS R 339.22307.

Mr. Glenn was acting in good faith; and this is a single, complicated incident. Mr. Glenn got his information about the zoning status of the property from traditional business sources that are ordinarily reliable. In this unusual case, his sources (including the Stockbridge zoning administrator) happened to be mistaken. This unusual incident hardly demonstrates that Mr. Glenn is incompetent. Mr. Glenn did not violate MCL 339.604(g); MSA 18.425(604)(g).

In light of Mr. Glenn's innocent misrepresentation, the Cogos are entitled to restitution of commissions paid to Glenn-Brooke Realty ($4,725), the cost of the variance application ($375), plus one year's lost income ($5,129).

PROPOSED SANCTIONS

Pursuant to MCL 339.602(h); MSA 14.825(602)(h), I recommend restitution of $10,227 and no other penalties.

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Erick Williams
Administrative Law Judge