

BEFORE THE
DEPARTMENT OF CORPORATIONS
STATE OF CALIFORNIA

In the Matter of the Accusation of:)
)
THE CALIFORNIA CORPORATIONS)
COMMISSIONER)
)
Complainant,)
)
v.)
)
BARRY C. BINDER,)
)
Respondent.)

Case No. 963-1681

OAH No. L2003010683

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the California Corporations Commissioner as his Decision in the above-entitled matter.

This Decision shall become effective 4/9/03

IT IS ORDERED 4/9/03

CALIFORNIA CORPORATIONS COMMISSIONER

By DEMETRIOS A. BOUTRIS

Exhibit "A"

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OF THE STATE OF CALIFORNIA**

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**THE COMMISSIONER OF
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Complainant,

v.

BARRY C. BINDER,

Respondent.

Case No. 963-1681

OAH No. L2003010683

PROPOSED DECISION

This matter came on regularly for hearing before H. Stuart Waxman, Administrative Law Judge of the Office of Administrative Hearings, in Los Angeles, California, on February 20, 2003.

Complainant, Demetrios A. Boutris, the Commissioner of the Department of Corporations of the State of California ("Complainant"), was represented by Dyan S. Farr, Corporations Counsel.

Respondent, Barry C. Binder ("Respondent"), was represented by Timothy R. Binder, Attorney at Law.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision.

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RESPONDENT'S MOTION TO DISMISS THE ACCUSATION

The Accusation in this matter was filed on January 27, 2003. On February 11, 2003, Respondent filed his "Motion to Dismiss Accusation" (Respondent's Exhibit "A"), pursuant to Government Code section 11506(a)(2). The motion was treated as a timely filed Notice of Defense (Government Code section 11506(a)(2) and (d).) (No other Notice of Defense was offered in evidence.) The parties argued the motion at the outset of the hearing. Having read and considered the moving and opposition papers, and having heard oral argument, the Administrative Law Judge took the matter under submission and advised the parties that he would rule on the motion in his Proposed Decision.

Respondent asserted that the Accusation should be dismissed for the following reasons:

1. The action is barred by Financial Code section 17006(a)(4).
2. The action is barred by the doctrine of double jeopardy.
3. The action is barred by the doctrine of collateral estoppel.
4. Re-litigating the matter before the Department of Corporations after it was previously litigated before the Department of Real Estate would constitute an inefficient use of judicial resources.
5. The principle of comity must apply among the state's various agencies.
6. The Accusation violates Business and Professions Code section 10179.
7. Absent fraud, an escrow agent cannot be disciplined for breach of fiduciary duty.
8. Breach of fiduciary duty by a real estate broker in a real estate transaction is not reasonably related to the qualifications, functions or duties of an escrow agent.

Respondent's Motion to Dismiss the Accusation is denied on the following grounds:

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The action is not barred by Financial Code section 17006(a)(4).

As is more fully set forth in the Factual Findings below, Complainant seeks to bar Respondent from employment, management or control of any escrow agent pursuant to Financial Code section 17423. This action is based on a civil judgment in which Respondent was found to have breached his fiduciary duty with respect to his role as the Responsible Managing Officer of Remax College Park Realty, Inc., a corporate real estate broker. Both Respondent and Remax College Park Realty, Inc. were licensed by the California Department of Real Estate as real estate brokers at the time of the events leading to the civil judgment.

Financial Code section 17423(a) permits, *inter alia*, the bar of an individual from any position of employment, management or control of any escrow agent if that individual has been found liable in a civil action, provided the final judgment is for an offense specified in Financial Code section 17414.1(b) or any other offense that is reasonably related to the qualifications, functions or duties of a person engaged in the escrow business.

Respondent argues that this action is barred by Financial Code section 17006(a)(4) because the civil judgment against him was incurred in connection with a real estate transaction in which he had served as the broker, and for which a real estate license was required, and because the statute exempts an individual from the provisions of the Escrow Law under such circumstances. Complainant argues that the statute only exempts a real estate broker from the Escrow Law when he/she engages in the business of escrow while acting in the capacity of a real estate broker. Therefore, the mere fact that the civil judgment against Respondent arose out of his work as a real estate broker does not exempt him from the entire division of the Financial Code relating to the laws of escrow. Complainant's interpretation of section 17006(a)(4) is the correct one.

Financial Code sections 17006 and 17423 are contained within Division 6 of the Financial Code. Section 17006(a) states in relevant part:

“(a) This division does not apply to:

* * *

“(4) Any broker licensed by the Real Estate Commissioner while performing acts in the course of or incidental to a real estate transaction in which the broker is an agent or a party to the transaction and in which the broker is performing an act for which a real estate license is required.”

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In that statute, "this division" refers to Division 6, known and cited as the "Escrow Law." (Financial Code section 17000.)

Proper interpretation of the statute lies in its legislative intent. In Torres v. Parkhouse Tire Service, Inc. (2001) 26 Cal.4th 995, 111 Cal.Rptr.2d 564, the Court stated:

"In interpreting a statute where the language is clear, courts must follow its plain meaning. (Droeger v. Friedman, Sloan & Ross (1991) 54 Cal.3d 26, 38 [283 Cal.Rptr. 584, 812 P.2d 931].) However, if the statutory language permits more than one reasonable interpretation, courts may consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute. (Wilcox v. Birtwhistle (1999) 21 Cal.4th 973, 977 [90 Cal.Rptr.2d 260, 987 P.2d 727].) In the end, we "must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." [Citation.]' (Id. at pp. 977-978.)"

The plain language of Financial Code section 17006(a) is just ambiguous enough to make the interpretations of both Complainant and Respondent plausible. Therefore, resort to extrinsic methods of interpretation is necessary.

In addition to real estate brokers meeting the requisites of subdivision (a)(4), Financial Code section 17006(a) names the following individuals who are exempt from Division 6:

(1) Any person doing business under any law of this state or the United States relating to banks, trust companies, building and loan or savings and loan associations, or insurance companies.

(2) Any person licensed to practice law in California who has a bona fide client relationship with a principal in a real estate or personal property transaction and who is not actively engaged in the business of an escrow agent.

(3) Any person whose principal business is that of preparing abstracts or making searches of title that are used as a basis for the issuance of a policy of title insurance by a company doing business under any law of this state relating to insurance companies. (Financial Code section 17006(a) (1) - (3).)

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The language of subdivisions (a) (1) through (3) appears to exempt from the Escrow Law individuals currently involved in certain businesses related to the escrow business. Those subdivisions do not imply or infer that the individuals' previous involvement in their respective businesses would render them exempt from the provisions of Division 6. In fact, were Respondent's reasoning to be followed with respect to subdivisions (a) (1) through (3), a bank or insurance company executive, an attorney who formerly performed services relating to a real estate transaction, and an individual formerly in the business of preparing abstracts and making title searches for use in title insurance would not be required to comply with any of the laws relating to escrow, even though members of the public had prevailed in business-related civil actions against them. This would also be the result, whether or not those individuals were still involved in the businesses referenced in subdivisions (a) (1) through (3). Yet, while such individuals would be exempt from the Escrow Law, individuals in other professions who had engaged in no wrongdoing whatsoever, would be required to strictly comply with each of the laws in Division 6. It is extremely unlikely that the Legislature intended such a convoluted result. Since the language in subdivision (a)(4) does not markedly differ from that of subdivisions (a) (1) through (3), it is unlikely that the Legislature intended subdivision (a)(4) to follow Respondent's interpretation. Rather, the Legislature contemplated that rules of proper conduct would be established, and wrongdoing by individuals referenced in section 17006(a) would be addressed by the regulatory agencies governing those individuals' respective professions, thereby obviating the necessity and redundancy of subjecting the same individuals to discipline under the Escrow Law for the same misfeasance in connection with the same transaction.

Respondent cites Escrow Institute of California v. Anthony R. Piemo, Commissioner of Corporations (1972) 24 Cal.App.3d 361 in support of his position. However, that case tends more to support Complainant's interpretation of Financial Code section 17006(a)(4) than that of Respondent. For example, in his moving papers, Respondent offers the following language from the Court:

"It is to be noted that the Escrow Law was enacted in 1951 (Stats. 1951, ch. 364, p. 1107). [FN5] It is manifest that at this time, as well as thereafter, the individuals and entities designated as exempt from the provisions of the Escrow Law in section 17006 of the Financial Code were respectively subject to stringent statutes and regulatory provisions governing the conduct of their business or profession. Consequently, it was not unreasonable for the Legislature to determine that further legislation, subjecting them to another administrative agency or official as to the portion of their conduct relating to escrows, was unnecessary for the protection of the public."
(Id. at 366.)

It was not the Legislature's intent to exempt from each and every escrow law in Division 6 of the Financial Code individuals who, in the past, were found civilly liable for wrongdoing in connection with their respective professions if those professions are presently related to the escrow industry. Section 17006(a) exempts only those individuals who presently work in specified escrow-related professions, and only under specific conditions.

The action is not barred by the doctrine of Double Jeopardy.

On October 18, 2000, an Accusation was filed before the Department of Real Estate ("DRE") against College Park Realty, Inc. and two of its licensees. Respondent was not a named respondent in that matter. The Accusation was based on the same civil judgment that is the subject matter of the instant case but was brought pursuant to Business and Professions Code section 10177.5. The Accusation alleged that the final civil judgment was grounded "upon fraud, misrepresentation or deceit with reference to a transaction for which a real estate license is required."

An administrative hearing was held on the DRE matter on March 29, 2001 and, on May 11, 2001, the Administrative Law Judge assigned to that case issued a Proposed Decision dismissing the Accusation on grounds that the civil judgment had been grounded on negligence and breach of fiduciary duty rather than on fraud, misrepresentation or deceit. The DRE adopted the Administrative Law Judge's Proposed Decision.

The doctrine of double jeopardy is set forth in the Fifth Amendment of the United States Constitution and is made enforceable against the states through the Fourteenth Amendment. It protects an individual against additional prosecutions for the same offense after acquittal or conviction. It is applicable solely to multiple criminal prosecutions against the same defendant for the same offense. Administrative actions such as the one before the DRE and the instant matter are not criminal in nature. Small v. Smith (1971) 16 Cal.App.3d 450, 457. Further, even if double jeopardy applied in this case, Respondent was not named in the DRE Accusation and therefore has not been tried in connection with any administrative matter prior to the instant case. Finally, the instant case is not a second trial for the same offense. This is an action to preclude employment, management or control of an escrow agent pursuant to Financial Code section 17423. The DRE case was an action against a business to revoke a corporate real estate broker license pursuant to Business and Professions Code section 10177.5.

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The action is not barred by the doctrine of collateral estoppel.

The doctrine of collateral estoppel requires a prior judgment involving the same parties and the same issues. As stated above, the DRE action did not name Respondent. In addition, the issue litigated in that action was whether the respondents' real estate licenses could be disciplined pursuant to Business and Professions Code section 10177.5 when the civil judgment against them was grounded on negligence and breach of fiduciary duty rather than fraud, misrepresentation or deceit. The issue in the instant case is whether Respondent should be barred from a position of employment, management or control of an escrow agent based on a civil judgment against him for negligence and breach of fiduciary duty on grounds that the bases of the civil judgment were reasonably related to the qualifications, functions or duties of one engaged in the escrow business.

The instant case does not constitute an inefficient use of judicial resources.

The Office of Administrative Hearings was established and is maintained by statute to, *inter alia*, adjudicate disciplinary matters for a large number of regulatory agencies including but not limited to The Department of Corporations and the Department of Real Estate (Government Code section 11370.2, *et seq.*). While certain matters involving the same charging allegations may be brought by more than one agency and consolidated for hearing (i.e., the Department of Psychology and the Board of Behavioral Sciences), the various boards and bureaus operate independently of each other and are free to choose whether or not to pursue disciplinary actions against their respective licensees pursuant to the statutes and regulations governing the particular professions involved. Even if the parties and the issues were the same between the instant case and the case before the DRE, the Complainants in both cases were entitled to bring their respective matters before the Office of Administrative Hearings without the risk of wasting judicial resources.

The principle of comity does not justify a dismissal in this case.

Except for the doctrines of primary jurisdiction and exhaustion of remedies, principles of comity are generally not applicable to administrative actions such as those before the Department of Corporations. Primary jurisdiction and exhaustion of remedies are related principles of comity between the courts and administrative agencies. Respondent offered no authority for the proposition that comity should require a dismissal of the instant case. Even if comity were an accepted method of disposing of cases brought by more than one agency, it would not apply in this situation in which the respondents and the issues in cases brought by separate agencies differ. In no event does comity require that one agency dismiss a disciplinary action against a licensee because another agency had dismissed a disciplinary action against a related but different licensee involving a related but different issue.

The Accusation does not violate Business and Professions Code section 10179.

Business and Professions Code section 10179 states:

"No violation of any of the provisions of this part relating to real estate or of Chapter L of Part 2 by any real estate salesman or employee of any licensed real estate broker shall cause the revocation or suspension of the license of the employer of the salesman or employee unless it appears upon a hearing by the commissioner that the employer had guilty knowledge of such violation."

Business and Professions Code section 10179 is part of the Real Estate Law and Subdivided Lands Law (Business and Professions Code section 10000 *et seq.*). Its scope is limited to violations of "this part," meaning Part One (Licensing of Persons), and Chapter 1 ("Subdivided Lands") of Part 2 ("Regulation of Transactions"). Neither the Department of Corporations, the Complainant bringing the instant action, nor the Accusation in the instant action are bound by the provisions of Business and Professions Code section 10179 with respect to this case.

In addition, Business and Professions Code section 10179 requires a hearing on the issue of whether the employer had guilty knowledge of his/her employee's violation. It does not appear from the Proposed Decision in the DRE case that the issue of Respondent's guilty knowledge was adjudicated (an unlikely prospect since he was not a named respondent) and Respondent offered no evidence on that issue.

An escrow agent may be disciplined for breach of fiduciary duty even in the absence of fraud.

Respondent argues that breach of fiduciary duties is not among the offenses specified in Financial Code section 17414.1(b)(7) which justify censure, suspension or preclusion from employment, management or control pursuant to Financial Code section 17423(a), and that the phrase "any other offense," as used in Financial Code section 17423(a)(2), refers to an offense similar in nature to those listed in section 17414.1(b)(7). He is correct in his first assertion but incorrect in his second.

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Financial Code section 17423 states in pertinent part:

“(a) The commissioner may, after appropriate notice and opportunity for hearing, by order, censure or suspend for a period not exceeding 12 months, or bar from any position of employment, management, or control any escrow agent, or any other person, if the commissioner finds either of the following:

* * *

(2) That the person has been convicted of or pleaded nolo contendere to any crime, or has been held liable in any civil action by final judgment, or any administrative judgment by any public agency, if that crime or civil or administrative judgment involved any offense specified in subdivision (b) of Section 17414.1, or any other offense reasonably related to the qualifications, functions, or duties of a person engaged in the business in accordance with the provisions of this division.”

(Emphasis added.)

The phrase “any other offense” does not mean that the unnamed offense must be similar in nature to those specified in section 17414.1(b). Rather, rather the plain language of the statute evinces a presumption that the specified offenses referenced in section 17414.1(b) are each reasonably related to the qualifications, functions or duties of a person engaged in the escrow business, and that any other offenses giving rise to discipline pursuant to section 17423(a) must also be so related.

An escrow agent owes a fiduciary duty to each of the parties to an escrow. (Hannon v. Western Title Ins. Co. (1989) 211 Cal.App. 3d 1122, 1127-1128.) A breach of that fiduciary duty is at least reasonably, and more likely substantially, related to the escrow agent’s qualifications, functions and/or duties. Therefore, breach of fiduciary duty is a qualifying offense under Financial Code section 17423(a)(2). In addition, under a number of circumstances, a breach of fiduciary duty can constitute constructive fraud. (Civil Code section 1573; *California Real Estate Loans, Inc. v. Wallace* (1993) 18 Cal. App. 4th 1575, 1581.)

Breach of fiduciary duty by a real estate broker in a real estate transaction is reasonably related to the qualifications, functions or duties of an escrow agent.

Respondent claims that a real estate broker holds a great many serious and varied fiduciary duties to his/her clients and that, since those fiduciary duties are much broader than those of an escrow agent, a breach of fiduciary duty by a real estate broker in a real estate transaction is not reasonably related to the qualifications, functions or duties of an escrow agent.

"Fiduciary duty" has been defined as follows:

"A duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person. It is the highest standard of duty implied by law (e.g., trustee, guardian). Black's Law Dictionary (6th ed.) p. 625. (Emphasis added.)

Respondent offered neither statutory nor precedential authority for the proposition that various fiduciary duties must or even should be qualified or quantified for purposes of determining whether the breach of such duty is sufficient grounds to bar an individual from employment, management or control of an escrow agent. The number or nature of fiduciary duties held by the individual is immaterial in making that determination, and it is expected that fiduciary duties in one profession will be different from those in another. However, if one breaches a fiduciary duty, he/she breaches "the highest standard of duty implied by law," regardless of that duty's definition. The breach of that standard is as serious in the escrow business as it is in the real estate business.

Further, Respondent seems to take the position that, simply because a real estate broker has more fiduciary duties than an escrow agent, the breach of one of those duties within the context of a real estate transaction cannot be considered reasonably related to the qualifications, functions or duties of an escrow agent. That argument is without authority and without merit. Even if Respondent could show that certain fiduciary duties breached by a real estate broker should not be considered for purposes of Financial Code section 17423, he would have to establish (1) which one(s) should not be so considered, (2) why they should not be so considered, and (3) that the fiduciary duty Respondent was found to have breached in the civil action qualifies as one that should not be considered. No evidence was offered to establish any of those three criteria.

FACTUAL FINDINGS

The Administrative Law Judge makes the following factual findings:

1. Beginning on a date prior to May 1, 2002, Respondent was an escrow officer at Suburban Cities Escrow, Inc. ("Suburban"), formerly Suburban Cities Escrow, Inc. f/k/a Cal Cities Escrow, Inc. ("Cal Cities"), an escrow agent licensed by Complainant pursuant to California's Escrow Law (Financial Code section 17000, et seq.).
2. Prior to November 1, 1999, Respondent was the Responsible Managing Officer of Remax College Park Realty, Inc., a corporate real estate broker. Both Respondent and Remax College Park Realty, Inc. were licensed by the California Department of Real Estate as real estate brokers.

3. On May 21, 1998, a Complaint was filed in Superior Court of California, County of Orange, in the case of Reuben Hughes, et al. vs. Remax College Park Realty, Inc., et al. Orange County Superior Court Case No. 794601. Both Respondent and Remax College Park Realty, Inc. were named defendants in that lawsuit.

4. On November 1, 1999, a Judgment on Special Verdict was issued in the above-referenced lawsuit. According to that judgment, the jury, by special verdict found, *inter alia*, that Respondent had been negligent and had breached his fiduciary duty to the plaintiffs in connection with the allegations contained in the Complaint.

5. The facts and circumstances underlying the civil lawsuit involved a real estate transaction in which the buyer and the seller were respectively represented by salespersons associated with Remax College Park Realty, Inc. Although Respondent was the Responsible Managing Officer of Remax College Park Realty, Inc. at that time, he was not directly involved with the subject transaction, but was responsible for overseeing the agents associated with Remax College Park Realty, Inc.

6. A breach of fiduciary duty is reasonably related to the qualifications, functions and duties of an escrow agent.

7. On May 18, 2001, Cal Cities filed an application for change of ownership according to which Respondent, Suburban's Secretary and Treasurer, sought to transfer 19,600 shares of Cal Cities' stock to Mary L. Thatch. (An additional transfer of 400 shares from Carol Olivia Treadway, the company's Chief Operating Officer, to Ms. Thatch was also indicated.) Following the change in ownership, Respondent would hold the titles of Secretary and Chief Financial Officer. As was the case before the change in ownership, he would also be one of three directors.

8. Based on the civil judgment referenced in Paragraph 4 above, Department of Corporations Special Administrator, Steven C. Thompson, recommended that the application be denied and that the matter be forwarded to the Enforcement and Legal Services Division for an order barring Respondent from any position of employment, management and control of an escrow agent pursuant to Financial Code section 17423. However, on September 19, 2001, before the Department of Corporations ("Department") could act on Mr. Thompson's recommendation, Cal Cities filed another application for change of ownership. That application reflected Respondent's intent to transfer 20,000 shares of Cal Cities' stock to Mary L. Thatch, as Trustee of the Mary L. Thatch Revocable Trust, and 19,600 shares of the company's stock to Carolyn O. Treadway as Trustee of the Carolyn O. Treadway Family Trust. Appended to the application was Respondent's resignation from all positions as an Officer and as a Director of Cal Cities Escrow, Inc. On September 24, 2001, Complainant consented to the securities transfer.

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9. On May 1, 2002, Suburban filed another application for change of ownership. According to that application, Respondent was to receive a transfer of 33.3% of Suburban's outstanding shares. Thereafter, he would hold the title of Vice-President and would serve as one of Suburban's three directors.

LEGAL CONCLUSIONS

Pursuant to the foregoing Factual Findings, the Administrative Law Judge makes the following legal conclusions:

1. Cause exists to bar Respondent from any position of employment, management or control of any escrow agent pursuant to Financial Code section 17423, for having been held liable in a civil action involving an offense substantially related to the qualifications, functions and duties of a person engaged in the escrow business, as set forth in Findings 1, 2, 3, 4, 5, 6, 7, 8 and 9.

Respondent argues that the Accusation violates Government Code section 11503 in that the language of the Accusation simply parrots that in Financial Code section 17423. That argument is without merit.

Government Code section 11503 states in pertinent part:

"The accusation shall be a written statement of charges which shall set forth in ordinary and concise language the acts or omissions with which the respondent is charged, to the end that the respondent will be able to prepare his defense. It shall specify the statutes and rules which the respondent is alleged to have violated, but shall not consist merely of charges phrased in the language of such statutes and rules."

The Accusation alleges a violation of Financial Code section 17423 and sets forth "in ordinary and concise language" the facts on which the allegation is made (Accusation, page 2, lines 17-26).

Respondent further argues that the offense that formed the basis of the civil judgment (breach of fiduciary duty) is not reasonably related to the qualifications, functions or duties of one engaged in the escrow business. As is more fully set forth above with respect to Respondent's Motion to Dismiss, a breach of fiduciary duty, whether in connection with one's work in the escrow business or as a real estate broker, bears a more than adequate nexus to satisfy the necessary requisites of Financial Code section 17423(a)(2).

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Respondent failed to offer any evidence of mitigation or rehabilitation, or any other evidence that might serve to militate against an outright bar from employment, management and control of any escrow agent. In fact, so little was offered with respect to the facts and circumstances that resulted in the civil judgment against Respondent, the trier of fact is left without knowing whether the jury rendered its verdict despite Respondent's lack of involvement in the subject transaction or because of his lack of involvement in it. Absent any such evidence, a complete bar is the only feasible result.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

Respondent, Barry C. Binder, is barred from any and all employment, management and/or control of any escrow agent.

DATED: March 6, 2003

H. STUART WAXMAN
Administrative Law Judge
Office of Administrative Hearings