

NEW JERSEY REAL ESTATE COMMISSION

NEW JERSEY REAL ESTATE)	
COMMISSION)	Docket No.: OCE-17-021
)	REC Ref. No.: 10005896
)	
Complainant,)	
)	
v.)	FINAL ORDER OF
)	DETERMINATION
JUDY FITZGERALD, a/k/a JUDITH A.)	
FITZGERALD, licensed New Jersey real)	
estate salesperson, (SP0230826))	
)	
Respondent.)	

This matter was heard at a hearing by the New Jersey Real Estate Commission (“Commission”) at the Department of Banking and Insurance, State of New Jersey in the Commission Hearing Room, 20 West State Street, Trenton, New Jersey on January 23, 2018.

BEFORE: Commissioners Linda K. Stefanik, Eugenia K. Bonilla, Sanjeev Aneja, Christina Banasiak, and Denise M. Illes.

APPEARANCES: Marianne Gallina, Regulatory Officer, appeared on behalf of the New Jersey Real Estate Commission staff (“REC”). Respondent Judy Fitzgerald (“Respondent” or “Fitzgerald”) appeared *pro se*.

STATEMENT OF THE CASE

The REC initiated this matter on its own motion through service of an Order to Show Cause (“OTSC”) dated October 30, 2017, pursuant to N.J.S.A. 45:15-17, 45:15-18, 45:15-19.2,¹

¹ On page one of the OTSC, it states that the OTSC is being issued pursuant to N.J.S.A. 45:15-19.2, which provides that the Commission may suspend the license of a licensee pending trial for

and N.J.A.C. 11:5-1.1 to -12.18. The OTSC alleges that although the Respondent was actively licensed in October and November 2015, the Respondent did not notify the Commission, pursuant to N.J.S.A. 45:15-17s, that on or about October 20, 2015 she was arrested and charged with the criminal offense of Theft by Deception. The OTSC further alleges that although the Respondent was actively licensed in January and February 2016, the Respondent did not notify the Commission, pursuant to N.J.S.A. 45:15-17s, that on or about January 26, 2016, the Respondent was indicted in the Superior Court of New Jersey, Ocean County, Indictment No. 16-01-187, on one count of Theft by Deception, a crime of the third degree. The OTSC further alleges that the conduct underlying the criminal charges demonstrates unworthiness, bad faith, and dishonesty, in violation of N.J.S.A. 45:15-17e. Finally, the OTSC alleges that the Respondent's conduct as alleged in the OTSC constitutes fraud or dishonest dealings, in violation of N.J.S.A. 45:15-171.

The Respondent timely filed an Answer to the OTSC wherein she admitted to and denied certain allegations as set forth in the OTSC. Accordingly, on November 28, 2017, the Commission reviewed the pleadings, deemed this matter a contested case, and directed that a hearing be scheduled.

A hearing was conducted on January 23, 2018, at which time the following exhibits were admitted into evidence by the REC, without objection:

- S-1 Toms River Municipal Court Complaint-Summons, State of New Jersey v. Judith A. Fitzgerald, dated October 20, 2015;
- S-2 Indictment No. 16-01-187, Superior Court of New Jersey Ocean County, State of New Jersey v. Judith A. Fitzgerald, dated January 26, 2016;
- S-3 Pre-Trial Intervention Order of Postponement, State of New Jersey v. Judith

certain enumerated offenses, including any theft offense. However, this appears to be a typographical error as the OTSC does not seek the suspension of the Respondent's license based upon this statutory citation nor did the REC seek such relief at the hearing.

A. Fitzgerald, filed May 9, 2016; and

- S-4 Social Security Administration Retirement, Survivors and Disability Insurance Notice of Change in Benefits, addressed to Judy A. Fitzgerald, dated April 12, 2017.

TESTIMONY OF THE WITNESSES

Judy Fitzgerald

The Respondent testified on her own behalf. She testified that she has been a licensed real estate agent in New Jersey since 2002.

Regarding the conduct underlying the criminal charges against her, the Respondent testified that her husband, James Fitzgerald, applied for social security disability benefits because he was ill from cancer. She claimed that in or about August 2010 her husband was awarded social security disability benefits, and that those benefits were electronically deposited directly into her husband's bank account, which was solely owned by him and in his name only. She testified that her husband's pension checks were also being directly deposited electronically into that same bank account.

The Respondent testified that she had no access to her husband's bank account records because they were paperless and had no access to ascertain the account balance. She had access only to the money in his bank account through a Money Access Debit Card ("MAC Debit Card").

The Respondent testified that during a visit with her husband to the Social Security Administration Office in Toms River, New Jersey in or about July 2010, she was told by a Social Security Administration official that she would be eligible for, and would receive, widow's benefits when her husband dies.

The Respondent testified that her husband died on October 1, 2011. She further testified that she was very depressed and that she was hit with multiple horrific circumstances around the

time of her husband's death including, that her mother was sick, her dog was dying, her brother was dying, and her house was being foreclosed upon. She testified that she was not aware of a lot of things going on at that time because she was so depressed.

The Respondent testified that she relied upon information provided to her by her attorney and by the funeral director. Specifically, her attorney informed her that everything her late husband owned would go to her and that she did not need to probate the will. The funeral director for her husband's funeral stated that he would notify everyone about her husband's death. She believed that this included notifying the Social Security Administration of her husband's death. However, the Social Security Administration was not notified at the time of her husband's death and continued to pay social security disability payments into her husband's bank account.

The Respondent testified that she used her husband's MAC Debit Card to pay household bills online. She did not know how much money was in the account because she did not have the passcode to access the account to check balances, nor did she go to the bank to inquire about anything because she was very depressed. She testified that she did not have her own bank account, and that she was preoccupied in trying to "stay in her house and keep the lights on" as long as she could.

The Respondent testified she was further distressed because the housing market had crashed, her home was being foreclosed on, and then Superstorm Sandy hit in 2014 and caused damage to her property.

The Respondent further testified that in June 2014, two investigators from the Social Security Administration contacted her and advised that social security disability payments were deposited directly into her husband's bank account after his death, and that they had questions about those deposited monies. The Respondent stated that she was cooperative and truthful when

stating that she thought any money deposited in that account was her widow benefits, and she immediately provided the MAC Debit Card to the investigators.

The Respondent testified that six months later a detective called her and told her that \$37,000 was in her husband's bank account, of which she was not aware. Thereafter, she received a letter of award of survivor benefits. She testified that the Social Security Administration Office advised her that her husband's benefits would be converted to widow benefits, and that she did not owe any monies and that she did not do anything wrong.

The Respondent testified that she was later issued summons to appear before the Superior Court in Ocean County alleging she wrongfully received social security disability payments when her husband had been deceased.

The Respondent testified that she believed she was innocent of the charges and wanted to try the case. She also testified that her attorney told her that going to trial would be very expensive and that she would be eligible for Pre-Trial Intervention ("PTI"), and if admitted into PTI, the charges against her would be dropped after three years.

The Respondent testified that in May 2016, she was admitted into the PTI program and is currently on probation for a period of 36 months and required to make restitution of \$27,520. The Respondent further testified that in addition to the Court-ordered restitution of \$25 per month, she has made arrangements with the Social Security Administration to withhold \$50 from her social security widow's benefit to pay off the restitution requirement as soon as possible. The Respondent claims that as a result of her accelerated payments her current balance owed is approximately \$18,000, paid down from an original balance of approximately \$62,911 of wrongfully-collected social security benefits.

The Respondent admitted that she failed to notify the Commission within 30 days of her

October 20, 2015 arrest on the charge of Theft by Deception. She further admitted that she failed to notify the Commission within 30 days of being indicted on or about January 26, 2016. She mistakenly believed that the reporting requirement applied only to convictions, not simply charges. The Respondent testified that she notified the Commission that she was on criminal probation when she renewed her real estate salesperson license in 2017.

The Respondent testified that currently she is 63 years old and is trying to rebuild her life since losing her husband in 2011 and her home in 2015. She claims it will be extremely difficult if not impossible to start a new profession at her age, and concluded that the termination of her real estate license will mitigate her ability to pay the restitution in her criminal matter. The Respondent requested leniency in consideration that she has never been convicted of a crime and that she erred unintentionally.

Doreen Longo

Longo testified that she has known the Respondent since 1995 when they were both students together. Longo said that the Respondent is honest, trustworthy, caring, will go above and beyond to help anyone, and displays a true passion for her career and the utmost of professionalism.

Longo testified that the Respondent was the listing agent on her mother's home after her mother died, and Longo referred her son to the Respondent and the Respondent sold him a home and assisted him in obtaining a mortgage.

Longo further testified that several horrible things happen to the Respondent in a short time frame, including the Respondent's husband's cancer diagnosis, the Respondent's mother's illness, and the Respondent's brother and dog died in a two month span.

FINDINGS OF FACT

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

1. Respondent Fitzgerald is a licensed New Jersey real estate salesperson currently licensed with Grand Central Station, LLC, d/b/a ReMax Real Estate Ltd., licensed New Jersey real estate broker, whose main office is located at 284 Mantoloking Road, Brick, N.J.
2. Respondent Fitzgerald was first licensed in New Jersey in 2002, and at all times relevant hereto, the Respondent was actively licensed with Weichert Co., licensed New Jersey real estate broker.
3. On or about October 20, 2015, the Respondent was arrested and charged with committing Theft by Deception, in violation of N.J.S.A. 2C:20-4A.
4. Although licensed by the Commission in October and November 2015, the Respondent did not notify the Commission of her arrest and the charges against her. The Respondent explained that she believed that she needed to notify the Commission of convictions, not arrests and charges.
5. On or about January 26, 2016, Respondent Fitzgerald was indicted in the Superior Court of New Jersey, Ocean County, Indictment No. 16-01-187, on one count of Theft by Deception, a crime of the third degree, in violation of N.J.S.A. 2C:20-4A.
6. Although licensed by the Commission in January and February 2016, the Respondent did not notify the Commission of the indictment. The Respondent explained that she believed that she needed to notify the Commission of convictions, not indictments.

7. On or about May 3, 2016, Respondent Fitzgerald was admitted into the PTI Program, and the criminal proceedings against her were postponed for a period of 36 months, beginning on May 9, 2016. As part of her PTI, the Respondent is required to make restitution of \$27,520 to the Social Security Administration.

CONCLUSIONS OF LAW

1. The Respondent failed to notify the Commission within 30 days of being arrested and charged with a crime and within 30 days of being indicted of a crime, constituting two violations of N.J.S.A. 45:15-17s, as alleged in the OTSC.
2. There is insufficient evidence to support a finding of a violation of N.J.S.A. 45:15-17e, as alleged in the OTSC.
3. There is insufficient evidence to support a finding of a violation of N.J.S.A. 45:15-17l, as alleged in the OTSC.

DETERMINATION

At the conclusion of the hearing and executive session in this matter, the Commission voted in favor of finding the violations and imposing the sanctions described in this Final Order of Determination. In arriving at the determination in this matter, the Commission took into consideration the testimony of the witnesses and the undisputed documentary evidence admitted at the hearing. The Commission also considered the circumstances surrounding the Respondent's actions.

Allegations Against the Respondent

The OTSC alleges that by failing to timely notify the Commission of criminal charges and an indictment, the Respondent violated N.J.S.A. 45:15-17s (licensees must notify the Commission within 30 days of having been indicted or of the filing of any formal criminal charges.) Here, on

or about October 20, 2015, the Respondent was arrested and charged with committing Theft by Deception, in violation of N.J.S.A. 2C:20-4A. Although licensed by the Commission in October and November 2015, the Respondent did not notify the Commission of her arrest and the charges against her. On or about January 26, 2016, the Respondent was indicted in the Superior Court of New Jersey, Ocean County, Indictment No. 16-01-187, on one count of Theft by Deception, a crime of the third degree, in violation of N.J.S.A. 2C:20-4A. Although licensed by the Commission in January and February 2016, the Respondent did not notify the Commission of the indictment.

The Respondent admitted that she failed to report the arrest and charges as well as the indictment to the Commission because she mistakenly believed that only convictions needed to be so reported. However, the Respondent, as a real estate licensee, has a responsibility to be aware of and abide by the statutes and regulations that apply to her real estate license. The Respondent was tasked to be knowledgeable as to the specific notice requirements that related to the filing of formal criminal charges against her. As such, the Commission finds that the Respondent is in violation of N.J.S.A. 45:15-17s (two counts) for failing to timely notify the Commission of the filing of criminal charges against her and the indictment.

The OTSC further alleges that the conduct underlying the criminal charges demonstrates unworthiness, bad faith, and dishonesty, in violation of N.J.S.A. 45:15-17e and said conduct constitutes fraud or dishonest dealings, in violation of N.J.S.A. 45:15-171. The facts underlying the criminal charges are not in dispute. The Respondent failed to report her husband's death to the Social Security Administration, and continued collecting her deceased husband's social security disability benefits for over two years after his death. The Respondent explained that she did not intend to deceive or act in a dishonest manner. Instead, the Respondent mistakenly relied upon

the funeral director to report her husband's death, and assumed the monies received in the account were social security widow's benefits that she was entitled to receive. Moreover, the Respondent testified that she was distraught and depressed over the deaths of her husband, brother, and dog, and her mother's serious illness at the time, the financial challenges and hardships created by Superstorm Sandy which damaged her home, and the ultimate loss of her home to foreclosure during the time period. Although the Respondent used her husband's MAC Debit Card after his death, she believed the money being put in the account were her social security widow's benefits.

After being criminally charged and indicted, the Respondent was accepted into the PTI program. The terms of PTI include an order to postpone the criminal proceedings for a period of 36 months beginning on May 9, 2016. According to the Respondent's testimony, the terms of PTI also include a requirement to pay restitution of \$27,520 to the Social Security Administration. According to her testimony, the Respondent has been making payments towards the \$27,520 restitution as required and a balance of approximately \$18,000 remains. The record is void of any documents wherein the Respondent makes any admissions of criminal wrongdoing.

The Commission found the Respondent to be credible and no evidence was presented to contradict the Respondent's credible testimony that she did not act with dishonest or fraudulent intent. Accordingly, the Commission finds there to be insufficient evidence to support findings that the Respondent violated N.J.S.A. 45:15-17e or 17l.

Penalty Against the Respondent

The Real Estate License Act, N.J.S.A. 45:15-1 to -42 ("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 Comm'n, 29 N.J. Super. 178, 181-182 (App. Div. 1954). The nature and duties of a real

estate business are grounded in interpersonal, fiduciary, and business relationships and demand the utmost honesty, trust, and good conduct. Maple Hill Farms, Inc. v. New Jersey Real Estate Comm'n, 67 N.J. Super. 223, 232 (App. Div. 1961); Div. of New Jersey Real Estate Comm'n 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 Comm'n v. Ponsi, 39 N.J. Super. at 532-533. Thus, the Commission has the power to suspend, revoke, or place on probation the license of any licensee for "failing to notify the commission within 30 days of having been ... indicted, or of the filing of any formal criminal charges." N.J.S.A. 45:15-17s.

Based upon a review of the pending criminal matter against the Respondent, and given the mitigating circumstances, as discussed above, the Commission determined that the appropriate penalty in this matter is for the Respondent's real estate salesperson license to be held on probation, with the conditions set forth below, for a period concurrent with her criminal PTI, and that a fine be imposed.

Pursuant to N.J.S.A. 45:15-17, the Commission may impose of 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 to evaluate 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) any 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. Kimmelman, 108 N.J. at 137-139. Analysis of these factors in this matter requires the

imposition of a lesser fine.

First, the Respondent's actions do not demonstrate bad faith. Although the Respondent, as a real estate licensee, has a responsibility to be aware of and abide by the statutes and regulations that apply to her real estate license, the Commission found her testimony to be credible in that she mistakenly believed that only convictions needed to be so reported to the Commission.

As to the second factor, through her credible testimony, the Respondent has demonstrated a limited ability to pay as evidenced by the loss of her home through foreclosure, and her limited income.

The third Kimmelman factor addresses the amount of profits obtained or likely to be obtained from the illegal activity. The greater the profits an individual is likely to obtain from the illegal conduct, the greater the penalty must be if penalties are to be an effective deterrent. Kimmelman, 108 N.J. at 138. In the present matter, it does not appear that the Respondent financially benefited from her failure to notify the Commission of the criminal charges filed against her and the indictment. When she renewed her license, the Respondent truthfully disclosed the pending criminal charges.

The fourth Kimmelman factor addresses the injury to the public. In order to protect consumers, the Commission is charged with the "high responsibility of maintaining ethical standards among real estate brokers and sales[persons]." Goodley, 29 N.J. Super. at 182. The Respondent's failure to comply with the Commission's notification requirements are contrary to the principle intent behind the Act: to "protect consumers by excluding 'undesirable, unscrupulous and dishonest persons' ... from the real estate business." Sammarone v. Bovino, 395 N.J. Super. 132 (App. Div.); see also Tobias v. Comco/America, Inc., 96 N.J. 173, 180 (1984); Kazmer-Standish Consultants, Inc. v. Schoeffel Instruments Corp., 89 N.J. 286, 290 (1982); and Markheim-

Chalmers, Inc. v. Masco Corp., 332 N.J. Super. 452, 457 (App. Div. 1999). Here, the Respondent did not notify the Commission within 30 days of the filing of criminal charges against her and of the filing of the indictment against her. As set forth above, this conduct was not motivated by bad faith. However, as previously provided, the responsibility falls on the licensee to be aware of the applicable statutory and regulatory requirements of those in their profession. The Commission must encourage licensees to abide by the rules that are in place to protect consumers and ensure ethical conduct by those in the real estate profession. The Respondent's failure to abide by these rules weighs in favor of a monetary penalty.

The fifth Kimmelman factor to be examined is the duration of the illegal activity. Based on the testimony provided, the failures to notify the Commission of the pending criminal matters appear to be isolated in nature.

Sixth, the Respondent has not been party to criminal proceedings related to her failure to notify the Commission of the criminal charges filed against her.

As to the final factor, there is no evidence of prior violations committed by the Respondent.

In light of these factors and penalties previously assessed by the Commission, the Respondent shall pay a fine in the amount of \$250 for two counts of failure to timely notify the Commission of the criminal charges filed against her, in violation of N.J.S.A. 45:15-17s. This penalty is consistent with prior Commission decisions. See NJREC v. Charles Chichizola, Dkt. No. BER-15-018, Final Order (02/14/17) (licensee fined \$250 for failure to notify the Commission within 30 days of the filing of criminal charges against him, in violation of N.J.S.A. 45:15-17s).

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

- I. The Respondent's real estate salesperson license shall be held on probation from

the date of this Final Order of Determination for the duration she is in the criminal PTI program. During the period of probation, the following conditions apply: 1) Fitzgerald shall inform her employing broker that her license is currently on probation as prescribed herein; 2) Fitzgerald's broker shall notify the Commission within 72 hours if he or she receives any information indicating that Fitzgerald may have violated the Act or corresponding regulations; 3) Fitzgerald must notify the Commission within 72 hours if she is charged with or convicted of any criminal or disorderly persons offense; and 4) Fitzgerald must notify the Commission within 72 hours if she is notified that she may have violated the terms of her criminal PTI program; and

- II. The Respondent shall pay a fine of \$250, which may be paid on a payment schedule agreed to by the Respondent and the Department of Banking and Insurance.

SO ORDERED this 27th day of June 2018.

By: Linda K. Stefanik, President
Eugenia K. Bonilla, Vice President
Sanjeev Aneja, Commissioner
Christina Banasiak, Commissioner
Denise M. Illes, Commissioner



Patrick J. Mullen
Director of Banking