

WISCONSIN DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES



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**Before the
State Of Wisconsin
Real Estate Examining Board**

In the Matter of the Disciplinary Proceedings
Against KEVIN G. ECKER, Respondent

FINAL DECISION AND ORDER

Order No. 0002953

Division of Legal Services and Compliance Case No. 13 REB 070


The State of Wisconsin, Real Estate Examining Board, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, make the following:

ORDER

NOW, THEREFORE, it is hereby ordered that the Proposed Decision annexed hereto, filed by the Administrative Law Judge, shall be and hereby is made and ordered the Final Decision of the State of Wisconsin, Real Estate Examining Board.

The rights of a party aggrieved by this Decision to petition the department for rehearing and the petition for judicial review are set forth on the attached "Notice of Appeal Information."

Dated at Madison, Wisconsin on the 26th day of February, 2015.



Member
Real Estate Examining Board



Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Disciplinary Proceedings
Against **KEVIN G. ECKER**, Respondent

PROPOSED DECISION AND ORDER
DHA Case No. SPS-14-0007

Order No. 0002953

Division of Legal Services and Compliance Case No. 13 REB 070

The parties to this proceeding for purposes of Wis. Stat. §§ 227.47(1) and 227.53 are:

Kevin G. Ecker
325 Court Street
P.O. Box 265
Stockbridge, WI 53088

Real Estate Examining Board
P.O. Box 8366
Madison, WI 53708-8366

Department of Safety and Professional Services, Division of Legal Services and
Compliance, by

Attorney Sarah E. Norberg
Department of Safety and Professional Services
Division of Legal Services and Compliance
P.O. Box 7190
Madison, WI 53707-7190

PROCEDURAL HISTORY

These proceedings were initiated when the Department of Safety and Professional Services, Division of Legal Services and Compliance (Division), filed a formal Notice of Hearing and Complaint against Respondent Kevin G. Ecker (Respondent). The Complaint alleged that Respondent's license was subject to disciplinary action pursuant to Wis. Stat. § 452.14(3)(b), (i), (k) and (L) because Respondent: (1) violated Wis. Stat. § 452.13(2)(c) and Wis. Admin. Code § REEB 18.031(3)(a) by failing to deposit client funds in an interest-bearing common trust account; (2) violated Wis. Stat. § 452.133(1)(f) by failing to safeguard trust funds held by the broker; (3) violated Wis. Stat. § 452.133(1)(a) by failing to provide brokerage services honestly and fairly; (4) violated Wis. Stat. § 452.133(2)(a)1. by failing to place his

client's interests ahead of his own; (5) violated Wis. Stat. § 452.133(3)(b) by acting in a transaction on his own behalf, and (6) violated Wis. Admin. Code § REEB 24.03(2)(b) by failing to protect the public against fraud, misrepresentation and unethical practices. The Division served Respondent on January 24, 2014 by sending a copy of the Notice of Hearing and Complaint to his address on file with the Department. Although Respondent eventually filed an Answer to the Complaint, his Answer was not filed within 20 days of service of the Complaint as required by Wis. Admin. Code § SPS 2.09. Furthermore, Respondent failed to appear at multiple prehearing conferences held before the Division of Hearings and Appeals, including conferences held on February 26, 2014, September 18, 2014, November 6, 2014 and December 10, 2014.

At the prehearing conference held on December 10, 2014, the Division moved for default pursuant to Wis. Admin. Code § SPS 2.14 and Wis. Admin. Code § HA 1.07(3)(c), based on Respondent's repeated failures to appear for scheduled conferences. The undersigned administrative law judge (ALJ) found Respondent to be in default and on December 10, 2014, issued a Notice of Default against Respondent which required the Division to file a recommended proposed decision by January 9, 2015. The Division timely filed its recommended proposed decision. Respondent did not file a response to either the Notice of Default or to the Division's subsequent submission.

FINDINGS OF FACT

Facts Related to the Alleged Violations

Findings of Fact 1–22 are taken from the Division's Complaint against Respondent filed in this matter.

1. Respondent Kevin G. Ecker, (D.O.B. 02/10/1960), is licensed in the State of Wisconsin as a Real Estate Broker, having license number 26990-090, first issued on June 2, 1982, and expired on December 14, 2014.

2. Respondent's most recent address on file with the Wisconsin Department of Safety and Professional Services (Department) is P.O. Box 265, Stockbridge, WI 53088-0265. Respondent does business as Wisconsin Real Estate.

3. On December 18, 2006, Dennis Van Grinsven entered into a WB-6 Business Listing Contract-Exclusive Right to Sell with Respondent for the sale of his and his wife's business, DJ's Used Truck Sales. The listing contract was subsequently extended on multiple occasions.

4. In November 2008, Respondent indicated that he had a buyer for the Van Grinsven business (Scott Lenz and/or Hwy 55 Used Truck Sales, LLC) but that the buyer needed assistance with a down payment. Respondent asked Dennis and Anna Van Grinsven if they would advance a down payment to the buyer.

5. On November 14, 2008, Anna Van Grinsven issued a check (number 1303) from the DJ's Used Truck Sales, Dennis or Anna Van Grinsven, Owners account, in the amount of

\$75,000 to "Wi Realestate" as an advance on closing to provide a method for the buyer to have a down payment on the purchase of their business and residence. The memo line of the check states, "closing expense."

6. On November 17, 2008, the Van Grinsvens' check number 1303 was endorsed by Kevin Ecker, Wisconsin Real Estate and deposited into Respondent's business account (no. 011279) at the State Bank of Chilton.

7. In April 2009, Respondent indicated the potential buyer needed additional money for a down payment.

8. On April 16, 2009, Anna Van Grinsven issued a check (number 1602) from the DJ's Used Truck Sales, Dennis or Anna Van Grinsven, Owners account, in the amount of \$35,000 to "Wi Realestate." The memo line of the check states, "business sale."

9. On April 17, 2009, the Van Grinsvens' check number 1602 was endorsed by Wisconsin Real Estate, Kevin Ecker and deposited into Respondent's business account (no. 011279) at the State Bank of Chilton.

10. When the sale of the Van Grinsvens' business failed to close, Respondent informed the Van Grinsvens that their money was invested in an account with Bank of America.

11. The alleged potential sale of the Van Grinsvens' business to Scott Lenz and/or Hwy 55 Used Truck Sales, LLC never occurred.

12. In December 2012, the Van Grinsvens informed Respondent that they wanted their money returned.

13. In February 2013, the Van Grinsvens received a bankruptcy notice from Respondent.

14. The Calumet County Sheriff's Department was unable to locate any company named Hwy 55 Used Truck Sales, LLC or any interested buyer named Scott Lenz.

15. A review of Respondent's numerous bank accounts reveal that Respondent never placed the Van Grinsvens' money into his real estate trust account (M&I Marshall & Ilsley Bank account number 16002598), but instead used the money for personal purposes.

16. On or about May 15, 2009, Jeff Rueden entered into a listing contract with Respondent for the sale of a commercial real estate property in Hilbert, Wisconsin.

17. Between June 16, 2009 and September 4, 2009, Mr. Rueden had three checks issued from his business account, Rueden Beef LLC, totaling \$80,000, to Wisconsin Real Estate. The purpose of these funds was to provide a potential buyer with a cash incentive to make an offer to purchase the property.

18. Between June 17, 2009 and September 4, 2009, Mr. Rueden's checks were endorsed by Wisconsin Real Estate, Kevin Ecker and deposited into Respondent's business account (no. 011279) at the State Bank of Chilton.

19. Mr. Rueden's property did not sell.

20. Respondent has not returned the \$80,000 to Mr. Rueden.

21. On November 22, 2013, Respondent was charged with two counts of Felony Theft-Business Setting > \$10,000 (Calumet County Case Number 2013CF000186).

22. On December 11, 2013, Respondent informed the Department that he is still practicing real estate and has an active listing.

23. On November 4, 2014, Respondent was convicted of one count of Felony Theft-Business Setting > \$10,000 (Calumet County Case Number 2013CF000186).¹

Facts Related to Default

24. The Complaint and Notice of Hearing in this matter were served on Respondent on January 24, 2014 by both certified and regular mail, consistent with Wis. Admin. Code § SPS 2.08. The Notice of Hearing advised Respondent: "If you do not provide a proper Answer within 20 days, you will be found to be in default and a default judgment may be entered against you on the basis of the Complaint and other evidence. In addition, the Board may take disciplinary action against you and impose the costs of the investigation, prosecution and decision of this matter upon you without further notice or hearing."

25. Respondent failed to file an Answer as required by Wis. Admin. Code § SPS 2.09(4).

26. Following expiration of the 20-day time period to file an Answer, the ALJ scheduled a telephone prehearing conference for February 26, 2014. Notice of this prehearing conference was sent to both parties, with instructions that Respondent provide the ALJ with a telephone number at which he could be reached no later than February 21, 2014. The Notice instructed Respondent: "A respondent's failure to appear at a scheduled conference or hearing may result in default judgment being entered against the respondent."

27. Respondent failed to provide a telephone number and could not be reached for the prehearing conference.

28. Respondent subsequently contacted the ALJ, claiming that he had never received the Division's Complaint or the Notice of Prehearing Conference. An additional prehearing conference was held.

29. As a result of the information provided by Respondent, the ALJ scheduled an additional telephone prehearing conference for March 11, 2014. The Notice of Prehearing Conference informed Respondent that he was to file an Answer to the Division's Complaint by March 10, 2014.

¹ The Division attaches to its recommended proposed decision a Wisconsin Circuit Court Access (WCCA) printout reflecting this conviction. I take official notice of Respondent's conviction as reflected in WCCA and the attached printout.

30. Respondent requested that the March 11, 2014 prehearing conference be rescheduled for March 20, 2014. A new Notice of Prehearing Conference was issued.

31. At the March 20, 2014 prehearing conference, Respondent stated that he had sent his Answer to an unidentified individual a week prior to the conference. The ALJ ordered him to re-send a copy of his Answer, which Respondent did on March 21, 2014.

32. Additional conferences were held, at which Respondent appeared intermittently. Respondent's subsequent failures to appear included failing to appear at conferences held on September 18, 2014, November 6, 2014 and December 10, 2014.

33. As a result of Respondent's failure to appear at the December 10, 2014 status conference, the Division moved for default pursuant to Wis. Admin. Code § SPS 2.14 and Wis. Admin. Code § HA 1.07(3)(c).

34. On December 10, 2014, the ALJ issued a Notice of Default and Order, requiring the Division to serve no later than January 9, 2015 a recommended proposed decision.

35. The Division timely filed its recommended proposed decision.

36. Respondent did not file a response to either the Notice of Default and Order or to the Division's subsequent submission.

DISCUSSION AND CONCLUSIONS OF LAW

Default

As stated in the December 10, 2014 Notice of Default and Order, Respondent is in default for repeated failures to appear for scheduled conferences. Wisconsin Admin. Code § SPS 2.14 provides: "If the respondent fails to answer as required by s. SPS 2.09 or fails to appear at the hearing at the time fixed therefor, the respondent is in default and the disciplinary authority may make findings and enter an order on the basis of the complaint and other evidence." In addition, Wis. Admin. Code § HA 1.07(3) states, in relevant part:

(3) FAILURE TO APPEAR.

...

(b) If a respondent fails to appear, the administrative law judge may . . . take the allegations in an appeal as true as may be appropriate . . .

(c) For a telephone or video hearing or prehearing, the administrative law judge may find a failure to appear grounds for default if any of the following conditions exist for more than ten minutes after the scheduled time for hearing or prehearing conference: (1) The failure to provide a telephone number to the division after it had been requested; (2) the failure to answer the telephone or videoconference line . . . (4) the failure to be ready to proceed with the hearing or prehearing conference as scheduled.

Because Respondent is in default for failure to appear, an order may be entered against him on the basis of the Complaint and other evidence. *See* Wis. Admin. Code § SPS 2.14; Wis. Admin. Code § HA 1.07(3)(b) and (c).

Violations of Wis. Stat. §§ 452.13(2)(c), 452.133(1)(a), 452.133(1)(f), 452.133(2)(a)1. and 452.133(3)(b) and Wis. Admin. Code §§ REEB 18.031(3)(a) and 24.03(2)(b)

Pursuant to Wis. Stat. § 452.14(3)(L), the Wisconsin Real Estate Examining Board (Board) may take disciplinary action against a real estate broker when it concludes that the broker violated any provision of Chapter 452 of the Wisconsin Statutes or any rule promulgated under that chapter. The Board's rules promulgated under Chapter 452 are contained in Chapters REEB 11-25 of the Wisconsin Administrative Code.

In its Complaint, the Division alleged that Respondent: (1) violated Wis. Stat. § 452.13(2)(c) and Wis. Admin. Code § REEB 18.031(3)(a) by failing to deposit client funds in an interest-bearing common trust account; (2) violated Wis. Stat. § 452.133(1)(f) by failing to safeguard trust funds held by the broker; (3) violated Wis. Stat. § 452.133(1)(a) by failing to provide brokerage services honestly and fairly; (4) violated 452.133(2)(a)1. by failing to place his client's interests ahead of his own; (5) violated Wis. Stat. § 452.133(3)(b) by acting in a transaction on his own behalf, and (6) violated Wis. Admin. Code § REEB 24.03(2)(b) by failing to protect the public against fraud, misrepresentation and unethical practices. The undisputed facts prove these violations.

Wisconsin Stat. § 452.13(2)(c) states that a "broker shall deposit all client funds in the interest-bearing common trust account." Likewise, Wis. Admin. Code § REEB 18.031(3)(a) states: "Client funds shall be deposited in an interest-bearing common trust account and the department of administration shall be the beneficial owner of the interest accruing to the account, minus any service charges. . . ."

It is undisputed that in 2008 and 2009, the Van Grinsvens issued checks in the amounts of \$75,000 and \$35,000, respectively, to "Wi Realestate" as an advance on closing to provide a method for the buyer to have a down payment on the purchase of their business and residence. The memo lines of the checks state, "closing expense" and "business sale," respectively. Respondent endorsed both checks and deposited them into his business account (no. 011279) at the State Bank of Chilton. Respondent never placed the Van Grinsvens' money into his real estate trust account (M&I Marshall & Ilsley Bank account number 16002598), but rather, used the money for personal purposes.

It is also undisputed that in 2009, Respondent's client, Mr. Rueden, had three checks issued from his business account, Rueden Beef LLC, totaling \$80,000, to Wisconsin Real Estate and that the purpose of these funds was to provide a potential buyer with a cash incentive to make an offer to purchase the property. Respondent endorsed Mr. Rueden's checks and they were deposited into his business account at the State Bank of Chilton rather than into an interest-bearing common trust account. Respondent did not return the \$80,000 to Mr. Rueden.

These facts establish that Respondent violated Wis. Stat. § 452.13(2)(c) and Wis. Admin. Code § REEB 18.031(3)(a) by failing to deposit client funds in an interest-bearing common trust account;

In addition, Wis. Stat. § 452.133(1) requires a broker providing brokerage services to “safeguard trust funds and other property held by the broker as required by rules promulgated by the department under s. 452.13(5),” Wis. Stat. § 452.133(1)(f), and “to provide brokerage services honestly and fairly.” Wis. Stat. § 452.133(1)(a). A broker also has a duty to “loyally represent a client’s interests” by “[p]lacing the client’s interests ahead of the broker’s interests,” Wis. Stat. § 452.133(2)(a)1., and a broker may not “[a]ct in a transaction on the broker’s own behalf . . . unless the broker has the written consent of all parties to the transaction.” Wis. Stat. § 452.133(3)(b). Finally, a real estate licensee is required to “act to protect the public against fraud, misrepresentation and unethical practices.” Wis. Admin. Code § REEB 24.03(2)(b).

The undisputed facts establish that Respondent obtained money from the Van Grinsvens on two occasions on the premise that he was in the process of procuring a buyer for their business. Respondent never deposited these funds into his real estate trust account and did not return the funds to the Van Grinsvens upon their request and used their money for his own personal purposes. The Van Grinsvens’ business never sold. Furthermore, Respondent engaged in nearly identical behavior with another client, Mr. Rueden. Subsequently, on November 22, 2013, Respondent was charged with two counts of Felony Theft-Business Setting > \$10,000 (Calumet County Case Number 2013CF000186). These charges were pending at the time the Department filed its Complaint; however, on November 4, 2014, Respondent was convicted of one count of Felony Theft-Business Setting > \$10,000.

Based on the undisputed facts of the case as presented in the Division’s Complaint, as well as Respondent’s subsequent felony conviction, the Division has established that Respondent also violated Wis. Stat. § 452.133(1)(f) by failing to safeguard trust funds held by the broker; violated Wis. Stat. § 452.133(1)(a) by failing to provide brokerage services honestly and fairly; violated 452.133(2)(a)1. by failing to place his client’s interests ahead of his own; violated Wis. Stat. § 452.133(3)(b) by acting in a transaction on his own behalf; and violated Wis. Admin. Code § REEB 24.03(2)(b) by failing to protect the public against fraud, misrepresentation and unethical practices. As a result, Respondent is subject to discipline pursuant to Wis. Stat. § 452.14(3)(L).

Appropriate Discipline

The three purposes of discipline are: (1) to promote the rehabilitation of the licensee; (2) to protect the public from other instances of misconduct; and (3) to deter other licensees from engaging in similar conduct. *State v. Aldrich*, 71 Wis. 2d 206, 237 N.W.2d 689 (1976).

The Division requests that Respondent’s right to renew his real estate broker license be revoked. Even though Respondent’s license is currently expired, it is appropriate and necessary to impose discipline and to revoke Respondent’s right to renew his license. Wisconsin Stat. § 440.08(3)(a) allows the holder of a credential to restore the credential even after expiration by simply paying the applicable renewal fee plus a late renewal fee of \$25. Under Wis. Stat. § 440.08(3)(b), the Department may promulgate rules requiring credential holders who have

failed to renew the credential for five years to complete additional requirements to restore the credential. The Department has appropriately interpreted these provisions to mean that credential holders retain a right to automatically renew their credentials within five years of expiration by simply paying the required fees. Thus, Respondent has an automatic right to renew his permit until December 14, 2019 by merely paying the applicable renewal fees.

In light of the facts of this case, the discipline recommended by the Division is warranted. Respondent's violations are very serious and demonstrate a disregard for ethical practice. Respondent used his real estate broker's license to steal large sums of money from the public. His conduct resulted in a felony conviction for theft. Notably, the legislature has recently changed the law to reflect a policy determination that individuals with felony convictions are unfit to practice real estate and generally barred from licensure, except under certain specified conditions, requiring meticulous consideration by the Board. *See Wis. Stat. § 452.25*. Under the circumstances of this case and the criteria set forth in *Aldrich*, Respondent's right to renew his license must be revoked.

Costs

The Department has the authority to assess costs pursuant to Wis. Stat. § 440.22. The Division requests that Respondent be ordered to pay the full costs of its investigation and of these proceedings prior to the Department's consideration of any future application by Respondent for a credential. The Division asserts that this request is consistent with Department practice when dealing with an expired license. The factors to be considered in assessing full costs are: (1) the number of counts charged, contested, and proven; (2) the nature and seriousness of the misconduct; (3) the level of discipline sought by the parties; (4) the respondent's cooperation with the disciplinary process; (5) prior discipline, if any; (6) the fact that the department is a "program revenue" agency, whose operating costs are funded by the revenue received from licenses, and the fairness of imposing the costs of disciplining a few members of the profession on the vast majority of the licensees who have not engaged in misconduct; and (7) any other relevant circumstances. *See In the Matter of Disciplinary Proceedings Against Elizabeth Buenzli-Fritz*, LS0802183CHI (Aug. 14, 2008).

Based on the factors delineated in the *Buenzli-Fritz* decision and the facts of this case, Respondent should be assessed the full amount of recoverable costs in this case should he seek to apply for an active credential with the Department. Respondent's violations evidence conduct of a serious nature; Respondent did not participate in these proceedings in a meaningful way; all of the violations alleged have been proven; the discipline sought and imposed is significant; and, given the program revenue nature of the Department, fairness dictates imposing costs of these disciplinary proceedings on Respondent rather than on fellow members of his profession who have not engaged in such conduct.

ORDER

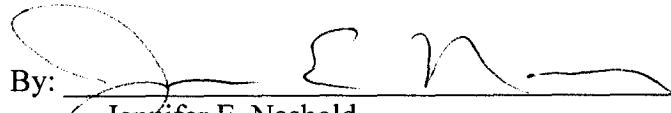
Accordingly, IT IS ORDERED that Respondent Kevin G. Ecker's right to renew his real estate broker license (license no. 26990-90) is hereby REVOKED.

IT IS FURTHER ORDERED that should Respondent Kevin G. Ecker ever apply for a credential with the Department in the future, Respondent shall pay all recoverable costs in this matter in an amount to be established, pursuant to Wis. Admin. Code § SPS 2.18, prior to the Department's consideration of any such application.

IT IS FURTHER ORDERED that the terms of this Order are effective the date the Final Decision and Order is signed by the Board.

Dated at Madison, Wisconsin on January 15, 2015.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By: 
Jennifer E. Nashold
Administrative Law Judge