

WISCONSIN DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES



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STATE OF WISCONSIN
BEFORE THE REAL ESTATE EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY
PROCEEDINGS AGAINST

FINAL DECISION AND ORDER
WITH VARIANCE

JASON S. SCHWITTAY and
APPLE VALLEY REALTORS, LLC,
RESPONDENTS.

DHA Case No. SPS-14-0056
DLSC Case No. 12 REB 095

0003776

BACKGROUND

On October 17, 2014, Administrative Law Judge Jennifer Nashold (ALJ), Division of Hearings and Appeals, issued a Proposed Decision and Order (PDO) in the above referenced matter. The PDO was mailed to all parties. No objections to the PDO were filed. On February 26, 2014, the Real Estate Examining Board (Board) met to consider the merits of the PDO. The Board voted to approve the PDO with variance. The PDO is attached hereto and incorporated in its entirety into this Final Decision and Order with Variance (Order).

VARIANCE

Pursuant to Wis. Stat. §§ 440.035(1) and 452.14, the Board is the regulatory authority and final decision maker governing disciplinary matters of those credentialed by the Board. The matter at hand is characterized as a class 2 proceeding pursuant to Wis. Stat. § 227.01(3). The Board may make modifications to a PDO, a class 2 proceeding, pursuant to Wis. Stat. § 227.46(2).

In the present case, the Board adopts the PDO in its entirety except for amendment to the section titled, "**ORDER**" found on page seven (7) of the PDO. The Board makes the following amendment as a result of Mr. Schwittay's real estate broker's license having expired since the ALJ issued the PDO on October 17, 2014. Since Mr. Schwittay's license had expired and he had not yet renewed his license, the following amendment is necessary.

The section titled "ORDER" is amended as follows. On page seven (7), following the paragraph titled, "ORDER" the first paragraph is deleted and the following is substituted in its place.

Accordingly, IT IS ORDERED that the real estate broker license of Jason S. Schwittay (no. 55272-90) and/or Jason S. Schwittay's right to renew that license is REVOKED. The right to renew the real estate business entity license of Apple Valley Realtors, LLC (no. 936301-91) is also REVOKED, effective on the date the Final Decision and Order is signed by the Board.

Dated at Madison, Wisconsin this 3 day of March, 2015.

By: Stephen Beersby
A Member of the Board



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of the Disciplinary Proceedings
Against **JASON S. SCHWITTAY AND APPLE
VALLEY REALTORS, LLC**, Respondents

PROPOSED DECISION AND ORDER
DHA Case No. SPS-14-0056

Division of Legal Services and Compliance Case No. 12 REB 095

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

Jason S. Schwittay
222 North Oneida Street
Appleton, WI 54911

Apple Valley Realtors, LLC
800 South Daybreak Drive
Appleton, WI 54915

Wisconsin 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 (Department), Division of Legal Services and Compliance (Division), filed a formal Notice of Hearing and Complaint against Respondent Jason S. Schwittay and Respondent Apple Valley Realtors, LLC. The Complaint alleged that Respondent Schwittay's license is subject to disciplinary action pursuant to Wis. Stat. § 452.14(3)(L) for failing to make trust account records and other documents available for inspection and copying by the Real Estate Examining Board

(Board) and failing to respond to the Department within 30 days of a request for information in violation of Wis. Admin. Code §§ REEB 15.04 and 24.17(5). The Complaint also alleged that Respondent Apple Valley Realtors, LLC's license is subject to disciplinary action pursuant to Wis. Stat. § 452.14(3)(L) for aiding and abetting the aforementioned violations in violation of Wis. Admin. Code § REEB 24.17(3). The Division served Respondents on July 16, 2014 by sending a copy of the Notice of Hearing and Complaint to their addresses on file with the Department. Respondents failed to file an Answer to the Complaint, as required by Wis. Admin. Code § SPS 2.09 and failed to appear at the prehearing conference held before the Division of Hearings and Appeals on August 20, 2014.

At the prehearing conference, the Division moved for default pursuant to Wis. Admin. Code § SPS 2.14 and Wis. Admin. Code § HA 1.07(3)(c), respectively. In light of Respondents' failure to file an Answer to the Complaint and failure to appear for the conference, the undersigned administrative law judge (ALJ) found Respondents to be in default. On August 20, 2014, the ALJ issued a Notice of Default against Respondents and ordered that the Division file a recommended proposed decision by September 12, 2014. The Division timely filed its recommended proposed decision. Respondents 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 1–12 are taken from the Division's Complaint against Respondents filed in this matter.

1. Respondent Jason S. Schwittay is licensed in the State of Wisconsin to practice as a Real Estate Broker, having license number 55272-90, first issued on August 19, 2008 and current through December 14, 2014.

2. The most recent address on file with the Department for Respondent Schwittay is 222 N. Oneida Street, Appleton, Wisconsin 54911.

3. Respondent Apple Valley Realtors, LLC is licensed in the State of Wisconsin as a Real Estate Business Entity, having license number 936301-91, first issued on August 19, 2008 and expired as of December 14, 2012.

4. The most recent address on file with the Department for Respondent Apple Valley Realtors is 800 South Daybreak Drive, Appleton, Wisconsin 54915.

5. Respondent Schwittay is identified in Department records as the supervising broker of Respondent Apple Valley Realtors.

6. On April 24, 2007, Respondent Schwittay was disciplined by the Real Estate Board for violating Wis. Stat. § 452.14(3)(k) and Wis. Admin. Code §§ RL (now REEB) 15.04,

24.03(2)(b) and 24.04(1) by making false and fraudulent statements in letters to homeowners and by failing to retain records prepared in connection with a transaction for at least three years.

7. On August 28, 2008, Respondent Schwittay registered Apple Valley Realtors, LLC IBRETA Trust Account held at Associated Bank with account number ending in -053 with the Department.

8. On or about September 24, 2012, the Department received a complaint alleging that Respondents were:

- a. completing contracts incorrectly,
- b. failing to maintain complete files, and
- c. committing trust account violations, including failing to return earnest money, failing to maintain a journal and ledger, and failing to reconcile the trust account.

9. On or about November 26, 2012, the Department received a second complaint alleging that Respondents were:

- a. failing to maintain complete files and
- b. committing trust account violations, including commingling earnest money, failing to maintain a journal and ledger, and failing to reconcile the trust account.

10. On February 4, 2013, the Department auditor attempted to contact Respondent Schwittay by e-mail and telephone to schedule an audit of Respondents' real estate trust account for February 13, 2013 at 11:00 a.m. at the offices of Respondent Apple Valley Realtors. Respondent Schwittay failed to respond to the auditor.

11. On February 7 and 12, 2013, the Department auditor again attempted to contact Respondent Schwittay by telephone to confirm the February 13, 2013 audit. Respondent Schwittay failed to respond to the auditor.

12. On February 13, 2013, the Department auditor arrived at the office of Respondent Apple Valley Realtors at the scheduled time to audit Respondents' real estate trust account. Respondent Schwittay failed to appear for the audit.

Facts Related to Default

13. The Complaint and Notice of Hearing in this matter were served on Respondents on July 16, 2014 by both certified and regular mail consistent with Wis. Admin. Code § SPS 2.08. The Notice of Hearing advised Respondents: "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."

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

15. Following expiration of the 20-day time period to file an Answer, the ALJ scheduled a telephone prehearing conference for August 20, 2014. Notice of this prehearing conference was sent to the Division and Respondent Schwittay, with instructions that Respondent Schwittay provide the ALJ with the telephone number at which he could be reached no later than August 15, 2014. The Notice instructed Respondent Schwittay: “A respondent’s failure to appear at a scheduled conference or hearing may result in default judgment being entered against the respondent.”

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

17. At the prehearing conference, the Division moved for default pursuant to Wis. Admin. Code § SPS 2.14 and Wis. Admin. Code § HA 1.07(3)(c).

18. On August 20, 2014, the ALJ issued a Notice of Default and Order, requiring the Division to serve no later than September 12, 2014 a recommended proposed decision.

19. The Division timely filed its recommended proposed decision.

DISCUSSION AND CONCLUSIONS OF LAW

As stated in the August 20, 2014 Notice of Default and Order, Respondents are in default for failing to file an Answer to the Complaint and failing to appear at the prehearing conference held on August 20, 2014. 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.” Wisconsin 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.

An Answer to a Complaint must be filed within 20 days of service of the Complaint. *See* Wis. Admin. Code § SPS 2.09(4). Service of the Complaint may be made by mailing a copy of the Complaint to the respondent at the respondent’s last known address. *See* Wis. Stat.

§ 440.11(2); Wis. Admin. Code § SPS 2.08(1). “Service by mail is complete upon mailing.” Wis. Admin. Code § SPS 2.08(1). On July 16, 2014, the Division served Respondents with the Complaint by mailing a copy of the Notice of Hearing and Complaint by both regular and certified mail to Respondents’ most recent addresses on file with the Department. Pursuant to Wis. Admin. Code §§ SPS 2.08(1) and 2.09(4), Respondents were required to file an Answer within 20 days but failed to do so.

Because Respondents are in default for their failure to file an Answer and to appear at the prehearing conference, an order may be entered against them on the basis of the Complaint and other evidence. Wis. Admin. Code § SPS 2.14; Wis. Admin. Code § HA 1.07(3)(b) and (c).

Violations of Wis. Admin. Code §§ REEB 15.04, 24.17(5) and 24.17(3)

Wisconsin Stat. § 452.14(3) states, in relevant part:

The board may revoke, suspend or limit any broker’s, salesperson’s, or time-share salesperson’s license or registration, or reprimand the holder of the license or registration, if it finds that the holder of the license or registration has:

...
(L) Violated any provision of this chapter or any rule promulgated under this chapter.

Pursuant to Wis. Admin. Code § REEB 15.04, a broker must retain a copy of all trust account records for at least three years and must make these records available for copying and inspection by the Board. Wisconsin Admin. Code § REEB 24.17(3) requires licensees to “respond to the department and the board regarding any request for information within 30 days of the date of the request.” Wisconsin Admin. Code § REEB 24.17(3) further states: “Licensees shall not violate any provisions or terms or conditions of, or aid or abet the violation of ch. 452, Stats., chs. REEB 11 to 26.”

The undisputed facts establish that Respondents refused to allow the Department to audit their trust account records despite two complaints alleging Respondents were committing trust account violations, including failure to maintain adequate bookkeeping records. The Department auditor attempted to contact Respondent Schwittay via email and telephone on February 4, 2013, February 7, 2013 and February 12, 2013 to schedule an audit. Respondent Schwittay did not respond. On February 13, 2013, the Department auditor arrived at the office of Respondent Apple Valley Realtors at the scheduled time to audit Respondents’ real estate trust account. Respondent Schwittay did not appear for the audit.

Based on the foregoing, I conclude that Respondent Schwittay violated Wis. Admin. Code § REEB 15.04 by failing to make trust account records and other documents available for inspection and copying by the Board, and Wis. Admin. Code § REEB 24.17(5) by failing to respond to the Department within 30 days of a request for information. I also conclude Respondent Apple Valley Realtors, LLC violated Wis. Admin. Code § REEB 24.17(3) by aiding and abetting the aforementioned violations. As a result of the above violations, Respondents are 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 recommends that Respondent Schwittay's license and Respondent Apple Valley Realtors, LLC's right to renew its license be revoked. This recommendation appropriately serves the purposes of discipline and is adopted in this case. Respondents' behavior exhibits flagrant disregard for the Board's authority and, more importantly, raises a serious public safety concern.

It is well-established that the purpose of licensing statutes is to protect the public by ensuring licensees possess a minimal level of professional competence. *Stringez v. Dep't of Regulation & Licensing Dentistry Examining Bd.*, 103 Wis. 2d 281, 286–87, 307 N.W.2d 664, 667 (1981). The license allows the public to trust that the individual is subject to rules and requirements that guarantee competence and accountability for substandard practice or misdeeds. *Id.* As such, when the Board cannot assure the public of the licensee's competence to practice his profession, revocation is appropriate. *See Gilbert v. State Medical Examining Bd.*, 119 Wis. 2d 168, 189–90, 349 N.W.2d 68 (1984).

In the context of a real estate broker and entity with the authority to hold client funds, the public safety implications are especially acute. By authorizing licensees to hold money in trust, the Board promises the public that sufficient standards are in place to guarantee licensees will safeguard client funds. Here, Respondents' refusal to provide the Department with access to their trust account records strips the Board of its ability to fulfill that promise. This is particularly troubling because the Department has received two complaints alleging Respondents are not keeping adequate trust account records and may be misappropriating funds. Accordingly, revocation is appropriate to protect the public from other instances of misconduct by Respondents.

Rehabilitation is not plausible in this case, as Respondents refuse to submit to the authority of the Board which granted their licenses. Having obtained no information from Respondents, the Board cannot even determine what competency issues may exist and therefore cannot ascertain what rehabilitative measures might be effective. Moreover, revocation in this case would send a strong message to licensees that refusing to cooperate with the Board's investigation of complaints is not an option. To allow licensees to disregard the Board's authority in this way would contravene the purpose of the licensing statutes.

In light of the facts of this case and the Division of Hearings and Appeals' practice of complying with the prior decisions of the Department, the discipline recommended by the Division is warranted here.

Costs

The Department has the authority to assess costs pursuant to Wis. Stat. § 440.22. The Division requests that Respondents be ordered to pay the full costs of its investigation and of these proceedings. 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, Respondents should each be assessed one-half of the full amount of recoverable costs in this case. The Division has proven all counts charged. By refusing to cooperate with the Department's attempt to audit their trust account records, Respondents have committed serious violations which present troubling public safety concerns. The Board has also previously disciplined Respondent Schwittay for substandard practice. As a program revenue agency, the Department is funded entirely by the fees it collects. The expenses of responding to Respondents' violations should not be distributed among others in Respondents' profession. Instead, Respondents should bear that burden.

ORDER

Accordingly, IT IS ORDERED that the real estate broker license of Jason S. Schwittay (no. 55272-90) is REVOKED and that the right to renew the real estate business entity license of Apple Valley Realtors, LLC (no. 936301-91) is also REVOKED, effective on the date the Final Decision and Order is signed by the Board.

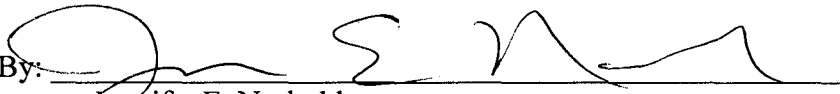
IT IS FURTHER ORDERED that Respondents shall each pay one-half of all recoverable costs in this matter in an amount to be established, pursuant to Wis. Admin. Code § SPS 2.18. After the amount is established, payment shall be made by certified check or money order payable to the Wisconsin Department of Safety and Professional Services and sent to:

**Department Monitor
Department of Safety and Professional Services
Division of Legal Services and Compliance
P.O. Box 7190
Madison, WI 53707-7190**

IT IS FURTHER ORDERED that the above-captioned matter is hereby closed as to Respondents Jason S. Schwittay and Apple Valley Realtors, LLC.

Dated at Madison, Wisconsin on October 17, 2014.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705
Telephone: (608) 266-7709
FAX: (608) 264-9885

By: 
Jennifer E. Nashold
Administrative Law Judge