

**Before the
New Hampshire Real Estate Commission
Concord, New Hampshire 03301**

In The Matter Of:

Docket No.: 2013-024

**New Hampshire Real Estate Commission v. Paul Schaefer, Jr. &
Affordable Property Management, LLC, Re: Complaint of Arthur Taylor**
License Nos.: 065761 (lapsed); 064239 (lapsed)
(Adjudicatory/Disciplinary Proceeding)

FINAL DECISION AND ORDER

Before the New Hampshire Real Estate Commission ("Commission") is an adjudicatory/disciplinary proceeding In the Matter of Paul Schaefer, Jr. ("Respondent Schaefer" or "Mr. Schaefer") and Affordable Property Management, LLC ("Respondent Affordable Property Management") in Docket Number 2013-024.

Background Information:

The Commission received a complaint from Arthur Taylor on July 1, 2013, and a complaint from the Commission's Investigator Ann Flanagan on July 10, 2013 against Respondents Paul Schaefer, Jr. and Affordable Property Management, LLC alleging that Respondent Schaefer paid Complainant Arthur Taylor by check for rents that Mr. Schaefer collected for Complainant that bounced for non-sufficient funds and Respondents failed to provide adequate accounting of expenditures to Complainant Arthur Taylor. Respondents failed to provide one year of escrow accounting to the Commission Investigator Ann Flanagan. On July 10, 2013, the Commission's Investigator Ann Flanagan initiated Complaint File No. 2013-024 against Respondents. Subsequent to an investigation, on November 24, 2014, the Commission issued a Notice of Hearing for a hearing scheduled for December 16, 2014.

On Tuesday, December 16, 2014, at 10:15 a.m., the Commission commenced the adjudicatory/ disciplinary hearing in the above captioned matter. Commission members present¹ were:

¹ These same Commission members also deliberated and voted on this Final Decision and Order.

William E. Barry, Commissioner, Presiding Officer
Paul A. Lipnick, Commissioner
Calley M. Milne, Commissioner

The prosecution was conducted by Ann Flanagan, the Commission's Investigator. Respondent Schaefer was not present at the hearing. Mr. Schaefer was represented by Attorney David Kolesar and Attorney Kolesar was present at the hearing.

The following exhibits were introduced into evidence and accepted into the record:

- Complainant Investigator Flanagan's Exhibits:
Exhibit #1 – Documents from Complaint File 2013-024: pages 1-64.
- Exhibit #2 – Documents from Complaint File 2013-024 & 2014-013: pages 1-8.
- The Respondent's exhibits:
No Exhibits were introduced.

The following witnesses were present and testified at the hearing:

- There were no witnesses.

Motion to Dismiss:

Respondent Schaefer individually and as principal agent for Affordable Property Management, LLC, by and through his counsel, Attorney Joseph Prieto filed a written Motion to Dismiss Complaint File No. 2013-024.

In his Motion, Respondent Schaefer seeks the dismissal of File No. 2013-024 for lack of Commission jurisdiction because he does not believe its denial was supported by current and existing NH laws and by the Commission's own agency rule. The Commission does have jurisdiction to investigate the actions against the Respondents where the Respondents were licensed at the time of the alleged violations and the Commission has the ability to impose sanctions if the Respondent is found guilty after a hearing of violations of RSA 331-A, pursuant to RSA 331-A:28.

Respondent in his motion to dismiss states that the Commission at a pre-hearing conference held on September 16, 2014 on File No. 2013-024 denied Respondent's previous Motion to Dismiss and that was it based on the Commission's lack of jurisdiction, and was denied based almost exclusively upon an email correspondence between the Commission and an unnamed source with the NH Attorney General's Office. The Commission in its decision to deny the Motion to Dismiss was not based on an e-mail communication from the Attorney General's office, but was based on its authority under RSA 331-A:28, as it has with past decisions.

Respondent's assertion that the Commission failed to turn over all documents relating to the complaints filed against the Respondents, specifically its denial of the Respondent's request for a copy of the email communication between the Attorney General's Office and the Commission's Executive Director is incorrect. The Commission has not refused to turn over documents relating to complaints filed against the Respondent. The email communication between the Commission's Executive Director Beth Edes and the NH Attorney General's office is protected under RSA 91-A, and the Commission is not required to provide a copy of the email communication to the Respondent. The Commission only read a portion of the email communication to Attorney Prieto and a Commission member turned the computer to show the e-mail communication to Attorney Prieto, but did not physically hand the email communication to Attorney Prieto. What was read from the email communication was provided to Attorney Prieto by copy of the audio recording of the prehearing conference held on September 16, 2014.

The Commission did not make a final determination on the Respondent's Motion to Dismiss on September 16, 2014 based on legal advice received from the NH Attorney General's Office, the Commission (refer to recording from September 16, 2014) based its decision to deny the Motion to Dismiss based on its authority under RSA 331-A:28.

Respondent in his Motion states that it was his understanding that the Chairman of the Commission was Commissioner Therrien, and at the time of the prehearing conference held on September 16, 2014, Commissioner Therrien was under investigation for charges of unprofessional

conduct relating to the sale of a condominium unit in Hampton, NH. Respondent in his Motion questions whether he was afforded a fair hearing on the merits of his motion to dismiss from an unbiased and impartial board of Commissioners where it could not be known what pressure Commissioner Therrien may have been influenced by in making his decision on the Respondent's Motion to Dismiss at the September 16, 2014 prehearing conference. The Respondent also points out that at no point did the Commission disclose to the Respondent that there was a potential conflict or pending investigation of its Chairman prior to the pre-hearing conference. Former Commissioner Therrien was never appointed as Chairman of the Commission while serving his term on the Commission. The co-commissioners knew nothing of the alleged charges complained about regarding form Commissioner Therrien, and any pending investigations against former Commissioner Therrien were confidential and exempt from disclosure under RSA 91-A. There were no potential conflicts of the Commissioners at the pre-hearing conference according to RSA 331-A:9, I, "No commission member shall participate in any action related to the issuance of a license or disciplinary matter involving the member or a person with whom the member is personally or professionally associated, or in any such action in which the member has a direct financial interest.

In the Motion, Respondent seeks the dismissal of File No. 2013-024 under Rule Rea 205.11 on the basis that the complaining party Arthur Taylor did not appear at the hearing. Respondent misconstrues Rea 205.11 which states:

If any party to whom notice has been given in accordance with Rea 205.01 fails to attend a hearing, the presiding officer shall:

- (a) Declare that party to be in default; and
- (b) Either:

- (1) Dismiss the case, if the party with the burden of proof fails to appear; or
- (2) Hear the testimony and receive the evidence offered by a party, if that party has the burden of proof in the case.

Respondent is mistaken as to who is a party in this case. The parties are the New Hampshire Real Estate Commission and Paul Schaefer, Jr. and Affordable Property Management, LLC (Respondents). See Rea 205.09. "Unless called as a witness or granted party or intervenor status, a person who initiates an adjudicative proceeding by complaining to the commission about the conduct of a person who becomes a party shall have no role in any enforcement or disciplinary

hearing.” Rea 205.09. In File No. 2013-024, the landlord Arthur Taylor, of whose absence the Respondent complains, is the person(s) who initiated the adjudicative proceeding by complaining to the Commission about the Respondent, but who did not request and was not granted party status. The New Hampshire Real Estate Commission, not Mr. Taylor, is the party with the burden of proof in regards to the claims set forth in the Hearing Notice. The absence of Arthur Taylor from the hearing does not support dismissal of the claims in File No. 2013-024.

Respondent’s assertion that Arthur Taylor, the named party who brought the complaint in File No. 2013-024 was not scheduled to appear at the December 16, 2014 hearing. Respondent claims that he has a right under Rea 205.16(b) to have the opportunity to cross-examine the witnesses against him at the conclusion of their direct testimony and if no direct witness testimony is offered by an eye witness to the alleged conduct in the complaint, then the Respondent is deprived of his due process right to confront his accuser under the Administrative Rules as well as Part I, Article 15 of the New Hampshire State Constitution. If Respondent desired the presence of Arthur Taylor, or that of any other witness at the hearing, he should have taken steps to secure it. The Commission had to meet its burden of proof without his presence, but his absence does not implicate procedural due process requirements.

For the foregoing reasons, the Motion to Dismiss is denied.

Findings of Fact:

In light of the testimony and exhibits, the Commission finds the following facts:

1. Respondent Schaefer was first granted a real estate salesperson's license in the State of New Hampshire on July 9, 2009 and a real estate broker license on March 14, 2012. At the time of the allegations, Respondent Schaefer was licensed as a real estate broker, license #065761. Respondent Schaefer’s license #065761 expired on March 14, 2014 and lapsed on September 14, 2014. Respondent Affordable Property Management, LLC was issued a real estate firm broker license on August 1, 2007. At the time of the allegations, Respondent Affordable Property

Management was licensed as a real estate firm, license #064239. Respondent Affordable Property Management's firm license #064239 expired on August 1, 2013 and lapsed on February 1, 2014.

2. Respondent Schaefer was the principal broker of Affordable Property Management, LLC doing rental management for property owned by Arthur and Meg Taylor.

3. Respondents paid Arthur and Meg Taylor for rents that were collected for the Taylor's two houses located at 20 Osborne Street and 128 Eastern Avenue in Rochester, NH, with check #1236, dated May 25, 2013 for an amount of \$2,811.39 which bounced for non-sufficient funds. (Ex. 1, pg. 29).

4. Arthur Taylor indicated through an email on July 31, 2013 to Investigator Flanagan that Respondents had made good on the rental check received on July 30, 2013. (Ex. 1, pg. 54)

5. Respondent Schaefer indicated in an email to Arthur Taylor on July 26, 2013 that he was in the process of closing down his property management company due to health reasons. (Ex. 1, pg. 57).

6. Respondent Schaefer indicated to Investigator Flanagan that during the time he was in New York with his parents away from the office and bank website, there was an accounting error causing the bounced checks (Ex. 1, pg. 63).

7. Respondent Schaefer indicated in an email to Arthur Taylor on July 26, 2013 that his lack of communication with the Taylors was because during this time Respondent Schaefer was spending a lot of time out of state with his father before he died and then after his father died Respondent was handling estate and spending time with his mother (Ex. 1, pg. 57).

8. Respondent Schaefer indicated in a phone conversation with the Commission Investigator Ann Flanagan that all client funds had been restored including the bank fees; however Respondent Schaefer had not documented his statement.

9. Respondent Schaefer was required to include 1 year escrow accounting in reply to this complaint but he has not provided any accounting; Respondent Schaefer has not included the required notarized reply Form 11-a; and Respondent Schaefer has not included required transaction documentation to the Commission in reply to this complaint.

10. Respondent Schaefer did not renew his broker license which expired on March 14, 2014 and lapsed on September 14, 2014, and Respondent Schaefer did not renew the firm license for Affordable Property Management, LLC which expired on August 1, 2013 and lapsed on February 1, 2014.

Relevant Law:

RSA 331-A:1. Purpose. It is the policy of this state to regulate the practice of real estate brokers and salespersons in order to ensure that they meet and maintain minimum standards which promote public understanding and confidence in the business of real estate brokerage.

RSA 331-A:2. Definitions. In this chapter:

XV. "Unprofessional conduct" means any action by a licensee or accredited individual, institution, or organization which is unlawful, dishonorable, unethical, or immoral.

RSA 331-A:13 Escrow Accounts of Broker; Interest; Audit.

I. The principal broker shall maintain an escrow account or accounts, separate and apart from the individual or office account, in which all deposits on fully executive contracts shall be promptly deposited. The escrow account or accounts shall be maintained in an insured financial institution within the state of New Hampshire.

RSA 331-A:25-a. Licensee; Scope of Agency; Interpretation.

I. – A licensee who provides services through a brokerage agreement for a seller, landlord, buyer, or tenant is bound by the duties of loyalty, obedience, disclosure, confidentiality, reasonable care, diligence, and accounting.

RSA 331-A:25-b. Seller Agent; Duties.

I. A licensee engaged by a seller or landlord shall:

(a) Perform the terms of the written brokerage agreement made with the seller or landlord.

(b) Promote the interests of the seller or landlord including:

(3) Accounting in a timely manner, during and upon termination, expiration, completion, or performance of the brokerage agreement for all money and property received in which the seller or landlord has or may have an interest.

331-A:26. Prohibited Conduct. – The following acts, conduct or practices are prohibited, and any licensee found guilty after a hearing shall be subject to disciplinary action as provided in RSA 331-A:28:

VII. Conversion of any money, contract, deed, note, mortgage, abstract or other evidence of title, to the licensee's own use, to the use of the licensee's principal, or of any other person, when delivered to the licensee in trust or on condition, in violation of the trust or before the happening of the condition. Failure to return any money or contract, deed, note, mortgage, abstract or other evidence of title within 30 days after the owner is entitled to and makes demand for such evidence, shall be prima facie evidence of such conversion.

XXVIII. Breaching a fiduciary duty owed by a licensee to the principal in a real estate transaction.

XXIX. – Unprofessional conduct defined in RSA 331-A:2, XV.

Rea 702.01 Trust Accounts.

(a) Every resident and non-resident principal broker who in the course of her or his real estate business in the state of New Hampshire receives, accepts and holds any monies on behalf of any principal, client or other person shall at all times maintain a separate escrow or real estate trust account, distinct from her or his own account, in a financial institution of her or his choice located in this state, for the deposit of all such monies so received by the licensee, pursuant to RSA 331-A:13.

(b) Upon acceptance and execution of a contract, all earnest money deposited and down payments received by a principal broker as escrow agent in a real estate transaction shall be promptly deposited in her or his separate escrow or real estate trust account, pursuant to RSA 331-A:13, when at that time the principal broker shall be responsible to make full accounting thereof to the signatories to the contract.

Rulings of Law:

The Commission makes the following findings by a preponderance of the evidence:

1. Respondents failed to maintain a separate escrow account at all times in an insured financial institution within the state of New Hampshire and breached their fiduciary duty of accounting owed to Arthur and Meg Taylor when the Taylor's received check #1236 on May 25, 2013 for an amount of \$2,811.39 that bounced for non-sufficient funds, in violation of RSA 331-A:13, I; RSA 331-A:25-a, I; RSA 331-A:25-b, I (a) and (b) (3); RSA 331-A:26, VII, XXVIII, XXIX; and Rea 702.01(a). (Notice of Hearing, paragraphs 5A-5B, and 5D-5J)

2. Respondent was not found in violation of Rea 701.02(b) where there was no evidence provided to show whether or not earnest money was promptly deposited. (Notice of Hearing, paragraph 5C).

Disciplinary Action:

Based upon the Findings of Facts and Rulings of Law above, the Commission has voted to order the following:

IT IS **ORDERED** that this matter be kept on file and if the Respondents should apply for a New Hampshire license in the future this matter will be considered along with the Respondents' applications for licensure.

IT IS **FURTHER ORDERED** that the Respondent's failure to comply with any terms or conditions imposed by this Final Decision and Order shall constitute unprofessional conduct pursuant to RSA 331-A:26, XXIX, and a separate and sufficient basis for further disciplinary action by the Commission against the Respondent.

IT IS FURTHER **ORDERED** that this Final Decision and Order shall become a permanent part of the Respondent's disciplinary file, which is maintained by the Commission as a public document.

IT IS FURTHER **ORDERED** that if this decision is not appealed within 30 days of the effective date, it shall become final. See RSA 331-A:28, III ("The action of the commission in revoking, suspending, or denying a license or accreditation, or levying a fine, shall be subject to appeal to the superior court at the instance of the licensee or an accredited individual, institution, or organization, within 30 days after the filing of the commission's decision...").

IT IS FURTHER **ORDERED** that this Final Decision and Order shall take effect as an Order of the Commission on the date the Commission signs it.

Wm. E. Barry
William E. Barry, Presiding Officer

6/16/2015
Date

Paul A. Lipnick
Paul A. Lipnick, Commissioner

6-16-2015
Date

Calley M. Milne
Calley M. Milne, Commissioner

6/16/2015
Date

*\ Daniel S. Jones, Commission member, (case evaluator) recused and Former David C. Dunn Commission member was recused.