

**State of New Hampshire  
Office of Professional Licensure & Certification  
NH Real Estate Commission  
Concord, New Hampshire**

In the Matter of:

Maria Pothier v. Lisa Hitchcock

Docket No. 2016-008

License No.: #055841 Salesperson

(Adjudicatory/Disciplinary Proceeding)

**FINAL DECISION AND ORDER**

This is a Final Decision and Order issued by New Hampshire Office of Professional Licensure & Certification, New Hampshire Real Estate Commission (“Commission”) following an adjudicatory/disciplinary proceeding in the Matter of Maria Pothier vs. Lisa Hitchcock (“Respondent” or “Hitchcock”) in Docket Number 2016-008 held on July 18, 2017

**BACKGROUND INFORMATION**

This matter was heard by the New Hampshire Real Estate Commission on July 18, 2017. The Notice of Hearing was properly issued to the Respondent dated June 29, 2017 by the New Hampshire Real Estate Commission (“the Commission”), notice was provided to the Respondent that a hearing was scheduled to determine whether Ms. Hitchcock, licensed New Hampshire salesperson, committed a number of violations of statutory law and rules governing her license to practice as a Real Estate salesperson in the State of New Hampshire as follows: statutory requirements as set forth in NH RSA 331-A; whether the Respondent committed unprofessional conduct subjecting her to sanctions and disciplinary action pursuant to NH RSA 331-A:28, 331-A:29, RSA 331-A:30 and RSA 331-A:34 and New Hampshire Code of Administrative Rules Chapter Rea 200.

More specifically, the Notice of Hearing scheduled and conducted before the Commission on July 18, 2017 was to determine:

- I. Whether the Respondent, as a licensed salesperson, who provided services through a brokerage agreement for a seller, landlord, buyer, or tenant and failed to provide the duties of loyalty, obedience, disclosure, confidentiality, reasonable care, diligence and accounting in violation of NH RSA 331-A:25-a, I;
- II. Whether the Respondent knowingly committed or was a party to any material fraud, misrepresentation, concealment, conspiracy, collusion, trick, scheme or device, whereby any other person relies upon the word, representation or conduct of the licensee in violation of NH RSA 331-A:26, V.

- III. Whether the Respondent converted 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 thirty (30) days after the owner is entitled to and makes demand for such evidence, shall be prima facie evidence of such conversation, in violation of NH RSA 331-A:26, VII.
- IV. Whether the Respondent failed to disclose in writing to a potential buyer or lessee, a licensee's ownership interest, direct or indirect, in property offered for sale or lease by the licensee, in violation of NH RSA 331-A:26, XXII(a)(2).
- V. Whether the Respondent failed to make such disclosures prior to an offer to purchase, sell, or lease and acknowledged in writing by all parties to the transaction, in violation of NH RSA 331-A:26, XXII(b).
- VI. Whether the Respondent licensee breached her fiduciary duty, in violation of NH RSA 331-A:26, XXVIII.
- VII. Whether the Respondent conducted business in an unprofessional manner as specified in NH RSA 331-A:2, XV, in violation of NH RSA 331-A:26, XXIX.
- VIII. Whether the Respondent demonstrated unworthiness or incompetency, in violation of NH RSA 331-A:26, XXXVI.

Testimony was received at the hearing from Maria Pothier, Ron Gobeio, husband of Maria Pothier, Kinsman Corthell, Investigator Professional Licensure and Certification and the Respondent Lisa Hitchcock, Gerry Stark, Broker for Lisa Hitchcock, Mark Brunelle, husband of Lisa Hitchcock. During the proceedings the following Commission members present who participated in this hearing were:<sup>1</sup>

Daniel Jones, Presiding Officer/Chair;  
Paul Lipnick, Commissioner;  
Calley Milne, Commissioner;  
William Barry, Commission  
John Cronin, Esquire – recused (Evaluator)

### **COMPLAINANT'S EXHIBITS:**

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

- Exhibit 1
  - Complaint Form 11 with attachments and Respondent's response with attachments.

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<sup>1</sup> The same Commission members also deliberated and voted on this Final Decision and Order.

## RESPONDENT'S EXHIBITS.

- None Submitted.

## LIST OF WITNESSES:

- Maria Pothier
- Ron Gobeio, husband of Maria Pothier
- Kinsman Corthell, Investigator, REC, OPLC
- Lisa Hitchcock.
- Gerry Stark, Broker for Lisa Hitchcock.
- Mark Brunelle

## DISCUSSION

The Claims asserted against the Respondent involve several statutory violations of laws governing real estate salespersons. The evidence presented at the hearing established that the Respondent did in fact violate New Hampshire laws and/or the Real Estate Commission rules/regulations. Specifically, the evidence established that the Respondent violated the following statutes in this regard: NH RSA 331-A:25(a), I; RSA 331-A:26, V; RSA 331-A:26, VII; RSA 331-A:26, XXIX, II(b) and RSA 331-A:26, XXXVI as set forth above and as described below. The Commission ruled that the Respondent was not in violation of the following: RSA 331-A, XXII(a)(2), RSA 331-A:26, XXII(b), RSA 331-A:26, XXVIII.

One of the primary disputes in this matter was the agreement with respect to the P & S Agreement and the Addendum between the Respondent and the complainant regarding the terms under which the deposit for the sale of the property located at 1 Fairway Drive, Grantham, New Hampshire would be returned to the complainant, Maria Pothier. Ms. Pothier testified credibly that under the terms of the P & S Agreement and the Addendum that the only conditions under which she would not receive the return of her \$20,000 deposit, would be if she walked away from the sale for any reason, other than her inability to receive financing. The property in question was located at 1 Fairway Drive, Grantham, New Hampshire. Specifically, she testified and referred to Section 18 of the Purchase and Sale Agreement, which specifically stated "This agreement is contingent upon BUYER obtaining financing under the following terms: 80% Term/year B/A, rate B/A Type Conventional. Again, she agreed that other than her inability to obtain financing, she unequivocally understood that her deposit would be non-refundable.

Additionally, Ms. Pothier testified credibly that the Addendum, page 25 of Exhibit 1, that initially stated "Buyer and seller agree that the deposit in the amount of \$20,000 will be given directly to the seller and not held in escrow. Deposit is not refundable," again only meant that it would not be refundable if the sale did not go through for reasons other than the contingency

clause for financing in the P & S itself. Ms. Pothier also testified credibly that although \$500 of the \$1,500 monthly rent that was to go toward the purchase price – which she paid while she was attempting to procure financing for the purchase, would not be returned to her if the sale did not go through, in that case even if it was due to her inability to procure financing. Again, at no point, according to her, however, was it clear other than that she would absolutely be refunded the deposit if she did not receive financing.

The Respondent, on the other hand, testified that the terminology in the P & S which said that the deposit would be non-refundable if Ms. Pothier did not go through with the sale simply meant that they would not bring suit against her and require her to go through with the sale if she was unable to procure financing. The Respondent has been a licensed real estate salesperson for more than a decade – since 2002. Clearly, according to her own admission, she recognized that if a person cannot get financing she cannot “force” a person to purchase a home, i.e. if they do not have the funds to do so. Her testimony that this was the intent of the clauses in question was questionable.

Accordingly, it is believed that given the conflicting terminology in the P & S and the Addendum, and the credibility of Ms. Pothier in contradiction to the testimony of the Respondent, the Commission determined that the Respondent was in violation of the aforementioned statutory and/or rule violations governing licensed real estate salespersons (see below also). Specifically, Ms. Pothier relied on the word and representation of the Respondent that the deposit was CONTINGENT on her procuring financing, which she ultimately was not able to do. Accordingly the Respondent is deemed to be in violation of RSA 331-A:26, V. Moreover, once the agreement for the sale of the property was terminated, the Respondent failed to return the requested deposit of \$20,000 to Ms. Pothier, in violation of RSA 331-A:26, VII.

Additionally, the Respondent was questioned about the conflicting terms in the P & S agreement and Addendum that the significant deposit of \$20,000 would go directly to the seller and not be held in escrow, in contradiction to the Liquidated Damages Clause in paragraph 16 of the P & S Agreement, clearly indicating the funds would be held in an escrow account and sets forth the terms under which the funds may be accessed by the Escrow Agent. The Seller, Mark Brunelle, husband of the Respondent, testified openly that his wife, Lisa Hitchcock, completed the forms as he directed her to, but did also admit that he spent the funds provided by the Respondent as a deposit for this property. The difficulty then became when the Respondent could not obtain financing, which she disclosed to the Respondent’s supervising Broker, but at that point the money had been spent according to Mr. Brunelle. Moreover, while Mr. Brunelle and the Respondent provided testimony that they routinely require a \$20,000 deposit, the subsequent buyer of the property in question provided a \$2,000 deposit (see page 69 of Exhibit 1).

Additionally, in light of the foregoing the Commission voted that the Respondent had a duty to perform “reasonable care” to her client regarding the language in the agreement. Given the foregoing, including the conflicting language between the liquidated damages clause in the P &

S and the Respondent incorporating the language that the escrow funds would go directly to the Seller, she was in violation of RSA 331-A:25(a), I.

All parties testified and agreed that the Respondent notified Ms. Pothier that the seller was her husband, Mark Brunelle.

Additionally, Mark Brunelle testified that at all times his wife, who represented him in this transaction, did as he had instructed her to and therefore did not breach any fiduciary duty to him.

### **FINDINGS OF FACT**

The Respondent was first issued a license as a New Hampshire real estate salesperson by the New Hampshire Real Estate Commission on August 30, 2002.

Respondent's Salesperson License # is 055841.

The Respondent completed a Purchase and Sales Agreement between the potential buyer, Maria Pothier and the seller, her husband, Mark Brunelle.

The P & S Agreement, Paragraph 18, specifically states that the Agreement was "Contingent" upon the buyer obtaining financing.

The Addendum, attached to the P & S and signed on the same date, stated conflicting and ambiguous language that the deposit is non-refundable.

The complainant, Maria Pothier, testified credibly that all parties were clear that that clause again only meant, as stated in the P & S, that the deposit would be non-refundable only if she could not procure financing, i.e. the agreement was clearly stated it was "contingent" upon financing.

Moreover, Paragraph 16 of the P & S Agreement signed by the parties outlines the liquidated damages clause, setting forth the terms and conditions under which the escrow funds may be accessed, indicating there was some expectation the funds would be protected if the sale did not go through due to financing.

The complainant, Ms. Pothier, understood at all times that if she failed to purchase the property for any reason other than being able to obtain financing, that the \$20,000 deposit would be non-refundable.

The Respondent disclosed verbally and on the Purchase and Sales Agreement that "Listing Agent is also Married to the seller." Moreover, the seller/husband testified that at all times the Respondent fulfilled her fiduciary obligations and performed the contract as he requested

### **CONCLUSIONS OF LAW**

The evidence in this matter has established that the Respondent has committed statutory and rule violations governing licensed real estate brokers and/or real estate salespersons in the State of New Hampshire as follows:

The Respondent, a real estate salesperson in the State of New Hampshire, failed to provide duties of loyalty, obedience, disclosure, confidentiality, reasonable care, diligence and accounting in not clearly identifying the conflicting terms of the P & S and the Addendum, including the contingency clause returning the deposit in the P & S and ambiguous term given that clause in the addendum; and in not apparently clearly indicating the discrepancy between the escrow agent role and the liquidated damages clause in the P & S Agreement, in violation of RSA 331-A:25-a, I.

The Respondent is found to be in violation of NH RSA 331-A:26, V, in that she knew, despite the agreement with Ms. Pothier that the deposit was contingent on financing, that she never, under any circumstances, intended to return the \$20,000 deposit in question, thereby knowingly committing, or being a party to any material fraud, misrepresentation, concealment, conspiracy, collusion, trick, scheme or device, whereby any other person, i.e. Ms. Pothier, relied upon the word, representation or conduct of the licensee.

The Respondent, failing to have ensured the return of the \$20,000 deposit within thirty (30) days, was found by the Commission to be in violation of RSA 331-A:26, VII which defines prohibited conduct as “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 . . . within 30 days after the owner is entitled to and makes demand for such evidence shall be prima facie evidence of such conversation.” Emphasis Added.

Respondent is found to be in violation of NH RSA 331-A:26, XXIX by engaging in unprofessional conduct as set forth in RSA 331-A:2, XV which is any conduct by a licensee . . . which is unlawful, dishonorable, unethical or immoral.

As a result of the foregoing findings the Respondent was also deemed by the Commission to be in violation of NH RSA 331-A:26, XXXVI, by demonstrating untrustworthiness or incompetency to act as a broker or salesperson.

The Respondent is not deemed to be in violation of: NH RSA 331-A:26, XXII(a)(2), 331-A:26, XXII(b) and 331-A:26, XXVIII as alleged in the Notice of Hearing.

WHEREFORE, pursuant to the authority of this Commission under NH RSA 331-A:28 and RSA 331-A:34 it is hereby Ordered, by a vote of the Commissioners of the New Hampshire Real Estate Commission of 3 to 1, who participated in the deliberations in this matter, that:

The Respondent is Ordered to pay a fine in the amount of \$1,000 for each of the five (5) violations set forth above, for a total of \$5,000, to be paid within thirty (30) days of the effective date of this Order, made payable to the Treasurer, State of New Hampshire.

IT IS FURTHER ORDERED that the Respondent shall provide proof of completion of a three (3) hour course, within ninety (90) days of the effective date of this Order, which course shall be a live course in contract law and shall course hours shall not be credited toward the otherwise required continuing education requirements.

IT IS FURTHER ORDERED that the Respondent shall provide proof of completion of a three (3) hour course, within ninety (90) days of the effective date of this Order, which course shall be a live course in ethics and said course hours shall not be credited toward the otherwise required continuing education requirements.

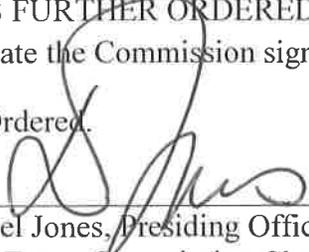
IT IS FURTHER ORDERED that the Respondent's failure to comply with any terms or conditions imposed by this Final Order shall constitute unprofessional conduct pursuant to RSA 331-A:26, XXIX and constitute separate and sufficient basis for further disciplinary action by the Commission against the Respondent.

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.

IT IS FURTHER ORDERED that the effective date of this Final Decision of the Commission is the date the Commission signs this Order as set forth below.

So Ordered.

  
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Daniel Jones, Presiding Officer  
Real Estate Commission Chair

9/19/17  
\_\_\_\_\_  
Date