

BEFORE THE IOWA REAL ESTATE COMMISSION
1918 S.E. HULSIZER
ANKENY, IOWA

| | | |
|------------------------|---|-------------------------|
| IN RE: |) | CASE NUMBER 89-008 |
| |) | DIA NO. 91DOCRE-3 |
| DARRYL GREEN (B10747), |) | |
| Broker-Respondent |) | FINDINGS OF FACT, |
| 6500 Hickman Road |) | CONCLUSIONS OF LAW, AND |
| Des Moines, IA 50322 |) | DECISION AND ORDER |

Roger L. Hansen, Executive Secretary of the Iowa Real Estate Commission (hereinafter commission), filed a complaint regarding Darryl Green. The complaint alleged violation of Iowa Code section 117.34(8) and 193E Iowa Administrative Code 1.28. Notice of Hearing was issued, and an Order continued the hearing to May 16, 1991.

The hearing for the above case was held on May 16, 1991, in the conference room of the Real Estate Commission, 1918 S.E. Hulsizer, Ankeny, Iowa. The Respondent, Mr. Darryl Green, was present and represented himself. John Parmeter, Assistant Attorney General, represented the State. The commission members who were present for the hearing were commission chair Jerry Duggan, Robert Christensen, E. Joe Ann Lutz, Russell Nading, and Marlys Nielsen. Amy Christensen Couch, Administrative Law Judge from the Iowa Department of Inspections and Appeals, presided and was instructed to prepare this unanimous commission decision. At the hearing, the State orally moved to amend the complaint, which was amended to reflect that the correct date in paragraph five was October 31, 1988. The hearing was open to the public, and was tape recorded. After hearing the evidence in the case, the commission convened in closed session pursuant to Iowa Code section 21.5(1)"f" to deliberate the decision to be rendered in this contested case.

The record in this case includes the amended Complaint, the Notice of Hearing, the Order Granting Continuance, the testimony of the witnesses, and State's Exhibits 1, 2, 3, and 5.

FINDINGS OF FACT

1. The Respondent, Darryl Green, is a licensed real estate broker. Mr. Green was a credible, persuasive witness. (testimony of Mr. Green).

2. Gerald and Sandra Przybylinski were the owners of a condominium located at 4857 Woodland, Number 5, West Des Moines, Iowa. They listed this condominium for sale with the Respondent, Darryl Green, in 1988. (testimony of Mr. Przybylinski, Mr. Green).

3. On November 3, 1988, after negotiation, the Przybylinskis agreed to sell the condominium to a buyer. The selling broker was Wendell Harms. The purchase agreement contained a written agreement that the buyer would pay \$470.00 per month rent beginning December 1, 1988 until closing. The sellers agreed to sell the appliances as part of the sale. (testimony of Mr. Przybylinski, Mr. Green; State's Exhibits 1, 2).

4. The purchase agreement was never amended in writing. Nonetheless, prior to December 1, 1988, the buyer refused to take possession of the condominium and refused to pay rent of \$470.00 per month. In an attempt to settle the matter, Mr. Green agreed to pay 25 percent of the agreed rental if the buyer and the selling broker would pay the rest. The buyer and broker refused.

Mr. Green contacted Mr. Przybylinski by telephone and informed him of the refusal to pay rent prior to December 1, 1988. Mr. Green offered Mr. Przybylinski the option of not going through with the sale. Mr. Przybylinski told Mr. Green he would talk to his attorney and get back to Mr. Green. Mr. Przybylinski and Mr. Green both spoke to Mr. Przybylinski's attorney, the matter was taken under advisement, and the matter was not resolved. Mr. Green did not hear further from Mr. Przybylinski's attorney or Mr. Przybylinski. (testimony of Mr. Green).

5. Mr. Przybylinski was never paid the \$470.00 per month rent. Mr. Przybylinski knew prior to closing he was not going to get paid the rent, signed the deed and affidavit which were prerequisites to closing, and chose to go through with the closing in spite of not receiving the rent. Closing occurred on approximately January 6, 1989. (testimony of Mr. Przybylinski, Mr. Green).

6. A charge of \$62.57 for repair to the dryer, and a charge of \$338.00 for repair to the water heater, were deducted from the seller's proceeds check. The seller, Mr. Przybylinski, did not authorize the repairs or deductions. The selling broker had the repairs made without telling Mr. Green. (testimony of Mr. Przybylinski, Mr. Green; State's Exhibit 3).

7. The seller's broker, Mr. Green, and the selling broker followed customary practice in Des Moines, in that the selling broker handled the closing and prepared the seller's settlement statement. The selling broker sent the seller's settlement statement to the seller's broker, Mr. Green, approximately two weeks after the closing. Prior to seeing the seller's settlement statement, Mr. Green did not know the repairs had been authorized. (testimony of Mr. Green; State's Exhibit 5).

8. Mr. Przybylinski has never received reimbursement for the \$400.57 deducted from his proceeds check. (testimony of Mr. Przybylinski, Mr. Green).

9. Mr. Green was not sufficiently attentive to detail with

respect to following through on the failure to pay rent, and with respect to the unauthorized deductions from the Przybylinskis' proceeds check. He did not follow through in checking on the selling broker as he should have, and did not follow through in communication with his own client as he should have. (testimony of Mr. Przybylinski, Mr. Green; State's Exhibits 1, 2, 3, 5).

CONCLUSIONS OF LAW

1. The Respondent was charged with a violation of Iowa Code section 117.34(8), which states:

The real estate commission may upon its own motion and shall upon the verified complaint in writing of any person, if the complaint together with evidence, documentary or otherwise, presented in connection with the complaint makes out a prima-facie case, request the department of inspections and appeals to investigate the actions of any real estate broker, real estate salesperson, or other person who assumes to act in either capacity within this state, and may suspend or revoke a license issued under this chapter at any time if the licensee has by false or fraudulent representation obtained a license, or if the licensee is found to be guilty of any of the following:

. . .

8. Being unworthy or incompetent to act as a real estate broker or salesperson in such manner as to safeguard the interests of the public.

With respect to the nonpayment of rent, Mr. Green did not follow through on communication with his client. The written terms of the purchase agreement were never changed. Mr. Green did not follow up with Mr. Przybylinski's attorney. On the other hand, Mr. Green did communicate the buyer's refusal to his client and the attorney, and the attorney also did not follow through on calling Mr. Green back as agreed. Knowing of the buyer's refusal to pay rent, Mr. Przybylinski went ahead and signed the deed and affidavit, and went through with the closing.

Therefore, although he was somewhat careless, Mr. Green was not unworthy or incompetent in this case, and is therefore not guilty of violating Iowa Code section 117.34(8) (1991).

2. 193E Iowa Administrative Code section 1.28 provides, in part, the following:

Closing transactions. It shall be mandatory for every broker to deliver to the seller in every real estate transaction, at the time the transaction is consummated, a complete detailed statement, showing all of the receipts and disbursements handled by the

broker. Also, the broker shall at the same time deliver to the buyer a complete statement showing all moneys received in the transaction from the buyer and how and for what the same were disbursed. The broker shall retain all trust account records and a complete file on each transaction for a period of at least five years after the date of the closing which shall include one copy of the listing, any offers to purchase, all correspondence pertinent to the transaction, and the closing statement. The listing broker shall be responsible for the closing even though the closing may be completed by another licensee. If the closing transaction is handled through an unlicensed escrow agent and the escrow agent renders a closing statement, the listing broker shall assure that funds which the broker has received or paid as part of the transaction are accounted for properly.

With respect to the \$400.57 deduction from proceeds, the deduction was made without authorization from the Przybylinskis. The Board believes Mr. Green when he testified the repairs had been made without his knowledge, and he did not learn the repairs had been authorized until he saw the seller's closing statement two weeks after closing. Mr. Harms should have called Mr. Green prior to authorizing the repairs. However, it was Mr. Green's responsibility to protect his client's interest and stay on top of the transaction much more closely than he did.

Mr. Green did deliver the detailed statement to the Przybylinskis. However, the statement contained unauthorized deductions. The rule clearly states that "the listing broker shall be responsible for the closing even though the closing may be completed by another licensee." Mr. Green's lack of knowledge that unauthorized repairs had been made, and that he did not learn of this until he saw the deductions from proceeds, does not mean Mr. Green did not violate this rule. The fact that Mr. Green was following local custom in having Mr. Harms handle the closing is no defense. Even though the local custom in Des Moines is that the selling broker handles the closing, the listing broker is still ultimately responsible under the law. When the listing broker allows the selling broker to handle the closing, the listing broker does so at his or her own peril. If a problem occurs and something is not done correctly, as happened in this case, it is the listing broker who is responsible and must accept the consequences. Local custom cannot change the law, and cannot relieve the listing broker of responsibility and liability. Mr. Green violated 193E I.A.C. 1.28.

3. The commission has the authority to issue a reprimand as a form of disciplinary action. 193E I.A.C. 4.2.

DECISION AND ORDER

Regardless of local custom, the law is that the listing broker is responsible for the closing regardless of who actually handles the closing. Mr. Green violated 193E I.A.C. 1.28 because \$400.57 was deducted from the sellers' proceeds check without their authorization. However, several mitigating factors exist in this case such that the penalty for the violation should be minimal. The selling broker made the repairs without receiving authorization from Mr. Green. Mr. Green learned of the unauthorized payments only when he received the sellers' closing statement two weeks after closing.

Nevertheless, the responsibility for the error rests on Mr. Green. Mr. Green should have been more attentive to detail in this case.

It is therefore the ORDER of the Iowa Real Estate Commission that the Respondent, Darryl Green, is hereby reprimanded for his violation of 193E I.A.C. 1.28. Any proven future violations may be cause for harsher disciplinary action.

Dated this 8 day of July, 1991.

[Redacted signature]

Jerry Duggan, Chair
Iowa Real Estate Commission

[Redacted signature]

Amy Christensen Couch
Administrative Law Judge
Iowa Department of Inspections and Appeals

[Redacted signature]

Roger L. Hansen
Executive Secretary
Iowa Real Estate Commission

ACC/jmm

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause by depositing a copy thereof in the U. S. Mail, postage prepaid, in accordance with the provisions of the attorneys of record herein at this date in a registered envelope on the pleadings, on July 12, 1991

[Redacted signature]