

No. 4456

**Official Order
of the
Texas Commissioner of Insurance**

Date: MAY 09 2016

Subject Considered:

Texas Department of Insurance

v.

Harry Erwin Wilbanks

SOAH Docket No. 454-15-4127.C

General remarks and official action taken:

The commissioner of insurance considers whether to revoke the escrow officer license held by Harry Erwin Wilbanks. Following a hearing at the State Office of Administrative Hearings, the administrative law judge (ALJ) who conducted the hearing submitted a proposal for decision containing findings of fact and conclusions of law, recommending that Harry Erwin Wilbanks be ordered to make restitution, be assessed an administrative penalty, and that his escrow officer's license be revoked.

Harry Erwin Wilbanks filed exceptions to the proposal for decision, TDI staff submitted a reply to the exceptions Harry Erwin Wilbanks filed, and Harry Erwin Wilbanks filed a reply to the reply TDI Staff submitted. The ALJ responded to the exceptions and replies, recommending no changes to the proposal for decision based on them.

The commissioner accepts the proposed findings of fact, conclusions of law, and recommendation of the ALJ, with additional nonsubstantive formatting and style changes.

FINDINGS OF FACT

1. Harry Erwin Wilbanks (Respondent) holds an escrow officer license issued by the Texas Department of Insurance (Department).
2. On March 30, 2010, Respondent, as an escrow officer, issued a title insurance commitment, prepared a settlement statement, and collected \$7,361.00 from Lodhi Group of Investments, Inc. (Lodhi) and \$100.00 from KNJ Enterprises, Inc. (KNJ) in premiums for title insurance for the sale of property located at

24900 Kuykendahl Rd., Tomball, Texas 77375 (the Property) from Lodhi to KNJ.

3. Respondent knew that Lodhi was represented by a real estate salesperson, Sean Baig, but that KNJ was not represented by an attorney or real estate salesperson or broker.
4. Respondent did not forward any of the collected premiums to a title insurance company, never obtained title insurance for the Property, and still holds the money he collected from both Lodhi and KNJ.
5. At the time of the March 2010 transaction, Respondent was holding a warranty deed dated January 28, 2007, from Paarus Investments, Inc. (Paarus) to Karim Lakhani for the Property. This warranty deed was not recorded in the public records at the time he closed the March 2010 transaction, and Respondent did not disclose this deed to the parties.
6. Respondent knew that KNJ believed it was purchasing the Property from Lodhi. Respondent also knew that Lodhi did not have record title to the property.
7. An April 5, 2010, letter agreement stated that "documents" placed in escrow with Respondent were to be held until KNJ obtained financing to pay the balance of the outstanding debt to the Property.
8. The April 5, 2010, letter agreement did not inform the parties that title insurance would not issue.
9. Respondent created the April 5, 2010, letter agreement in an attempt to protect himself and his law firm. Respondent failed to disclose the significance of the letter agreement, as he intended it as the drafter, to KNJ.
10. The contract for the March 2010 transaction called for the buyer to accept seller financing.
11. Respondent did not close the March 2010 transaction according the parties' instructions. There was no seller financing; instead the lender was Lakhani Real Estate, Inc. (Lakhani).
12. Roughly a year later, Respondent prepared a conveyance deed, security instrument, and settlement statement for another sale of the Property, this time from KNJ to Dawani Investments, Inc. (Dawani), all dated March 1, 2011. As an escrow officer, Respondent collected \$7,844.00 from KNJ as the premium

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for owner's title insurance. Respondent also collected \$500.00 from KNJ and \$500.00 from Dawani for title services and lender's title insurance.

13. Respondent received instructions from Mr. Baig, Dawani's agent, regarding the March 2011 transaction. In the email, Mr. Baig indicated that the transaction should be done the same way as the March 2010 transaction - with wrap-around seller financing of the two liens on the Property. KNJ was not a part of the communications, and Respondent did not disclose the communications to KNJ.
14. Respondent did not forward any of the collected premiums to a title insurance company, did not issue title insurance for the March 2011 transaction, and still holds the money he collected from both KNJ and Dawani.
15. Not until February and March of 2013 did Respondent offer to refund \$7,844.00 to KNJ for the March 2011 transaction. KNJ did not accept the refund due to pending civil litigation resulting from the transaction.
16. Respondent did not refund any of the \$7,361.00 in collected premiums to Lodhi.
17. Respondent did not refund any of the \$500.00 in collected premiums to Dawani.
18. Respondent did not disclose to KNJ in either the March 2010 or March 2011 transactions that he was not going to record the warranty deeds for those transactions.
19. Respondent did not disclose to KNJ in either the March 2010 or March 2011 transactions that he could not issue the title insurance policies unless the warranty deeds were recorded.
20. Respondent did not record the warranty deed from either the March 2010 transaction or March 2011 transaction until December 2011.
21. KNJ did not instruct Respondent to leave the prior liens off of the warranty deed for the March 2011 transaction.
22. Respondent knew there were at least two liens on the Property but did not disclose their existence to Dawani at the time of the March 2011 transaction.

23. Dawani sued KNJ after the March 2011 transaction alleging that KNJ concealed the existence of the lien imposed by the \$170,682.70 promissory note to Lakhani from the March 2010 transaction.
24. In October 2011, Respondent notified KNJ that Lakhani was going to foreclose on the \$170,682.70 promissory note from March 30, 2010.
25. Respondent knew that, as of May 2011, Lakhani had already assigned to Japage Realty (Japage) all of its interest in the \$170,682.70 promissory note from KNJ.
26. On March 1, 2012, Respondent, acting as Lakhani's trustee, sued KNJ to recover the full amount of the loan principal.
27. In order to settle the lawsuit, KNJ signed an Agreed Judgment relinquishing title to the Property to Lakhani.
28. KNJ is paying Dawani \$375,000.00 to settle the claims Dawani brought as a result of the March 2011 transaction.
29. KNJ paid \$32,500.00 to Lakhani to settle claims Lakhani brought as a result of the March 2011 transaction.
30. On June 3, 2015, the Department's staff (Staff) sent Respondent notice of the hearing. The notice contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing would be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
31. The hearing on the merits was held on October 21, 2015, before Administrative Law Judge Meitra Farhadi at the State Office of Administrative Hearings (SOAH), 300 W. 15th Street, Austin, Texas. Staff Attorney Casey Seeboth represented Staff, and attorney Patrick Hyde represented Respondent. The record closed on December 31, 2015, after the parties filed post-hearing briefs.

CONCLUSIONS OF LAW

1. The Commissioner of Insurance (Commissioner) has jurisdiction over this matter under Texas Insurance Code §§ 82.051 - 82.053, 84.051 - 84.053, 2652.201, and 2703.151.

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2. SOAH has jurisdiction to conduct the administrative hearing in this matter, including the authority to issue a Proposal for Decision with Findings of Fact and Conclusions of Law, pursuant to Texas Government Code ch. 2003 and Texas Insurance Code ch. 40.
3. Proper and timely notice of the hearing was provided. Tex. Gov't Code §§ 2001.051 - 2001.052.
4. Texas Insurance Code § 2551.351(a)(2) does not apply to Respondent because he is an individual and not a corporation.
5. Respondent violated or failed to comply with the Texas Insurance Code and rules of the commissioner, which, pursuant to Texas Insurance Code §§ 82.051 - 82.053 and 2652.201, are grounds for taking disciplinary action against a license holder.
6. Escrow officers have a fiduciary duty to show loyalty to both the buyer and the seller, and that duty includes the following:
 - a duty to conserve the escrow funds and pay them only to the parties that are entitled to them;
 - a duty to ensure that a transaction is closed according to the parties' instructions; and
 - a duty to make full disclosure of all material facts to both the buyer and the seller.
7. The duty of full disclosure requires escrow officers to notify the buyer and seller of all material facts known to the escrow agent that might affect the buyer's and seller's transaction. *Home Loan Corp. v. Texas American Title Co.*, 191 S.W.3d 728, 731-34 (Tex. App. - Houston [14th Dist.] 2006, *pet. denied*); *Capital Title Co., Inc. v. Donaldson*, 739 S.W.2d 384, 389 (Tex. App. - Houston [1st Dist.] 1987, *no writ*).
8. Respondent charged a premium rate other than the rate promulgated by the commissioner in violation of Texas Insurance Code § 2703.151(c).
9. Respondent did not pay the title insurance company the insurance premiums he collected in violation of Texas Insurance Code § 2703.003.

10. Respondent charged for title insurance and withheld issuance of a policy in violation of Rate Rule R-2 of the Texas Title Insurance Basic Manual.
11. Respondent illegally withheld money belonging to another person, as contemplated in Texas Insurance Code § 2652.201(a)(4).
12. Breach of a fiduciary relationship constitutes constructive fraud. *Flanary v. Mills*, 150 S.W.3d 785, 795 (Tex. App. - Austin 2004, *pet. denied*) (citing *Chien v. Chen*, 759 S.W.2d 484, 495 (Tex. App. - Austin 1988, *no pet.*)).
13. When one has a duty to speak the truth, a false representation of a past or present material fact is fraudulent when another relies thereon to his detriment. *Chien v. Chen*, 759 S.W.2d 484, 495 (Tex. App. - Austin 1988, *no pet.*).
14. As escrow agent, Respondent owed fiduciary duties to both the buyer and seller. *Boatright v. Texas Am. Title Co.*, 790 S.W.2d 722, 728 (Tex. App. - El Paso 1990, *writ dismissed*). By his actions in the March 2010 and March 2011 transactions, Respondent breached those fiduciary duties.
15. Respondent failed to exercise the duties of full disclosure and loyalty he owed to the buyer and the seller in both the March 2010 transaction and the March 2011 transaction. *City of Fort Worth v. Phippen*, 439 S.W.2d 660, 665 (Tex. 1969); *JQ Holdings, Inc. v. Stewart Title Guaranty Co. and Stewart Title Co. f/k/a/ Stewart Title Co. of Houston*, 451 S.W.3d 861, 871 (Tex. App. - Houston [1st Dist.] 2014, *no pet.*).
16. Respondent committed both fraudulent and dishonest practices, as contemplated in Texas Insurance Code § 2652.201(a)(5).
17. The Commissioner has the authority to cancel or revoke the escrow officer license of Respondent, pursuant to Texas Insurance Code § 82.051.
18. Pursuant to Texas Insurance Code § 84.021 and the factors set out in Texas Insurance Code § 84.022, Respondent should be assessed an administrative penalty of \$20,000.00.
19. Pursuant to Texas Insurance Code § 82.053, Respondent should be ordered to make restitution to KNJ, Lodhi, and Dawani in the amount of \$500.00 to Dawani, \$8,444.00 to KNJ, and \$7,361.00 to Lodhi.
20. Pursuant to Texas Insurance Code § 82.051, Respondent's escrow officer license should be revoked.

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Based on the findings of facts and conclusions of law:

The commissioner of insurance orders that Harry Erwin Wilbanks make restitution to KNJ Enterprises, Inc.; Lodhi Group of Investments, Inc.; and Dawani Investments, Inc. in the amount of \$500.00 to Dawani Investments, Inc.; \$8,444.00 to KNJ Enterprises, Inc.; and \$7,361.00 to Lodhi Group of Investments, Inc.

The commissioner of insurance orders that Harry Erwin Wilbanks pay an administrative penalty of \$20,000.00.

The commissioner of insurance revokes the escrow officer license held by Harry Erwin Wilbanks.


David C. Mattax
Commissioner of Insurance