

BEFORE THE
DEPARTMENT OF BUSINESS OVERSIGHT¹
STATE OF CALIFORNIA

In the Matter of the Statement of Issues/
Accusation of:

Case No. 963-2542

THE CALIFORNIA CORPORATIONS
COMMISSIONER,

OAH No. 2013020822

Complainant,

v.

DESTINY ESCROW, INC., OSCAR
ROLANDO PORTILLO, aka OSCAR
ROLANDO PORTILLO ARRIAGA, and
IMELDA JIMENEZ,

Respondents.

PROPOSED DECISION

Howard W. Cohen, Administrative Law Judge in the Office of Administrative Hearings (OAH), heard this matter in Los Angeles on July 8, 2013.

Judy L. Hartley, Senior Trial Counsel, Enforcement Division, Department of Business Oversight (Department), appeared on behalf of Jan Lynn Owen, formerly California Corporations Commissioner, now Department Commissioner (complainant or Commissioner).

No appearance was made by or on behalf of respondent Oscar Rolando Portillo, also known as Oscar Rolando Portillo Arriaga.²

¹ Effective July 1, 2013, after the filing of the Statement of Issues/Accusation but before the hearing in this matter, the Department of Corporations and the Department of Financial Institutions merged, forming the Department of Business Oversight.

² The other named respondents are no longer parties to this action.

Complainant requested that respondent's default be entered and that complainant be permitted to prove up the allegations set forth in the Statement of Issues/Accusation. This matter proceeded as a default under Government Code section 11520. Complainant presented oral and documentary evidence.

The record was closed and the matter was submitted for decision on July 8, 2013.

FACTUAL FINDINGS

Jurisdiction

1. Complainant, in her official capacity, filed and served on respondent a Notice of Intention to Issue Order Pursuant to California Financial Code Section 17423 (Bar From Employment, Management or Control of Any Escrow Agent),³ with an Accusation attached, on January 2, 2013.

2. Respondent signed, wrote his home address on, and, through his attorney, timely filed a Notice of Defense and requested a hearing.

3. A Notice of Assigned Hearing Dates setting this matter for hearing on July 8 and 9, 2013, was served on respondent's attorney on March 6, 2013.

4. Respondent immediately moved to continue the hearing dates. Three weeks later, by letter dated March 28, 2013, respondent's attorney notified OAH that he had withdrawn from the case, and requested that all future notices be sent to respondent at his home address, which his counsel identified.

5. On April 10, 2013, OAH issued a Notice Denying Respondent's Motion for Continuance; the notice provided that "[t]he hearing in this case will proceed as previously scheduled at 9:00 a.m. on July 8 and 9, 2013" OAH served the notice on respondent's former counsel and on respondent at his home address, as specified by respondent's former counsel.

6. Also on April 10, 2013, complainant served a Notice of Hearing on respondent at his home address, again notifying respondent that the hearing dates would be July 8 and 9, 2013.

7. Although complainant did not introduce into evidence certified mail receipts for service of notice of the hearing, respondent's signed and addressed notice of defense and the fact that numerous notices of the hearing dates were sent, by complainant and by OAH, to respondent's home address of record, the address

³ The notice included other matters as well, pertaining to the other originally-named respondents.

identified by him and by his former counsel, evidence that respondent was put on notice of the hearing dates.

8. Findings 1 through 7 reflect that respondent's failure to appear at the hearing constituted a default. The hearing proceeded as a default prove-up.

Respondent's Activities at Destiny Escrow, Inc.

9. Respondent was employed as an escrow officer at Destiny Escrow, Inc. (Destiny Escrow), formerly known as SL Escrow Services, Inc. (SL Escrow), an escrow agent licensed by the Department on June 30, 2008. SL Escrow's license was amended on May 17, 2011, to reflect a name change to Destiny Escrow and an address change, from Paramount Boulevard to Lakewood Boulevard in Downey.

10. On November 15, 2010, a Department escrow specialist sent SL Escrow a letter to remind the licensee of its duty to file an annual audit report by April 15, 2011, within 105 days of the December 31, 2010, close of SL Escrow's fiscal year.⁴ At the written request of Susan Robinson, President of SL Escrow, Richard Malme, then a Department escrow specialist, granted SL Escrow an extension of time to file its report, to May 2, 2011. Mr. Malme, who testified at hearing, has recently begun serving the Department as a Supervising Examiner of Escrow Law; he served as an escrow specialist for 13 years, overseeing, among other things, licensees' compliance with annual reporting requirements.

11. SL Escrow submitted its December 31, 2010, audit report late, several days after the extended May 2011 deadline. The audit report showed that SL Escrow had failed to meet statutory liquid asset and tangible net worth requirements.⁵ Mr. Malme repeatedly wrote to SL Escrow, requesting corrective action. No response was received.

12. On August 5, 2011, Destiny Escrow filed an application for change of ownership with the Commissioner, identifying respondent as the sole shareholder and director, president, secretary and treasurer, and stating that respondent had been employed in the construction industry, doing business as RMS Remodeling.

13. The Department conducted a regulatory examination of Destiny Escrow in January 2012, finding that the company's liquid asset and tangible net worth deficiencies had increased since May 2011. In February 2012, Ms. Robinson told Mr. Malme that the company was being sold; she forwarded plans for the transfer of 60,000 shares from her to respondent, who was also to be appointed president, secretary, and treasurer. By letter dated March 28, 2012, Mr. Malme informed Ms.

⁴ See Financial Code section 17406.

⁵ See Financial Code section 17210.

Robinson that the application for change of ownership could not be approved until the company was first found to be in compliance with liquid asset and tangible net worth requirements. On March 31, 2012, Ms. Robinson resigned as an officer and respondent took over management of the company even though the ownership transfer was never approved.

14. Destiny Escrow did not file its 2011 annual report, which was due on April 15, 2012, until November 13, 2012, seven months late, despite a reminder letter from Mr. Malme and a 10-day demand letter dated April 23, 2012, warning the licensee of penalties for late filing. The report showed that Destiny Escrow had still failed to meet liquid asset and tangible net worth requirements. Mr. Malme so informed respondent, as president of Destiny Escrow, by letter dated November 15, 2012, and wrote that if Destiny Escrow did not cure the deficiencies the matter would be referred for administrative action, which could result in the suspension of Destiny Escrow's license. As of the time of hearing, Destiny Escrow had failed to provide the Department any documentation showing that the deficiencies were corrected.

15. In May 2012, the Commissioner's office conducted a special examination of Destiny Escrow's business records. The examination was prompted by the Department's investigation of a licensee called MS Escrow Services (MS Escrow), in which findings were made of unusual activity at Destiny Escrow, and of respondent's involvement in activities at MS Escrow. The special examination disclosed that Destiny Escrow was operating without an approved manager and had an unreported employee, and disclosed violations in connection with several escrow accounts. Kathleen Partin, Special Administrator on Escrow Law for the Department, testified that the Department has revoked MS Escrow's escrow agent license as a result of the investigation. She also testified that, where a check has been issued from an escrow trust account but not cashed, the escrow company must attempt to get the check cashed by the payee; if that is not possible, the check must escheat to the State Controller's Office. Similarly, if funds remain on deposit after the close of an escrow because not all disbursements have been made, the escrow company must maintain the funds until it receives authorization to disburse them; if the escrow company does not receive such authorization, the funds must escheat to the state. The escrow balance may not be distributed to a third party without authorization from the principals to the transaction.

16. Aron Haben Hagos, a Corporations Examiner, conducted the investigation into Destiny Escrow's books and ledgers in May 2012. In a report dated September 14, 2012, and in testimony at hearing, Mr. Hagos concluded that Destiny Escrow had disbursed funds without authorization, had failed to file an annual report, had failed to have an approved manager at the licensed location, had liquid asset deficiencies, and created a trust shortage. These violations are discussed in more detail, below.

a. On February 7, 2012, from the trust account for Escrow Number 10035-IJ, Destiny Escrow disbursed \$100,000 to respondent through his construction company, RMS Remodeling, prior to the close of escrow, without signed instructions from all parties to the escrow. On the escrow ledger, the disbursement was misrepresented as a refund to the buyer. The wire transfer request for the funds misrepresented that the payee was the buyer, when in fact it was respondent. In a May 29, 2012, letter to respondent as president of Destiny Escrow, Mr. Hagos demanded that respondent replace the \$100,000 in the escrow account. On May 31, 2012, Destiny Escrow deleted and altered information in the escrow file, removing the buyer's request to have his deposit refunded, removing the copy of the buyer's deposit check, removing an outgoing wire transfer request to disburse the \$100,000 deposit to the buyer and replacing it with an outgoing wire transfer request to pay \$100,000 to respondent through RMS Remodeling, and inserting an instruction dated February 2, 2012, authorizing payment of \$100,000 to respondent through RMS Remodeling and an invoice from RMS Remodeling, among other things.

b. On April 4, 2012, from the trust account for Escrow Number 10065-IJ, Destiny Escrow disbursed \$25,000 to respondent through RMS Remodeling, without authorization from all parties to the escrow. The disbursement caused a \$25,000 shortage to exist in the trust account from April 4 to May 18, 2012, when Destiny cured the shortage after receiving a written demand from Mr. Hagos dated May 14, 2012.

Respondent and MS Escrow

17. The Department revoked MS Escrow's escrow agent license on December 1, 2011. (See Factual Finding 15.) In late December 2011, Sultanna Wan, Corporation Examiner, began conducting a special examination of MS Escrow to determine whether it was still operating. After her investigation, in a report dated March 28, 2012, and in testimony at hearing, Ms. Wan concluded that MS Escrow was continuing to engage in escrow activities after its license had been revoked, and that it had made disbursements of funds from its outstanding checks and escrow balances to third parties without authorization. Ms. Wan found that respondent, who was married to the daughter of the owner of MS Escrow, had accepted at least 27 unauthorized disbursements of trust funds from MS Escrow totaling \$101,293.23 between March 14, 2011, and January 19, 2012, as set forth in detail below.

a. On October 12, and December 12, 2011, respondent received at least 15 unauthorized disbursements of trust funds from 13 escrows at MS Escrow, totaling \$6,599.08. The disbursements represented funds from outstanding trust account checks that were cancelled and then reissued to respondent's company, RMS Remodeling.

b. On December 8, 2011, and January 5, 2012, respondent received at least five unauthorized disbursements of trust funds from five escrows at MS Escrow, totaling \$5,204, representing the balances remaining in those escrows.

c. Respondent received at least seven additional unauthorized disbursements from four escrows at MS Escrow, totaling \$89,490.15. Those disbursements included:

i. A \$45,562.32 disbursement by check to RMS Remodeling on March 14, 2011, from the trust account on MS Escrow number 1488, supported only by an RMS Remodeling invoice that had no invoice number, no information about RMS Remodeling, and no information about the work performed. There were no escrow instructions approved by the parties authorizing this disbursement.

ii. A \$5,000 disbursement to RMS Remodeling on June 3, 2011, from the account on MS Escrow number 1891, from \$290,000 deposited by the buyer on May 31 and June 2, 2011. There were no escrow instructions approving the disbursement, and there was no invoice.

iii. An \$8,000 disbursement to RMS Remodeling on June 13, 2011, from the account on MS Escrow number 1891, from \$290,000 deposited by the buyer on May 31 and June 2, 2011. There were no escrow instructions approving the disbursement, and there was no invoice.

iv. A \$5,000 disbursement to RMS Remodeling on November 17, 2011, from the account on MS Escrow number 1891, from \$293,000 deposited by the buyer on November 17, 2011. This disbursement occurred after the buyer and seller had executed instruction to release \$270,000 of the \$290,000 deposit back to the buyer due to inactivity on the escrow with an agreement that the buyer would re-deposit the funds once the escrow again became active. There were no escrow instructions approving the disbursement, and there was no invoice.

v. An \$11,500 disbursement to RMS Remodeling on November 23, 2011, from the account on MS Escrow number 1891, part of the \$293,000 deposited back into escrow by the buyer on November 17, 2011. There were no escrow instructions approving the disbursement, and there was no invoice.

vi. An \$8,720.71 disbursement to RMS Remodeling on September 20, 2011, from the account on MS Escrow number 1907. There were no escrow instructions approving the disbursement, which was supported only by an RMS Remodeling invoice that had no invoice number, no information about RMS Remodeling, and no information about the work performed.

vii. A \$5,707.12 disbursement by wire transfer to respondent, doing business as RMS Remodeling, on January 19, 2012, from the

account on MS Escrow number 1919, money that was due to the listing agent on the subject property, as reflected on the ledger.

LEGAL CONCLUSIONS

1. The Commissioner may, after notice and opportunity for hearing, bar from any position of employment, management, or control any escrow agent, or any other person, if the Commissioner finds that the bar:

is in the public interest and that the person has committed or caused a violation of this division or rule or order of the commissioner, which violation was either known or should have been known by the person committing or causing it or has caused material damage to the escrow agent or to the public.

(Fin. Code, § 17423, subd. (a)(1).)

2. It is a violation for an escrow agent or any employee or officer to:

(1) Knowingly or recklessly disburse or cause the disbursement of escrow funds otherwise than in accordance with escrow instructions, or knowingly or recklessly to direct, participate in, or aid or abet in a material way, any activity which constitutes theft or fraud in connection with any escrow transaction.

(2) Knowingly or recklessly make or cause to be made any misstatement or omission to state a material fact, orally or in writing, in escrow books, accounts, files, exhibits, statements, or any other document pertaining to an escrow or escrow affairs.

(Fin. Code, § 17414, subd. (a)(1) and (2).)

3. Money deposited in an escrow account may be withdrawn or transferred to other accounts “only in accordance with the written escrow instructions of the principals to the escrow transaction” or pursuant to court order. (Cal. Code Regs, tit. 10, § 1738.) Escrow agents may use “property deposited in escrow only in accordance with the written escrow instructions of the principals to the escrow transaction . . . or . . . in accordance with sound escrow practice,” or pursuant to court order. (Cal. Code Regs., tit. 10, § 1738.2.) “. . . [A] disbursement, other than for a fee, commission or compensation[,] may be advanced or paid out prior to the close of an escrow if the written instructions of all parties to the transaction so provide.” (Fin. Code, § 17421.)

4. “An escrow agent shall not withdraw, pay out, or transfer monies from any particular escrow account in excess of the amount to the credit of such account at the time of such withdrawal, payment, or transfer.” (Cal. Code Regs., tit. 10, § 1738.1.)

5. Cause exists to bar respondent from any position of employment, management, or control of any escrow agent under Finance Code section 17423, subdivision (a)(1), based on respondent’s violations of escrow instructions and unauthorized transfers and disbursements of funds placed in escrow in violation of Financial Code sections 17414, subdivision (a)(1) and (2), and 17421, and California Code of Regulations, title 10, sections 1738, 1738.1, and 1738.2, as set forth in Factual Findings 9-17.

6. The escrow business is regulated and monitored by the Department to protect the public because, among other things, an escrow agent receives money in trust and holds it and distributes it for the benefit of others.

7. Based on the evidence in this matter, it is appropriate for the Commissioner to exercise her discretion to bar respondent from any position of employment, management, or control of any escrow agent, in order to ensure honesty, integrity, and neutrality in the conduct of licensed activities.

ORDER

The Commissioner may bar respondent Oscar Rolando Portillo, also known as Oscar Rolando Portillo Arriaga, from any position of employment, management, or control of any escrow agent.

DATED: July 24, 2013

/s/

HOWARD W. COHEN
Administrative Law Judge
Office of Administrative Hearings

