Citation: Evans (Re), 2024 BCSRE 59
Date: 2024-09-04
File No. 23-4754

BC FINANCIAL SERVICES AUTHORITY

IN THE MATTER OF THE *REAL ESTATE SERVICES ACT*
SBC 2004, c 42 as amended

AND

IN THE MATTER OF

LORI EVANS
LORI EVANS PERSONAL REAL ESTATE CORPORATION
(185021)

REASONS FOR DECISION REGARDING
ADMINISTRATIVE PENALTY RECONSIDERATION REQUEST

[These Reasons have been redacted before publication.]

DATE AND PLACE OF HEARING:	Via Written Submissions
HEARING OFFICER:	Andrew Pendray

INTRODUCTION

1. On January 25, 2024, pursuant to sections 57(1) and 57(3) of the *Real Estate Services Act* ("RESA"), the BC Financial Services Authority ("BCFSA") issued a Notice of Administrative Penalty to Lori Evans and Lori Evans Personal Real Estate Corporation (the "respondent").

2. In that Notice of Administrative Penalty, BCFSA determined that the respondent had contravened Rule 34 of the *Real Estate Services Rules* (the "Rules"), by failing to act with reasonable care and skill in respect of a listing held by the respondent for a property at [Property 1], Christina Lake (the "property").

3. Specifically, BCFSA determined that the respondent had to disclose that the advertised photos of the furnishings and interior of the property had been digitally modified prior to a buyer's submission of an offer which was accepted and included all furnishings and appliances in the purchase price.

4. BCFSA further determined that the respondent had contravened Rule 41 by publishing real estate advertising of the property when she knew, or reasonably ought to have known, that the advertising contained a false or misleading statement or misrepresentation concerning real estate.

5. As a result of those determinations, BCFSA applied an administrative penalty of $6,000 against the respondent.

6. The respondent seeks reconsideration of the penalty. Pursuant to section 57(4) of RESA she requests that the penalty be cancelled. The respondent's reconsideration application proceeded by way of written submissions.

Issue

7. The issue is whether the January 25, 2024 administrative penalty should be cancelled or confirmed.

Jurisdiction and Standard of Proof

8. This application for reconsideration is brought pursuant to section 57(4) of RESA, which requires the Superintendent of Real Estate (the “superintendent”) to provide a person who receives an administrative penalty with an opportunity to be heard.

9. Under section 57(4) of RESA the superintendent may cancel the administrative penalty, confirm the administrative penalty, or, in circumstances where the superintendent is satisfied that a discipline hearing under section 40 of RESA would be more appropriate, cancel the administrative penalty and issue a notice of discipline hearing.

10. The superintendent has delegated the statutory powers and duties set out in section 57 to Hearing Officers.

11. The standard of proof is the balance of probabilities.

Background

12. The evidence and information before me consists of an investigation report completed by BCFSA, and the information provided by the respondent in her application for reconsideration, which included photographs of the property, and correspondence including the accepted offer. The following is intended to provide some background to the circumstances and to provide context for my reasons. It is not intended to be a recitation of all of the information before me.

<u>General Background</u>

13. Ms. Evans was licensed under RESA for trading services in November 2019.

14. On April 5, 2023 the respondent entered into a multiple listing contract to sell the property as designated agent. Schedule A of the multiple listing contract indicated that the property would be sold with the existing furniture.

15. On May 11, 2023, [Complainant 1] wrote an offer on the property. That offer was not accepted.

16. [Complainant 1] provided a second offer, also dated May 11, 2023, which was again not accepted.

17. A third offer on the property from [Complainant 1], also dated May 11, 2023, was accepted by the sellers on May 18, 2023.

18. In each of the above noted offers, item 7 indicated that the refrigerator, stove, and furnishings were to be included items in the sale.

19. [Complainant 1] had not seen the property prior to making the above noted offers. He in fact did not attend the property until May 20, 2023.

20. On June 26, 2023 BCFSA received a complaint from [Complainant 1]. In that complaint [Complainant 1] indicated that he was of the view that the respondent had misrepresented

the property. [Complainant 1] explained that he had recently attempted to purchase the property, and that Ms. Evans had been the seller's agent.

21. [Complainant 1] indicated that upon attending a site visit with his realtor he had been shocked to find that the property did not resemble that which had been advertised on the Multiple Listing Service (the "MLS listing"). [Complainant 1] further set out his specific complaints as follows:

> 1) The Listing Agent admitted to digitally manipulating the photos that are used for the MLS listing; therefore, she knowingly used misleading advertising. These alterations were not limited to furnishings. Property and appliance defects were also retouched. The following pages will document this point in detail.
>
> 2) The contract stipulated that the property was sold furnished. The furnishings in the altered photos were not the ones in the property. The fact that the listing pictures were digitally staged was not communicated in any form at any time prior to the offer or the viewing.
>
> 3) The initial offer price for the property was increased based upon the condition of the property and the inclusion of the pictured furnishing as it was represented in the MLS listing photos.
>
> 4) I had no choice but to rescind the deal as the Listing Agent refused to speak with the Seller on these matters. The costs for that action should be the responsibility of the Listing Agent.
>
> 5) My family and I traveled to Christina Lake this past weekend to view the property. As the condition and contents of the property were not as advertised, we are seeking compensation for our time and travel due to the false and misleading advertising of the Listing Agent.

22. [Complainant 1] indicated in his complaint that neither he nor his agent had been informed verbally or in writing that the photos of the property had been digitally altered, or that the furnishings in the photos were not included in the contract.

23. [Complainant 1] provided copies of the property from the MLS listing, as well as photos he had taken of the same rooms of the property when he had attended in person on May 20, 2023.

24. [Complainant 1] also provided with his complaint what he said were copies of text messages between his realtor and the respondent. In those text messages the respondent appears to acknowledge that all of the MLS photos were edited with the bedroom photos virtually staged.

25. [Complainant 1] also provided a copy of the entire contract of purchase and sale for the property. Item 7 of the contract sets out that the purchase price included the refrigerator, stove, and furnishings.

26. BCFSA's investigation was prompted by [Complainant 1]'s complaint.

27. In the course of that investigation BCFSA contacted the Association of Interior Realtors (the "Association"). In a November 14, 2023 email the Association informed BCFSA that:

- The respondent had submitted the listing for the property on May 3, 2023, with three photos;
- The respondent added 8 further photos to the listing on May 15, 2023;
- On May 25, 2023, the respondent had changed the "Realtor Remarks" and "Remarks" sections on the listing; and
- On June 13, 2023, the respondent deleted two photos from the listing.

28. The Association indicated that the update to the Realtor Remarks, which occurred on May 25, 2023, was to include the following:

> Bedrooms virtually staged and photos have been edited to remove most personal belongings.

29. The Association further indicated that the update to the Remarks section of the listing, which occurred on May 25, 2023, was to include the following:

> Bedrooms virtually staged and photos have been edited to remove most personal belongings.

30. The respondent wrote to BCFSA on November 10, 2023 in response to the investigation.

31. In her November 10, 2023 email, the respondent indicated that she considered that she had been representing the best interests of her seller client in the transaction. The respondent indicated that she considered that the buyer was familiar with the property as the buyer's family had previously owned it. The respondent indicated that the buyer had submitted their initial offer prior to any photos having been published.

32. The respondent provided the following timeline of the transaction in her November 10, 2023 email:

- The first offer on the property, at $400,000, was received on May 11, 2023. The respondent allowed that offer to expire;
- The second offer on the property was received at 1:30 pm on May 15, 2023. The respondent indicated that that offer also expired;
- On May 15, 2023 the respondent requested that her brokerage's listing department upload photos to the listing. The respondent was unsure what time the photos would have been posted, although an email from the respondent's brokerage at 10:17 a.m. on May 15, 2023 indicates that the photos had been uploaded at that time.
- On May 17, 2023 the third offer on the property from [Complainant 1] was received, and accepted.
- On May 20, 2023 [Complainant 1] attended the property and demanded that the purchase include a variety of items including a boat, boat motor, kayak, generators, chain saw, tools, washer and other items;
- On May 21, 2023 the respondent informed [Complainant 1]'s agent that various items inside the property could be included or removed. The respondent indicated that she

identified certain items that the seller was willing to sell, and that there were items she was taking with her.

- The respondent received a recession notice for the contract on May 21, 2023.

33. The respondent also provided copies of her correspondence with [Complainant 1]'s agent.

34. In a May 20, 2023, email [Complainant 1]'s agent wrote to the respondent and indicated that:

> The pictures in the listings of furnishings are not what is there and there was no communication of that fact when we discussed adding the furnishings. They agreed to all furnishings as they were under the impression from the pics in the listing that even though it is cluttered with stuff at viewing they thought the furnishings advertised in pics were actually there and not replaced with old items.

35. The respondent also provided a copy of her text message conversations with [Complainant 1]'s agent. On May 11, 2023, [Complainant 1]'s agent enquired as to what inclusions there were with the sale of the property. The respondent replied that "The furniture and beds will stay".

36. Those text messages show that there was back and forth negotiation between the respondent and [Complainant 1]'s agent from the time [Complainant 1]'s agent sent an offer at approximately 1:00 pm on May 15, 2023 through to May 17, 2023, at 10:11 am, when [Complainant 1] offered $490,000 for the property. The respondent indicated that her client would be willing to accept that offer at 11:37 am on May 17, 2024.

37. The respondent attended (virtually) for an interview with BCFSA investigators on December 13, 2023. At that interview the respondent confirmed that the bedroom photos had been digitally modified, and that she did not believe that [Complainant 1]'s agent had been informed that the photos had been digitally modified prior to or at the time the offers were received on the property.

Submissions

38. In her submissions the respondent noted that at the time of [Complainant 1]'s initial offer on May 11, 2023, there were in fact no photographs of the interior of the property posted on the listing. The respondent noted that despite that fact [Complainant 1]'s initial May 11, 2023 offer included a request for the refrigerator, the stove, and the furnishings to be included in the purchase of the property.

39. The respondent further noted that the offer to purchase the property had been made without any request to view the property.

40. The respondent further submitted that at the time of [Complainant 1]'s May 15, 2023 offer, while there were further photos posted on the online listing for the property, those photos did not show the interior of the property. The respondent indicated that she had been clear to [Complainant 1]'s agent that the property was primarily in the same condition as it had been when [Complainant 1] had last attended it, approximately two years prior.

41. The respondent indicated that on May 17, 2023 the photos on the online listing for the property included the interior of the subject property. The respondent noted that [Complainant 1]'s offer, received on that date, again did not include a condition requesting to view the property.

42. In the respondent's submission the photos that were posted did not misrepresent the interior of the property. The respondent further submitted that she did not make any representations to [Complainant 1]'s agent regarding the condition of the property, and that [Complainant 1] did not rely on the representations made by the photographs.

> "A total of 3 offers to purchase the subject property were made without the benefit of [Complainant 1] reviewing the photographs. At all times it was stated by [Complainant 1's] realtor that he was prepared to proceed with the purchase of the subject property without the benefit of the photographs. Additionally, [Complainant 1] attended at the subject property on May 20, 2023, was personally aware of the condition of the subject property and I was notified by [Complainant 1's] realtor on May 20, 2023, via email (a copy of which is attached) that [Complainant 1] "are fine with it being left 'as is' with everything that is there now." The email from [Complainant 1's] realtor included an additional detailed offer to purchase the subject property along with a request to include a number of items of which included "all furnishing inside and outside the cabin.".

43. The respondent submitted that the photographs of the property were not "in any way substantially different from the actual condition of the subject property." She further submitted that the disclaimer on the MLS website was such that she ought not to be found to have misrepresented the nature of the subject property. Of note, the respondent submitted that the disclaimer on the MLS website read as follows:

> CREA makes no representations about the suitability of the data or graphics published on this website. The listing information is deemed reliable, but not guaranteed. Everything on this website is provided "As Is" without warranty of any kind including all implied warranties and conditions of merchantability, fitness for a particular purpose, accuracy, completeness, title and non-infringement. CREA may remove or change any content on this website for any reason. Neither CREA nor any of its suppliers shall be liable for any direct, incidental, consequential, indirect or punitive damages arising out of the user's access to or use of this website.

Reasons and Findings

Applicable Legislation

44. Rule 34 sets out that when providing real estate services, a licensee must act with reasonable care and skill.

45. Rule 41 provides that a licensee must not publish real estate advertising that the licensee knows, or reasonably ought to know, contains a false or misleading statement or misrepresentation concerning real estate, a trade in real estate, or the provision of real estate services.

46. Section 56 of RESA provides that BCFSA may designate specific provisions of RESA, the Real Estate Regulation (the "Regulations"), or the Rules as being subject to administrative penalties, and may establish the amounts or range of amounts of administrative penalty that may be imposed in respect of each contravention of a specified provision. Pursuant to section 56(2), the maximum amount of an administrative penalty is $100,000.

47. Rule 26(1) indicates that for the purposes of section 56(1) of RESA, contraventions of the Rules listed in Rule 26(2) are designated contraventions to which Division 5 (Administrative Penalties) of Part 4 of RESA applies.

48. Rule 26(2) identifies four categories, Category A, B, C, D, for designated contraventions of the Rules for the purpose of determining the amount of an administrative penalty. Rule 34 is placed in Category C, and Rule 41 is placed in Category D. Rule 27 sets out that:

> 27(3) For each contravention of a rule listed in Category C in section 26(2)(c), the amount of the administrative penalty is as follows:
>
> (a) $5,000 for a first contravention
>
> (b) $10,000 for a subsequent contravention
>
> (4) For each contravention of a rule listed in Category D in section 26 (2) (d), the amount of the administrative penalty is as follows
>
> (a) a base penalty amount as follows:
>
> (i) $1 000 for a first contravention;
>
> (ii) $2 000 for a subsequent contravention;

49. Section 57(1) of RESA sets out that if the superintendent is satisfied that a person has contravened a provision of RESA, the Regulations, or the Rules designated under section 56(1)(a) of RESA, the superintendent may issue a notice imposing an administrative penalty on the person. Section 57(2) requires that a notice of administrative penalty indicate the rule that has been contravened, indicate the administrative penalty that is imposed, and advise the person of the person's right to be heard respecting the matter.

Analysis

50. The imposition of an administrative penalty under section 57 of RESA is a discretionary decision. Requests for reconsideration of the imposition of an administrative penalty require a Hearing Officer to engage in a consideration not only of whether a contravention of RESA, the Regulations, or the Rules has occurred, but also whether a licensee exercised due diligence, that is: took reasonable steps or precautions, to prevent the contravention of the Rules identified in the notice of administrative penalty. A Hearing Officer may also consider information on any extenuating circumstances that prevented compliance, or any other information the licensee believes a Hearing Officer should consider.

<u>Rule 34 - Failure to Act with Reasonable Care and Skill</u>

51. The question at issue is whether the respondent failed to act with reasonable care and skill when she had the digitally altered photos posted on the MLS website listing for the property without disclosing the fact that those photos had been digitally altered.

52. I am of the view that she did.

53. At the outset, I consider it necessary to note that having reviewed the photographs of the property that were posted on the MLS website, and having compared those photographs to those taken when [Complainant 1] attended the property on May 20, 2023, I consider it to be clear that the photographs of the property that were placed on the MLS listing were digitally altered. The furnishings in the MLS photos are clearly not the same as those in the photos

taken on May 20, 2023. Further, the photos from May 20, 2023 show issues such as peeled and cracked paint on walls, which is not apparent in the MLS photos. Appliances such as the refrigerator and stove appear to have been edited in the MLS photos as compared to the photos taken on May 20, 2023.

54. While I acknowledge the respondent's submissions in which she takes the position that [Complainant 1] did not rely on the photos in question, I do not consider it is necessary to conclude that he did so for the respondent to be found to have failed to act with reasonable care and skill in allowing the photos to be posted as they were, without providing any indication that such editing had occurred.

55. In my view, the posting of those photographs was likely to give prospective purchasers an impression of the property which was not accurate. Leaving aside the issue of the furnishings, the reality of the May 20, 2023 photographs is that they show paint peeling from the walls, which is not the case in the photographs posted on MLS.

56. In short, regardless of whether [Complainant 1] relied on the photographs, I consider that any prospective purchaser who viewed the MLS listing of the property would have been left with the impression that the property was in a better state of repair than it in fact was, due to the digitally altered photographs. In my view, for the respondent to have allowed the photographs to convey such an impression, without providing a disclaimer indicating that the photographs had been digitally altered, demonstrated a failure to act with reasonable care and skill.

57. Although not necessary to my decision, I note further that I consider it to be likely that [Complainant 1] did, at least to some degree, rely on the photographs on MLS when making his final offer.

58. While I accept that the respondent entered into initial negotiations with [Complainant 1] and his agent on behalf of her client prior to the posting of the digitally altered photographs, the digitally altered photographs were posted on or about May 15, 2023, at a point when negotiations with [Complainant 1] were ongoing, and no disclaimer regarding editing accompanied those photographs.

59. [Complainant 1]'s initial offer on the property was $400,000. That offer was provided prior to any photographs of the interior of the property being posted. [Complainant 1] subsequently, in the afternoon of May 15, 2023, increased his offer, ceasing negotiations on that date with an offer of $475,000. That offer was again not accepted.

60. Finally, on May 17, 2023, [Complainant 1] again increased his offer to $490,000.

61. I accept, based on the email correspondence between [Complainant 1]'s agent and the respondent on May 20 and May 21, 2023, that [Complainant 1] was surprised that the furnishings in the property were not the same as those shown in the MLS listing photographs. In my view, it is likely that [Complainant 1] relied on the photographs, at least to some degree, in determining to increase his offers on the property.

62. I consider that a real estate agent acting with reasonable care and skill would have been aware that the photographs would be relied upon by a prospective buyer, including [Complainant 1], in determining the appropriate amount to offer for the property.

63. In my view, for the respondent to have demonstrated reasonable care and skill, she would have ensured that prospective buyers, including [Complainant 1], were aware of the fact that the photographs of the property that had been posted on the MLS listing had been digitally altered, and did not show the true nature of the furnishings of the property, or the state of

repair of the property. I consider this to particularly be the case here, where the respondent was aware that [Complainant 1] was seeking to retain the furnishings at the property as part of the purchase.

64. In those circumstances, where the respondent knew that the furnishings in the photographs were not those that were in the property, I consider that the exercise of reasonable care and skill required the respondent to inform [Complainant 1] of that fact.

65. Given my conclusions above, I find that the respondent was in breach of Rule 34.

Penalty Amount

66. As set out above, Rule 27(3) sets out that the amount of an administrative penalty for a first contravention of Rule 34 is $5,000, which is the penalty that was applied in this case.

67. Given my findings above, and the fact that the penalty applied was the base penalty of $5,000, I find that the Penalty should be confirmed.

Rule 41 – Publication of Advertising

68. As I have set out above, it is clear that the photographs of the property posted on MLS as of May 15, 2023 were digitally altered to show furnishings that were not actually present in the property, and more importantly to show the property in a better state of repair than it in fact was in.

69. Simply put, the photographs represented the property in a way that was not entirely accurate. While it could be argued the portions of the property that were edited in the photographs would perhaps not constitute the most important aspects of a property when one is considering a purchase, such an argument would not change the fact that the digital alteration of the photographs caused the property to be represented as being in a state of repair that it was not.

70. In short, the photographs, as included in the MLS listing as of May 15, 2023, were part of real estate advertising of the property that misrepresented that property. I therefore find that the respondent was in breach of Rule 41.

Penalty Amount

71. As set out above, Rule 27(4) sets out that the amount of an administrative penalty for a first contravention of Rule 41 is $1,000, which is the penalty that was applied in this case.

72. Given my findings above, and the fact that the penalty applied was the base penalty of $1,000, I find that the Penalty should be confirmed.

Conclusion

73. I find that the respondent contravened Rule 34 and Rule 41, by failing to disclose that the photographs of the property advertised on MLS were digitally modified. In doing so the respondent failed to act with reasonable care and skill, and published real estate advertising that she knew or reasonably ought to have known contained a misrepresentation concerning real estate.

74. As a result, the January 25, 2024 administrative penalty is confirmed.

75. The administrative penalty is now due and payable to BC Financial Services Authority.

DATED at KELOWNA, BRITISH COLUMBIA this 4th day of September, 2024.

"Original signed by Andrew Pendray"

Andrew Pendray
Chief Hearing Officer