

BEFORE THE BOARD OF REALTY REGULATION
STATE OF MONTANA

IN THE MATTER OF DOCKET NO. CC-08-0389-RRE REGARDING:

THE PROPOSED DISCIPLINARY)	Case No. 1180-2008
TREATMENT OF THE LICENSE OF)	
KRIS DESCHAMPS, A Licensed Real)	
Estate Property Manager,)	
License No. 11249.)	

**PROPOSED FINDINGS OF FACT; CONCLUSIONS OF LAW;
AND RECOMMENDED ORDER**

I. INTRODUCTION

In this matter, the Business Standards Division (BSD) seeks to impose sanctions against the property manager's license of Kris Deschamps. BSD alleges that Deschamps violated Mont. Code Ann. § 37-1-316(14) and Admin. R. Mont. 24.210.840(3)(w) (misappropriation of clients property) as well as Mont. Code Ann. § 37-1-316(18) (committing unprofessional conduct by violating Mont. Code Ann. § 37-1-316(14) and Admin. R. Mont. 24.210.840(3)(w)). The basis of these allegations are that Deschamps allegedly failed to return blueprints provided to her by a property owner and failed to give that property owner a videotape that Deschamps had made of a building owned by that property owner.

Hearing Examiner Gregory L. Hanchett convened a contested case hearing in this matter on May 30, 2008. Michael Fanning, agency legal counsel, represented the BSD. Deschamps represented herself. Deschamps, Richard Moore, and his wife, Denise Moore, testified under oath. The parties stipulated to the admission of BSD's Exhibits 1 through 8 and licensee's Exhibits 1 through 6. Although the licensee marked additional exhibits, these additional exhibits were not offered or moved into evidence. Based on the evidence and argument adduced at hearing, the hearing examiner makes the following findings of fact, conclusions of law and recommended decision.

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II. FINDINGS OF FACT

1. At all times pertinent to this matter, the licensee has been a licensed property manager in the State of Montana.

2. On May 7, 2004, the licensee and Richard Moore entered into a property management agreement for the licensee to manage Moore's commercial building which is located in Missoula, Montana. The agreement provided that the licensee would lease, manage, coordinate, and supervise the proper operation, maintenance, and management of the building. The agreement further provided that Moore would pay the licensee a management fee equal to 6% of the monthly gross receipts of the building. The agreement also provided that "Unless otherwise provided in this agreement, all services, duties and actions which the Manager is required or permitted to take in connection with the operation of the Property shall be taken on behalf of the Owner **at the sole expense of the Owner.**" (Emphasis added). Thus, under the terms of the management agreement, the licensee had the ability to charge Moore for additional services provided by the licensee under the agreement.

3. Prior to Moore signing the agreement, the licensee and Moore went over each provision of the agreement. Moore indicated that he understood each provision of the agreement. Moore then signed the agreement.

4. At the time the parties entered into the agreement, Moore provided the licensee with a copy of architectural blueprints for the building. The copy was on 8½ inch by 11 inch paper. The licensee made a copy of the copy of the blueprints and returned Moore's copy to him. Moore did not give the original blueprints to the licensee for safekeeping and the licensee, therefore, did not have any original blueprints to return to Moore.

5. On September 25, 2005, the licensee secured a tenant for Moore's building. The tenant, Mother Goose and Gander Children's Development Center, LLC, agreed to pay the sum of \$5,850.00 per month and agreed to a lease term of six months. Exhibit 3, September 23, 2005 lease.

6. The lease required the tenant to pay its monthly rent no later than the 10th day of each month. Exhibit 3. Immediately upon receipt of the rent, Moore would come to the licensee's office to collect the proceeds of the rent.

7. Moore needed to have most of the rent proceeds released to him in order to make sure that he could pay the debt service obligation he had for the building each month. As a result, after ensuring that the property tax and hazard insurance reserves were met, the balance of the proceeds would be paid out to Moore. This left insufficient or no funds from which the licensee could draw her monthly management funds.

8. The tenant did not treat Moore's building very well. After being in the building approximately one year, the tenant decided to move out. The tenant, however, had problems getting its new location ready for move-in. As a result, the tenant stayed on in a month to month tenancy until such time as it could move out.

9. Moore decided to terminate the licensee's property management agreement. To this end, he had his attorney prepare a letter, dated September 27, 2006, which terminated the licensee's property management agreement with Moore. Moore took the letter to the licensee's

office to meet with her and present it to her. At the meeting, the parties agreed to reconsider whether or not to terminate the property agreement. Eventually, Moore decided to proceed with termination of the property agreement.

10. As part of the tenant's vacating of Moore's building, Moore asked the licensee to videotape the building. The licensee, using her own video taping device, her own videotape, and on her own time, completed the video recording. Moore then demanded that the licensee provide him with the tape. The licensee agreed to do so if Moore would pay her for the tape in accordance with their property agreement. Moore refused to do so.

III. CONCLUSIONS OF LAW

A. The Department Has Failed to Demonstrate Any Violation

1. Mont. Code Ann. § 37-1-316 provides in pertinent part:

The following is unprofessional conduct for a licensee . . . governed by this chapter:

* * *

(14) Misappropriating property from a client or workplace or failing to comply with a board rule regarding the accounting and distribution of a client's property;

* * *

(18) conduct that does not meet the generally accepted standards of practice.

2. Administrative Rule of Montana 24.210.828(3)(w) defines unprofessional conduct to include "committing any act of forgery, fraud, misrepresentation, deception, misappropriation, conversion, theft or any *like* act." (Emphasis added).

3. BSD bears the burden of proof in this matter to show by a preponderance of the evidence that the licensee committed an act of unprofessional conduct. Mont. Code Ann. § 37-3-311; *Ulrich v. State ex rel. Bd of Funeral Service* (1998), 289 Mt. 407, 961 P.2d 126.

4. The Department conceded at hearing that the thrust of its complaint in this case was that Deschamps had refused to return Moore's blueprints and had failed to turn over a videotape that Deschamps had made with her own materials

on her own time and for which Moore refused to pay.¹ The evidence fails to preponderantly demonstrate that the licensee ever received any blueprints from Moore, much less kept them. The hearing examiner finds Deschamps' explanation-that Moore provided no blueprints but only an 8½ inch by 11 inch copy which Deschamps copied and then returned the copy provided by Moore to Moore-as the most credible testimony in this matter. Even taken in light that is most favorable to BSD, however, the evidence on this issue is at best a draw, insufficient to sustain BSD's burden of proof.

5. BSD's argument that Deschamps violated Mont. Code Ann. § 37-1-316(14), Admin. R. Mont. 24.210.840(3)(w) and Mont. Code Ann. § 37-1-316(18) by failing to turn over a videotape is not borne out by the evidence. Mont. Code Ann. § 37-1-316(14) encompasses conduct which amounts to fraud, conversion, misappropriation. Admin. R. Mont. 24.210.840(3)(w) encompasses the same conduct "or like acts." BSD is essentially arguing that the licensee misappropriated a videotape by refusing to turn over the tape even though she made it with her own materials (she bought the tape) on her own time (she did all of the filming of the property) and for which Moore refused to pay.

BSD never presented any evidence to refute Deschamps' contention that the tape which Deschamps used belonged to her and that she recorded the property on her own time. When she asked Moore to pay for the tape (which request conformed to the party's property management agreement), Moore refused. There is no evidence that Moore had any type of property interest in the videotape. In the absence of such evidence, a case for conversion or misappropriation cannot be made. See, e.g., *King v. Zimmerman and Big Z, Inc.*, (1994), 266 Mont. 54, 61, 878 P.2d 895, 900 (holding that while absolute ownership of or title to the property is not required in order to maintain a tort of conversion, there must be a showing that the party claiming conversion at least had an interest in the property that entitled him to possession at the time of the alleged conversion).

There is no evidence here that Moore had any right either contractually or by law to possess the videotape which he did not own or produce and for which he refused to pay. Without such evidence, there can be no showing of conduct that violates Mont. Code Ann. § 37-1-316(14), Admin. R. Mont. 24.210.840(3)(w) or Mont. Code Ann. § 37-1-316(18).

B. The Failure to Demonstrate a Violation Requires Dismissal

6. If a licensee is found not to have violated any of the provisions of Mont. Code Ann. Title 37, Chapter 1, Part 3, then the Department prepares and serves the Board's findings of fact together with an order of dismissal of the charges. Mont. Code Ann. § 37-1-311.

¹ When pressed about whether the complaint related to any alleged failure to properly return funds to Moore from Deschamps' trust account, BSD counsel stated that this case was solely about the failure to return the blueprints and the videotape because the licensee had in fact returned all monies due to Moore from the trust account. Record Transcript, Page 97, lines 8 through 12.

7. Because BSD has failed to demonstrate that the licensee engaged in conduct that violated Title 37, Chapter 1, Part 3, Montana Codes Annotated, dismissal of the charges is appropriate.

IV. RECOMMENDED ORDER

Based on the foregoing, the hearing examiner recommends that the Board of Realty Regulation enter its order dismissing the allegations contained in the complaint filed against the licensee as BSD has failed to prove its case by a preponderance of the evidence.

DATED this 16th day of July, 2008.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ GREGORY L. HANCHETT
GREGORY L. HANCHETT
Hearing Examiner