

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)	
PROFESSIONAL REGULATION,)	
)	
Petitioner,)	
)	
vs.)	Case No. 94-6495
)	
JOHN A. NEILSON, and)	
HENRY L. GAUTHIER, JR.,)	
)	
Respondents.)	
_____)	

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, Daniel M. Kilbride, held a formal hearing in the above-styled case on July 6, 1995, in Melbourne, Florida. The following appearances were entered:

APPEARANCES

For Petitioner: Steven W. Johnson, Esquire
Senior Attorney
Department of Business and
Professional Regulation
Division of Real Estate
400 West Robinson Street
Post Office Box 1900
Orlando, Florida 32802

For Respondent No Appearance

STATEMENT OF THE ISSUES

Whether Respondent John A. Neilson is guilty of misrepresentation, concealment, false promises, false pretenses, dishonest dealing by trick, scheme, or device, culpable negligence, or breach of trust in any business transaction, in violation of Subsection 475.25(1)(b), Florida Statutes.

Whether Respondent John A. Neilson is guilty of failure to account or deliver funds, in violation of Section 475.25(1)(d)1, Florida Statutes.

Whether John A. Neilson is guilty of failure to maintain trust funds in the real estate brokerage escrow account or some other proper depository until disbursement thereof was properly authorized, in violation of Section 475.25(1)(k), Florida Statutes.

Whether Respondent John A. Neilson is guilty of failure to notify the Petitioner of an escrow deposit dispute or good faith doubt as required by

Florida Administrative Code Rule 61J2-10.032, and therefore in violation of Section 475.25(1)(e), Florida Statutes.

PRELIMINARY STATEMENT

By an Administrative Complaint filed June 24, 1994, the Petitioner, Department of Business and Professional Regulation, alleges that the Respondents violated certain provisions of the Florida Statutes. The Respondents disputed the charges and requested a formal hearing. The matter was referred to the Division of Administrative Hearings and was set for hearing. Both Respondents were notified of the time set for hearing at the address provided. Respondent Gauthier requested a continuance. The motion was granted and the hearing was rescheduled for July 6, 1995. The parties were notified. At the hearing on July 6, Respondent Gauthier and Petitioner agreed to a stipulated settlement of the matters in dispute. Respondent Neilson failed to appear. After diligent search and inquiry, Neilson could not be located. The hearing proceeded as to Respondent Neilson only. At hearing, the Petitioner's Exhibits 1-8 were received into evidence. Charles Mosser, Ila Martin, and Investigator Fred Seli were called as witnesses by the Petitioner. The hearing was recorded but not transcribed. Petitioner submitted proposed findings of fact on July 17, 1995. Petitioner's proposals have been given careful consideration and are adopted in substance.

FINDINGS OF FACT

1. Petitioner is a state licensing and regulatory agency charged with the responsibility and duty to prosecute Administrative Complaints pursuant to the laws of the State of Florida, in particular, Section 20.30, Florida Statutes, Chapters 120, 455, and 475, Florida Statutes and the rules promulgated pursuant thereto.

2. Respondent is and was at all times material hereto a licensed Florida real estate broker having been issued license number 0342188 in accordance with Chapter 475, Florida Statutes.

3. The last license issued was as a broker-salesperson, percent Henry Gauthier, Jr. t/a/ Brevard Business Brokers, 1325 N. Atlantic Avenue, Cocoa Beach, Florida 32931.

4. Between January 21, 1992 and April 9, 1993, Respondent John A. Neilson was the qualifying broker of Cocoa Beach Realty.

5. Henry L. Gauthier became Respondent Neilson's employing broker about April 9, 1993.

6. On February 6, 1993, Respondent Neilson solicited and obtained a contract between seller Ila M. Martin and buyers Charles F. and Belle L. Mosser for the purchase of the house at 465 Skylark Boulevard in Satellite Beach, Florida.

7. According to the contract the buyers entrusted Respondent Neilson with a \$3,000.00 earnest money deposit.

8. The transaction was scheduled to close on April 7, 1993.

9. A few days prior to closing the buyers discovered that there was a cluster of amyotrophic lateral sclerosis (ALS) cases in the area of the home as evidenced by newspaper articles.

10. At no time material did Respondent Neilson disclose the cluster problem in the area to Mosser.

11. The buyers told Respondent Neilson that they would not close because of the ALS cluster in the area. They also advised they were not ready to close for other reasons.

12. On April 8, 1993, Respondent Neilson closed his brokerage and disbursed the \$3,000.00 to Mr. Gauthier without the consent of the buyers. Respondent Neilson then became a broker salesperson with Mr. Gauthier as qualifying broker.

13. On April 8, 1993, Gauthier disbursed the deposit, half to the seller and half to Respondent Neilson, without the knowledge or consent of the buyers, and without a written release.

14. By letter dated April 17, 1993, the buyers made a demand upon Gauthier for the return of their deposit.

15. At no time did the Respondents deliver the deposit to the buyers or notify the Petitioner of conflicting demands or good faith doubts about the disbursement of funds.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding, and the parties thereto, pursuant to subsection 120.57(1), Florida Statutes.

17. The parties were duly noticed pursuant to the notice provisions of Chapter 120, Florida Statutes.

18. Section 475.25, Florida Statutes, provides that the Florida Real Estate Commission may suspend a license for a period not exceeding ten years; revoke a real estate license; may impose an administrative fine not to exceed \$1,000 for each count or separate offense; and may impose a reprimand or, any or all of the foregoing, if it finds that a licensee has violated Section 475.25(1)(b); Section 475.25(1)(d)1, or Subsection 475.25(1)(k), Florida Statutes or 475.25(1)(e), Florida Statutes.

19. Section 475.25(16), Florida Statutes, proscribes misrepresentation, concealment, false promises, false pretenses, dishonest dealing by trick, scheme or device, culpable negligence or breach of trust in a business transaction.

20. Section 475.25(1)(d), Florida Statutes, proscribes failure to account and deliver trust funds.

21. Section 475.25(1)(k), Florida Statutes, proscribes failure to maintain trust funds in escrow account until disbursement is properly authorized. Rule 61J2-10.032, Florida Administrative Code.

22. Section 475.25(1)(e), Florida Statutes, proscribes failure to notify the Petitioner of an escrow dispute on good faith doubt.

23. The Respondent was guilty of failure to account for and deliver funds and failure to maintain trust funds until proper disbursal. Even though he was technically no longer the qualifying broker for Cocoa Beach Realty the Respondent was obligated as a broker-salesperson, to deal honestly and fairly with Mosser.

24. Certainly, Martin was satisfied with the wrongful disbursal. However, the Respondent and Gauthier had chosen to disburse as they pleased, without Mosser's approval. Mosser sent a clear demand to the Respondent's office which was ignored because the disbursal had already been completed.

25. Furthermore, the Respondent had not informed the Petitioner of a good faith doubt or that there was a dispute, in violation of Rule 61J2-10.032, Florida Administrative Code.

26. The Respondent and Gauthier took it upon themselves to interpret the parties' contract and gave the buyers short shrift.

27. The evidence failed to show that Respondent Neilson knew or should have known, of the ALS clusters in the area of Miller's home prior to April 7, 1993. Nor was it shown that Respondent Neilson was obligated to provide Mosser information about the incidents of ALS disease in the area, which he failed to do.

28. The burden of proof is on the Petitioner to prove each of the counts of the Administrative Complaint. *Balino v. Department of Health and Rehabilitative Services*, 348 So.2d 349 (Fla. 1st DCA 1977). Revocation of license proceedings are penal in nature. *State ex rel Vining v. Florida Real Estate Commission*, 281 So.2d 487 (Fla. 1983). The burden of proof in this matter is that relevant and material findings of fact must be supported by clear and convincing evidence. *Mel Heifetz d/b/a Key Wester Inn v. Department of Business Regulation, Division of Alcoholic Beverages and Tobacco*, 475 So.2d 1277 (Fla. 1st DCA 1985). See, *Ferris v. Turlington*, 510 So.2d 292, (Fla. 1987); *Pic' n' Save v. Department of Business and Professional Regulation*, 601 So.2d 245, (Fla. 1st DCA 1992).

29. The evidence is clear and convincing that the Respondent committed the actions alleged in Counts II, III and IV of the Administrative Complaint. Petitioner failed to make a prima facie case as to Count I.

30. As a real estate licensee in Florida, the Respondent occupies a status under the law with recognized privileges and responsibilities. *Zichlin v. Dill*, 25 So. 2d 4, (Fla. 2nd DCA 1946).

31. Inasmuch as a real estate licensee in Florida belongs to a privileged class, the State has prescribed a high standard of qualifications. *Zichlin*, supra. "The law specifically requires that a person, in order to hold a real estate license, must make it appear that he is . . . trustworthy . . . and that he bears a good reputation for fair dealing." *McKnight v. Florida Real Estate Commission*, 202 So.2d 199 (Fla. 2nd DCA 1967).

32. The Petitioner's proof is sufficient to justify the imposition of a penalty within the range of those provided for in the above-cited statutory authority as to Counts II, III and IV.

33. Respondent engaged in serious malpractice in closing his brokerage and essentially seizing Mosser's assets over Mosser's protest with the cooperation of Gauthier. The Respondent's actions amounted to a careless disregard for the welfare of the public with whom he dealt, and amounted to a reckless indifference to the rights of Mosser.

34. The Respondent is guilty of having committed the violations of Sections 475.25(1)(d)1., (k) and (1)(e), Florida Statutes as alleged in the Administrative Complaint. Respondent Neilson is not guilty of violating Section 475.25(1)(b), Florida Statutes.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that the Respondent John A. Neilson be found guilty of having violated Sections 475.25(1)(d)1., (1)(k), and (1)(e), Florida Statutes as charged in the Administrative Complaint. It is further

RECOMMENDED that Respondent John A. Neilson be found not guilty of having violated Section 475.25(1)(b), Florida Statutes.

RECOMMENDED that Respondent John A. Neilson be reprimanded and fined \$1,500.00.

DONE and ENTERED this 14th day of August, 1995, in Tallahassee, Florida.

DANIEL M. KILBRIDE
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of August, 1995.

APPENDIX

The following constitutes my specific rulings, in accordance with Section 120.57(1)(b)9., Florida Statutes.

Proposed findings of fact submitted by Petitioner.

Accepted in substance: paragraphs 1-15.

Proposed findings of fact submitted by Respondent.

None

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to the Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should consult with the agency that will issue the final order in this case concerning their rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.