



6-21-96

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Final Order No. BPR-96-02883 Date 5-28-96

FILED

Dept. of Business and Professional Regulation

AGENCY CLERK

Sarah Wachman, Agency Clerk

By: Brandi L. Moore

**STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS AND MOBILE HOMES
1940 NORTH MONROE STREET, TALLAHASSEE, FLORIDA 32399-1030**

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION,
DIVISION OF FLORIDA LAND SALES,
CONDOMINIUMS AND MOBILE HOMES,

Petitioner,

v.

ERNI HIRSCH,

Respondent.

DOAH CASE NO. 95-0951
DBPR CASE NO. TS94408

04 JUL 15 AM 9:45
DIVISION OF FLORIDA
ADMINISTRATIVE
HEARINGS

MWC-ELW

ORDER ON REMAND

THIS CAUSE came before the Division Director upon the issuance of the Hearing Officer's Recommended Order, the filing of Petitioner's Exceptions to the Hearing Officer's Recommended Order (PERO) and Respondent's Exceptions thereto and being otherwise fully advised in the premises, the following rulings are made as to Petitioner's Exceptions to the Hearing Officer's recommended findings of fact:

1. The Division accepts Petitioner's Exception as to the Hearing Officer's preliminary statement. (PERO: paragraphs 1-7, pages 1-3). On remand, the Division directs that the Hearing Officer clarify what exhibits were admitted into evidence, and to what extent they were admitted, so that the agency can determine whether the findings of fact are

supported by competent substantial evidence.

2. The Division rejects the Petitioner's Exception regarding recommended findings of fact numbers 1 - 5 (PERO: paragraphs 8-11, pages 6-9). Although the findings are for the most part irrelevant to determining whether the charges in the Notice to Show Cause have been proven, they do provide a background for the development of the ultimate findings.

3. The Division accepts Petitioner's Exception regarding recommended finding of fact number 8. (PERO: paragraph 11, page 9). The more accurate terminology of a "Notice to Show Cause," suggested by Petitioner is hereby substituted for the term "order to show cause" as used in the Hearing Officer's Recommended Order.

4. The Division accepts Petitioner's Exception regarding finding of fact number 10. (PERO: paragraph 11, page 9). Petitioner did not present evidence showing Respondent's status as a managing entity or showing her vicarious liability under any other legal theory. Therefore, finding of fact 10(f) is stricken in its entirety.

5. The Division rejects Petitioner's Exception regarding finding of fact number 11 as it relates to the first sentence of the finding of fact, but accepts Petitioner's Exception with regard to the second sentence. (PERO: paragraph 11, page 9). The finding is not probative of any material issue of fact and it is not supported by competent substantial evidence. Therefore, the second sentence of finding of fact number 11 is stricken in its entirety.

6. The Division accepts Petitioner's Exceptions relating to finding of fact number 13. (PERO: paragraph 11, pages 10 & 11). Inasmuch as the only evidence of the alleged statement is from an employee of the Division of Real Estate (a Division not having jurisdiction over this matter), who did not testify at the hearing, the statement is inadmissible

hearsay and is not sufficient in itself to support a finding. Therefore, sentence two of finding of fact number 13 is not supported by competent substantial evidence and is stricken.

7. The Division accepts Petitioner's Exceptions relating to finding of fact number 14. (PERO: paragraph 11, page 11). The finding is not supported by competent substantial evidence and is contrary to the evidence; therefore the first sentence of the finding of fact number 14 is stricken in its entirety.

8. The Division accepts Petitioner's Exceptions relating to finding of fact number 16. (PERO: paragraph 11, pages 11 & 12). No provision in Chapter 721, Florida Statutes, requires a finding of intent to support a violation of Section 721.05(9)(b), Florida Statutes (or any other provision of Chapter 721). Therefore, this finding is erroneous and is stricken in its entirety.

9. The Division accepts Petitioner's Exceptions as stated in paragraph 12 of Petitioner's exceptions. (PERO: paragraphs 12-15, pages 12-15). The identified findings, which the Hearing Officer did not address, are essential to the resolution of this cause. Accordingly, on remand, the Hearing Officer is directed to make findings of fact for those issues identified in subparagraphs 12.a. - 12.c. and 12.e. - 12.f. of Petitioner's Exception to the Recommended Order.

10. The Division rejects Petitioner's exception as expressed in paragraph 12.d. of Petitioner's exceptions (PERO: paragraph 12, page 14). The finding is unnecessary as a finding of fact and the Hearing Officer's rulings on the evidence on remand will determine whether Mr. Bell's opinion may be cited as evidence in support of the Division's ultimate conclusions of law.

11. The Division reserves ruling on Petitioner's exceptions to the recommended conclusions of law and the recommended penalty, and on Respondent's exceptions to the

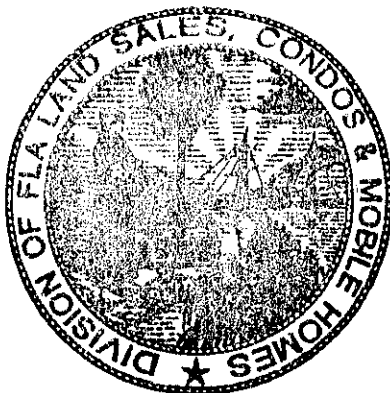
recommended conclusions of law, and the Hearing Officer's Order of February 21, 1996, until the Hearing Officer submits an Order in response to this Order on Remand. (PERO: paragraphs 13-19, pages 15-20). Ruling is reserved so that the Division's rulings on these issues may take into account all of the findings of fact necessary to the resolution of this cause. A copy of Petitioner's and Respondent's exceptions are attached for ease of reference.


Based upon all of the foregoing, it is

HEREBY ORDERED:

That this cause is remanded to the Hearing Officer for the limited purpose of clarifying what exhibits were admitted into evidence, as referenced in paragraph one of this Order, so that the agency may fulfill its duties pursuant to Chapter 120 and Chapter 721, Florida Statutes. See, e.g., Cohn v. Department of Professional Regulation, 477 So. 2d 1039 (Fla. 3d DCA 1985).

DONE AND ORDERED this 21st day of May 1996, at Tallahassee, Leon County, Florida.





ROBERT H. ELLZEY, JR. DIRECTOR
Division of Florida Land Sales,
Condominiums, and Mobile Homes
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1940 North Monroe Street
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent to Militana, Militana & Militana, Attorneys for Respondent, 8801 Biscayne Boulevard, Suite 101, Miami Shores, Florida 33138, by _____ this _____ day of May, 1996.

CAROLYN HOWARD, DOCKET CLERK

Copies furnished to:

Laura Glenn, Bureau Chief
Denise Bryant, Senior Attorney