

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION, DIVISION)
OF REAL ESTATE,)
)
Petitioner,)
)
vs.) CASE NO. 95-4111
)
PHILLIP B. GILBERT,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, William J. Kendrick, held a formal hearing in the above-styled case on January 25, 1996, in Miami, Florida.

APPEARANCES

For Petitioner: Daniel Villazon, Esquire
Department of Business and
Professional Regulation
Division of Real Estate
400 West Robinson Street
Post Office Box 1900
Orlando, Florida 32802

For Respondent: Phillip B. Gilbert, pro se
150 Northwest Fifty-sixth Street
Miami Shores, Florida 33127

STATEMENT OF THE ISSUE

At issue is whether respondent committed the offenses alleged in the administrative complaint and, if so, what disciplinary action should be taken.

PRELIMINARY STATEMENT

By a seven count administrative complaint dated April 26, 1994, petitioner charged that respondent, a licensed real estate

broker, violated various provisions of Chapter 475, Florida Statutes, and Rule 61J2-14.012, Florida Administrative Code. Specifically, petitioner alleged in Count I that respondent was "guilty of fraud, misrepresentation, concealment, false promises, false pretenses, dishonest dealing by trick, scheme or device, culpable negligence, or breach of trust in [a] business transaction in violation of [subsection] 475.25(1)(b)"; in Count II that respondent "fail[ed] to maintain trust funds in the real estate brokerage escrow bank account or some other proper depository until disbursement thereof was properly authorized in violation of [subsection] 475.25(1)(k)"; in Count III that respondent "operated as a broker without being the holder of a valid and current [active] license as a broker in violation of [subsection] 475.42(1)(a) . . . and therefore . . . [subsection] 475.25(1)(e)"; in Count IV that respondent "fail[ed] to comply with a subpoena in violation of . . . [subsection] 475.42(1)(h) . . . and therefore . . . [subsection] 475.25(1)(e)"; in Count V that respondent "operated as a broker under a trade name without causing the same to be noted in the records of the Commission and placed on his license or so operate as a member of a partnership or as a corporation or as an officer or manager thereof, without the partnership or corporation being the holder of a valid current registration in violation of [subsection] 475.42(1)(k) . . . and therefore . . . [subsection] 475.25(1)(e)"; in Count VI that respondent "fail[ed] to prepare the required written monthly escrow statement-reconciliations in violation of . . . [rule] 61J2-14.012(2) and (3) and therefore . . . [subsection] 475.25(1)(e)"; and in Count VII that respondent "failed to preserve the books, accounts and, records pertaining to the broker's real estate brokerage business for a period of not less than five (5) years subsequent to the time of receipt of any money, funds, deposit, check or drafts entrusted to the broker or the conclusion of the broker's involvement in the transaction, whichever results in a greater period of retention of records in violation of . . . [rule] 61J2-14.012(4) and therefore . . . [subsection] 475.25(1)(e)."

Respondent filed an election of rights wherein he disputed the allegations of fact contained in the administrative complaint, and on August 16, 1995, petitioner referred the matter to the Division of Administrative Hearings for the assignment of a Hearing Officer to conduct a formal hearing pursuant to Section 120.57(1), Florida Statutes.

At hearing, petitioner called Chester Morong and Kenneth Rehm as witnesses, and its exhibits A (the deposition of Bruce Gramigna, filed post-hearing) and 1 through 16 were received into evidence. Respondent testified on his own behalf, and his exhibits 2 through 7 were received into evidence. 1/

The transcript of hearing was filed February 12, 1996, and the parties were accorded twenty days from that date to file proposed recommended orders. Consequently, the parties waived the requirement that a recommended order be rendered within thirty days after the transcript is filed. Rule 60Q-2.031, Florida Administrative Code. Petitioner elected to file such a proposal and the proposed findings of fact contained therein are addressed in the appendix to this recommended order.

FINDINGS OF FACT

1. Petitioner, Department of Business and Professional Regulation, Division of Real Estate (Department), is a state government 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 20.165, Florida Statutes, and the rules promulgated pursuant thereto.

2. Respondent, Phillip Bantu Gilbert, is now and was at all times material hereto a licensed real estate broker in the State of Florida, having been issued license number 0460883.

Respondent's licensure status

3. On May 13, 1992, respondent applied to the Department for licensure as a real estate broker. As part of that application, respondent was required to make an election with regard to whether, upon successful completion of the examination, he would be actively employed or preferred an inactive broker's license. Specifically, the application provided:

EMPLOYMENT INFORMATION

You must select one of the following options for your first license which automatically will be mailed as notice of passing the examination, together with your examination score. The receipt of either license will establish your broker's status. You may immediately file a request to change employer, register as a real estate broker (sole proprietorship), or become a broker-member of a corporation or partnership, at no additional charge.

I will continue my present employment as a broker-salesman. (ATTACH COPY of your current salesman's license or Validated Confirmation Slip.)

I wish to be issued an inactive broker's license and understand that it may

be converted to a broker's or broker-salesman's license if I file and request same when notified that I have passed the examination.

Respondent elected the second option, to be issued an inactive broker's license.

4. Respondent successfully completed the examination, and on December 21, 1992, was issued his broker license. Such licenses do not carry any legend reflecting active or inactive status; however, due to his election, which evidenced no current real estate employment or place of business, respondent's status was inactive.

5. Following licensure, respondent began to actively operate as a broker, under the name Bantu Enterprises, at 150 Northwest 56th Street, Miami Shores, Florida. Bantu Enterprises, of which respondent is president and founder, is a Florida corporation, and has never been registered as a trade name or real estate brokerage company by the Department.

6. Respondent's license continued in a voluntary inactive status until, following the investigation hereinafter discussed, he applied to the Department for active status. That application, filed March 1, 1994, identified the name and business address of the owner/broker as Phillip B. Gilbert, 150 Northwest 56 Street, Miami, Florida.

The Morong transaction

7. On or about June 14, 1993, Chester Morong and Lynette Morong, his wife, submitted an offer to purchase certain real property located at 700 Northwest 55 Avenue, Plantation, Florida, to the Department of Veterans Affairs (VA) for \$177,250.00. Such offer was submitted through Bantu Enterprises, with Phillip B. Gilbert noted as the principal broker and sales person, and reflected an earnest money deposit of \$1,500.00 being held by the broker.

8. On June 30, 1993, respondent was advised by the VA that the Morong offer had been accepted for processing, and respondent was accorded three business days to present the Morongs to an authorized VA lender to process their offer. Respondent apparently complied with such requirement, and on August 4, 1993, the VA advised respondent that the Morongs had been approved to purchase the property and a closing date of August 13, 1993, was established.

9. On August 9, 1993, the VA sent by overnight express to respondent, as the broker of record, the closing package. Under

established procedure, respondent was to close the transaction, and then return to the VA, within 10 days of the closing, the closing package, the proceeds due the VA, and a recording receipt for any legal instruments that were recorded.

10. On August 13, 1993, Mr. Morong requested of respondent that the closing be postponed for fourteen days. According to Mr. Morong, a hurricane had destroyed his parents' home in Trinidad the previous weekend, and he had been required to use the closing monies, among others, to provide them assistance.

11. Respondent assured Mr. Morong that the time for closing could be extended; and on some date between August 13 and August 16, 1993, secured the Morongs' signatures to the closing documents in anticipation of closing. Among those documents was a mortgage deed to secure the repayment of the VA financing and a mortgage note in the sum of \$175,750.00.

12. On August 16, 1993, the VA contacted respondent's office and advised that there might be a title problem, and that the closing might have to be postponed to see if the problem could be resolved. According to the VA, respondent's office manager informed them that Mr. Gilbert told her to inform the VA that the sale had closed. In fact, the sale had not closed at that time.

13. At or about 2:30 a.m., August 17, 1993, respondent telephoned Mr. Morong and stated he had received a call from the VA and that if he didn't have the closing costs the next day he (respondent) would quit claim the property to another person.

14. On August 17, 1993, Mr. Morong telephoned the VA and learned that there might be a title problem with the property, associated with a bankruptcy. Acting on that advice, Mr. Morong delivered a letter to Mr. Gilbert that same day, which letter stated:

Without prejudice I would like to formally withdraw my offer to close on the purchase of the above captioned property.

This decision though saddening for us . . . was arrived at due to the attending problems with the property.

I would like the urgent return of my \$1500 earnest money. I also would like to bid on another property.

On August 19, 1993, Mr. Morong was given a check, post-dated for August 21, 1993, on the account of Bantu Enterprises, in the sum

of \$1,500.00, for return of his escrow deposit. That check was subsequently negotiated and paid.

15. Respondent did not advise the VA of Mr. Morong's withdrawal of the offer to purchase or his return of Mr. Morong's earnest money deposit. Had he done so, the closing on this property would not have occurred and the VA would have offered the property to the next highest bidder (offeror). Under such circumstances, respondent would have lost the six percent commission he anticipated from the transaction.

16. Subsequent to Mr. Morong's withdrawal of his offer to purchase on August 17, 1993, respondent proceeded to close on the property, without the Morongs' consent. In so doing, respondent caused the special warranty deed from the VA to the Morongs, as well as the mortgage previously executed by the Morongs, to be recorded in the public records of Broward County, Florida. Thereafter, on August 26, 1993, respondent caused a quit claim deed, dated August 18, 1993, between Chester Morong and Lynette Morong, his wife, as grantors and Beverly A. Henry, a single woman, as grantee, to be recorded in the public records. That quit claim deed, prepared by respondent's brokerage, is a fraudulent document since the signatures affixed to the quit claim deed purporting to be those of Mr. and Mrs. Morong are forgeries, as the Morongs never executed any such document.

17. On August 23, 1993, the VA received the closing package back from respondent, along with the settlement proceeds. Facially, the documents reflected that the sale had closed on August 13, 1993, and that Chester Morong and Lynette Morong, his wife, were the owners of the property. No reference was made to the transfer to Ms. Henry, and no request was made, at the time, for an assumption of mortgage package.

The investigation of respondent's records and escrow accounts

18. Following a complaint from Mr. Morong, after he discovered that the closing had occurred as heretofore discussed, a Department investigator commenced an audit of respondent's business practices. Among the items addressed by the investigator with respondent on his initial visit was a request to audit respondent's account to ascertain when Mr. Morong's \$1,500.00 deposit was placed in escrow, and into what escrow account it was placed. To adequately conduct such an audit, the investigator would need respondent's bank deposit slips, monthly bank statements, case files and broker's monthly reconciliations. Respondent advised the investigator that he did not have the documents available at the time.

19. Subsequently, on February 16, 1994, the investigator served a subpoena on respondent to compel production of the documents. That subpoena commanded that respondent produce on February 21, 1994, the following:

For the period Jan. 1, 1993 to present, all sale/purchase agreements, contracts, leasing or rental agreements either closed, pending or null and void including monthly bank statements and cancelled checks plus monthly reconciliations of all escrow accounts and bank deposit slips.

20. In response to the subpoena, respondent produced some bank statements and cancelled checks on an account for Bantu Enterprises, but no banking information for accounts in his name. As for the documents produced, they were fragmentary and not inclusive of the audit period, no contracts or case files were produced, and no written monthly reconciliations, as required by Rule 61J2-14.012, Florida Administrative Code, were produced. Consequently, a complete picture of respondent's activities was not presented, and the audit could not be completed. As of the date of hearing, respondent had still failed to produce the documentation requested by the subpoena, and the audit could not be completed.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. Sections 120.57(1) and 120.60(7), Florida Statutes.

22. Here, petitioner seeks to take disciplinary action against respondent for violating the provisions of Section 475.25(1), Florida Statutes. Consequently, the petitioner bears the burden of proving its charges by clear and convincing evidence. See *Ferris v. Turlington*, 510 So.2d 292 (Fla. 1987). The nature of clear and convincing evidence has been described as follows in *Slomowitz v. Walker*, 429 So.2d 797, 800 (Fla. 4th DCA 1983):

We therefore hold that clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it pro-

duces in the mind of the trier of fact a firm belief or conviction, without hesitancy as to the truth of the allegations sought to be established.

See also, *Smith v. Department of Health and Rehabilitative Services*, 522 So.2d 956 (Fla. 1st DCA 1988), which quotes with approval the above-quoted language from *Slomowitz*.

23. Pertinent to this case, Section 475.25(1), Florida Statutes, provides that the Florida Real Estate Commission may:

(1) . . . place a licensee, registrant, or permittee on probation; may suspend a license, registration, or permit for a period not exceeding 10 years; may revoke a license, registration, or permit; may impose an administrative fine not to exceed \$1,000 for each count or separate offense; and may issue a reprimand, and any or all of the foregoing, if it finds that the licensee, registrant, permittee, or applicant:

* * *

(b) Has been guilty of fraud, misrepresentation, concealment, false promises, false pretenses, dishonest dealing by trick, scheme, or device, culpable negligence, or

breach of trust in any business transaction in this state or any other state, nation, or territory

* * *

(e) Has violated any of the provisions of this chapter or any lawful order or rule made or issued under the provisions of this chapter or chapter 455.

* * *

(k) Has failed, if a broker, to immediately place, upon receipt, any money, fund, deposit, check, or draft entrusted to him by any person dealing with him as a broker in escrow with a title company, banking institution, credit union, or savings and loan association located and doing business in this state, or to deposit such funds in a trust or escrow account maintained by him with some bank, credit union, or savings and loan association located and doing business in this state, wherein the funds shall be kept until disbursement thereof is properly authorized . . .

Also pertinent to this case are the following provisions of Sections 475.42, Florida Statutes, and Rule 61J2-14.012, Florida Administrative code:

475.42 Violations and penalties.--

(1) VIOLATIONS.--

(a) No person shall operate as a broker or salesperson without being the holder of a valid and current active license therefor.

* * *

(h) No person shall fail or refuse to appear at the time and place designated in a subpoena issued with respect to a violation of this chapter, unless because of facts that are sufficient to excuse appearance in response to a subpoena from the circuit court . . .

* * *

(k) No person shall operate as a broker under a trade name without causing the trade name to be noted in the records of the commission and placed on his license, or so operate as a member of a partnership or as a corporation or as an officer or manager thereof, unless such partnership or corporation is the holder of a valid current registration.

61J2-14.012 Broker's Records.

(1) A broker who receives a deposit as previously defined shall preserve and make available to the BPR, or its authorized representative, all deposit slips and statements of account rendered by the depository in which said deposit is placed, together with all agreements between the parties to the transaction. In addition, the broker shall keep an accurate account of each deposit transaction and each separate bank account wherein such funds have been deposited. All such books and accounts shall be subject to inspection by the BPR or its authorized representatives at all reasonable times during regular business hours.

(2) At least monthly, a broker shall cause to be made a written statement comparing the broker's total liability with the reconciled bank balance(s) of all trust accounts. The broker's trust liability is defined as the sum total of all deposits received, pending and being held by the broker at any point in time. The minimum information to be included in the monthly statement-reconciliation shall be the date the reconciliation was undertaken, the date used to reconcile the balances, the name of the bank(s), the name(s) of the account(s), the account number(s), the account balance(s) and date(s), deposits in transit, outstanding checks identified by date and check number, and any other items necessary to reconcile the bank account balance(s) with the balance per the broker's checkbook(s) and other trust account books and records disclosing the date of receipt and the source of the funds. The broker shall review, sign and date the monthly statement-reconciliation.

* * *

(4) The books, accounts and records pertaining to the broker's real estate brokerage business shall be preserved for a period of not less than 5 years after receipt of any money, funds, deposit, check or drafts entrusted to the broker or the conclusion of the broker's involvement in the transaction, whichever results in a greater period of retention of records. If any brokerage record has been the subject of or has served as evidence in litigation, relevant books, accounts and records must be retained for at least 2 years

after the conclusion of the civil action or the conclusion of any appellate proceeding, whichever is later, but not less than a total of 5 years as set above.

24. Here, the proof is clear and convincing that respondent's conduct with regard to the Morong transaction violated the provisions of subsection 475.25(1)(b), as alleged in Count I of the administrative complaint. The proof further demonstrated that respondent operated as a broker without a current active license, and operated under a trade name or as a corporation without registering such name or corporation with the Commission, as alleged in Counts III and V, in violation of subsections 475.42(1)(a) and (k), and therefore subsection 475.25(1)(e), Florida Statutes. The proof also demonstrated that respondent, by failing to produce records in response to the Department's subpoena, failed to maintain records he was legally obligated to maintain or failed to comply with a subpoena issued by the Department, as alleged in Counts IV and VII, in violation of subsection 475.42(1)(h) and rule 61J2-14.012, and therefore subsection 475.25(1)(e), Florida Statutes. Finally, the proof demonstrated that respondent failed to maintain a monthly written statement-reconciliation as alleged in Count VI, in violation of rule 61J2-14.012(2), and therefore subsection 475.25(1)(e), Florida Statutes.

25. While the Department's charges in Counts I and III through VII of the administrative complaint have been sustained, it has failed to carry its burden of proof with regard to the allegations of Count II. Such count alleged that respondent "fail[ed] to maintain trust funds in the real estate brokerage escrow bank account or some other proper depository until disbursement thereof was properly authorized in violation of [subsection] 475.25(1)(k)." The proof demonstrated, however, that respondent apparently did maintain trust funds in an escrow account, albeit in the name of Bantu Enterprises. Consequently, while respondent is guilty of failing to register Bantu Enterprises, as heretofore noted, he is not guilty of the separate offense of having failed to maintain trust funds in an escrow account under his signatory control.

26. Having resolved that respondent committed the offenses heretofore noted, it remains to resolve the appropriate penalty for his offenses. Considering the seriousness of respondent's violations, the Department's recommendation that revocation is the appropriate penalty is accepted.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a final order be rendered which finds respondent guilty of Counts I and III through VII of the administrative complaint, and which dismisses Count II of the administrative complaint. As a penalty for such violations, respondent's broker's license should be revoked.

DONE AND ENTERED this 30th day of May 1996 in Tallahassee,
Leon County, Florida.

WILLIAM J. KENDRICK, 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 30th day of May 1996.

ENDNOTE

1/ On February 5, 1996, respondent filed a letter with the Division of Administrative Hearings to which were attached copies of two checks. To the extent respondent's submittal could be construed as a request that the copies of the two checks be received into evidence, such request, in the face of petitioner's objection, is denied.

APPENDIX

Petitioner's proposed findings of fact are addressed as follows:

1. Addressed in paragraph 1.
2. Addressed in paragraph 2.
- 3 and 4. Addressed in paragraphs 3 and 4.
- 5 through 10. Addressed in paragraphs 7 through 17.
- 11 and 12. Addressed in paragraphs 19 and 20.
12. (sic) Addressed in paragraphs 5 and 6.
13. (sic) Addressed in paragraph 20.

COPIES FURNISHED:

Daniel Villazon, Esquire
Department of Business and
Professional Regulation
Division of Real Estate
Post Office Box 1900
Orlando, Florida 32802-1900

Phillip B. Gilbert, pro se

150 Northwest Fifty-sixth Street
Miami Shores, Florida 33127

Henry M. Solares, Director
Division of Real Estate
Post Office Box 1900
Orlando, Florida 32802-1900

Lynda L. Goodgame, General Counsel
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-0792

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this recommended order. All agencies allow each party at least ten days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency 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.

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DISTRICT COURT OPINION
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NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A.D. 1997

PHILLIP B. GILBERT,

Appellant,

vs.

STATE OF FLORIDA, DEPARTMENT
OF BUSINESS AND PROFESSIONAL
REGULATION, DIVISION OF REAL

CASE NO. 96-02955
LOWER
TRIBUNAL NO. 95-4111

ESTATE,

Appellee.

Opinion filed April 9, 1997.

An appeal determined pursuant to Florida Rule of Appellate Procedure 9.315(a) from the State of Florida, Department of Business and Professional Regulation, Division of Real Estate.

Phillip B. Gilbert, in proper person.

Daniel Villazon, for appellee.

Before SCHWARTZ, C.J., and COPE and GERSTEN, JJ.

PER CURIAM.

Affirmed.

M A N D A T E
DISTRICT COURT OF APPEAL OF FLORIDAA
THIRD DISTRICT

DCA# 96-2955

PHILLIP B. GILBERT

vs.

STATE OF FLA, DEPT OF BUSINESS AND PROFESSIONAL REGULATION, etc.

This cause having been brought to this Court by appeal, and after due consideration the Court having issued its opinion.

YOU ARE HEREBY COMMANDED that further proceedings be had in said cause accordance with the opinion of this Court attached hereto and incorporated as part of this order, and with the rules of procedure and laws of the State of Florida.

Case No. 95-4111

WITNESS, The Honorable Alan R. Schwartz

Chief Judge of said District Court and seal of said Court at Miami, this 25th day of April, 1997.

(SEAL)

LOUIS J. SPALLONE, Clerk
District Court of Appeal of Florida, Third District