

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION, DIVISION)
OF REAL ESTATE,)
)
Petitioner,)
)
vs.) CASE NO. 95-4813
)
HILDA H. BELL and SHARMIC REALTY,)
INC.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in this case on February 29, 1996, at Fort Lauderdale, Florida, before Michael M. Parrish, a duly designated Hearing Officer of the Division of Administrative Hearings.

APPEARANCES

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

For Respondent: (No Appearance)

STATEMENT OF THE ISSUES

This is a license discipline proceeding in which the Petitioner seeks to take disciplinary action against the two Respondents, one individual and one corporation, on the basis of alleged violations set forth in an eight-count Administrative Complaint. The Respondents are charged with violation of Section 475.25(1)(b), Florida Statutes, and with multiple violations of Section 475.25(1)(e), Florida Statutes.

PRELIMINARY STATEMENT

Pursuant to written notice to all parties, the formal hearing in this case was scheduled to begin at 8:30 a.m. on February 29, 1996. At the appointed date, time, and place, the Petitioner appeared through counsel, but there was no appearance by or on behalf of either of the Respondents. The Hearing Officer waited until 9:00 a.m., by which time there was still no appearance by or on behalf of the Respondents.

The Hearing Officer called the hearing to order shortly after 9:00 a.m., whereupon the Petitioner began its presentation by announcing the voluntary

dismissal of the charges alleged in Counts III and IV of the Administrative Complaint. The Petitioner then presented the testimony of one witness (Investigator Margaret Hoskins) and offered six exhibits, all of which were received in evidence. At the conclusion of the presentation of evidence, counsel for the Petitioner stated that the Petitioner did not intend to order a transcript of the proceedings at the hearing. Counsel for Petitioner requested that the parties be allowed twenty days within which to file proposed recommended orders. The request was granted. At no time during the course of the hearing was there any appearance by or on behalf of the Respondents.

On March 20, 1996, the Petitioner filed a timely Proposed Recommended Order containing proposed findings of fact and conclusions of law. All findings of fact proposed by the Petitioner are included in the findings of fact which follow.² As of the date of this Recommended Order the Respondents have not filed any post-hearing document with the Hearing Officer.

FINDINGS OF FACT

1. The Petitioner is a state government licensing and regulatory agency charged with responsibilities and duties which include the prosecution of Administrative Complaints against licensees under Chapter 475, Florida Statutes.

2. Respondent Hilda H. Bell is now, and was at all times material hereto, a licensed Florida real estate broker, having been issued license number 0349586 in accordance with Chapter 475, Florida Statutes. The last license issued was as a broker at Sharmic Realty, Inc., at the following address: 8701 Willes Road, Unit 16-308, Coral Springs, Florida 33067.

3. Respondent Sharmic Realty, Inc., is now, and was at all times material hereto, a corporation registered as a Florida real estate broker, having been issued license number 0243150 in accordance with Chapter 475, Florida Statutes. The last license issued was at the following address: 8701 Willes Road, Unit 16-308, Coral Springs, Florida 33067.

4. At all times material hereto, Respondent Hilda H. Bell was licensed and operating as the qualifying broker of, and an officer of Respondent Sharmic Realty, Inc.

5. On September 27, 1994, Petitioner's Investigator Margaret R. Hoskins audited Respondents' escrow accounts.

6. The audit revealed that the Respondents maintained Property Management Escrow Account Number 00300066617 at Glendale Federal Bank, Fort Lauderdale, Florida.

7. A total trust liability for the Respondents' Property Management Escrow Account could not be determined because the Respondents did not have complete and accurate records.

8. On August 11, 1992, the Respondents deposited \$20,000.00 into their Property Management Escrow Account for a person who did not have a checking account.

9. On August 11, 1992, the Respondents issued escrow check number 0972 in the amount of \$20,000.00.

10. On August 18, 1992, the Respondents loaned Cecil Sailsman \$500.00 from the Property Management Escrow Account.

11. On January 12, 1993, the Respondents deposited \$22,496.91 in personal funds into the Property Management Escrow Account.

12. The Respondents subsequently disbursed \$15,045.00 of the personal funds from the Property Management Escrow Account.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. See Section 120.57, Florida Statutes.

14. Section 475.25, Florida Statutes, reads as follows, in pertinent part:

(1) The commission may deny an application for licensure, registration, or permit, or renewal thereof; may 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; has violated a duty imposed upon him by law or by the terms of a listing contract, written, oral, express, or implied, in a real estate transaction; has aided, assisted, or conspired with any other person engaged in any such misconduct and in furtherance thereof; or has formed an intent, design, or scheme to engage in any such misconduct and committed an overt act in furtherance of such intent, design, or scheme. It is immaterial to the guilt of the licensee that the victim or intended victim of the misconduct has sustained no damage or loss; that the damage or loss has been settled and paid after discovery of the misconduct; or that such victim or intended victim was a customer or a person in confidential relation with the licensee or was an identified member of the general public.

* * *

(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.

15. Rule 61J2-14.008(1)(c), Florida Administrative Code, reads as follows:

(c) "Trust" or "escrow" account means an account in a bank or trust company, title company having trust powers, credit union, or a savings and loan association within the State of Florida. Only funds described in this rule shall be deposited in trust or escrow accounts. No personal funds of any licensee shall be deposited or intermingled with any funds being held in escrow, trust or on condition except as provided in Rule 61J2-14.010(2), Florida Administrative Code.

16. Rule 61J2-14.010(2), Florida Administrative Code, reads as follows:

(2) A broker is authorized to place and maintain up to \$200 of personal or brokerage business funds in the escrow account for the purposes of opening the account, keeping the account open and/or paying for ordinary service charges.

17. Rule 61J2-14.012(4), Florida Administrative Code, reads as follows:

(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.

18. In a case of this nature where the potential penalties set forth in the Administrative Complaint include the possibility of suspension or revocation of a license or registration, the Petitioner bears the burden of proving its case by clear and convincing evidence. See *Ferris v. Turlington*, 510 So.2d 292 (Fla. 1987).

19. With regard to the violations alleged in Counts III and IV of the Administrative Complaint, those counts were voluntarily dismissed by Petitioner's counsel at the beginning of the formal hearing. Accordingly, they should be dismissed in the final order in this case.

20. With regard to the violations of Section 475.25(1)(b), Florida Statutes, alleged in Counts I and II of the Administrative Complaint, the Petitioner argues that the Respondents are guilty of a breach of trust in a business transaction or culpable negligence. The evidence in this case is insufficient to establish a breach of trust in a business transaction. The evidence is, however, sufficient to establish that the Respondents have committed culpable negligence within the meaning of Section 475.25(1)(b), Florida Statutes. Accordingly, the final order in this case should conclude

that the Respondents are guilty of the violations charged in Counts I and II of the Administrative Complaint by reason of culpable negligence.

21. With regard to Counts V and VI of the Administrative Complaint, the evidence is sufficient to establish that the Respondents violated Rule 61J2-14.008(1)(c), Florida Administrative Code, by depositing substantial amounts of personal funds in their Property Management Escrow Account. This violation of Rule 61J2-14.008(1)(c), Florida Administrative Code, constitutes a violation of Section 475.25(1)(e), Florida Statutes, as alleged in Counts V and VI of the Administrative Complaint. Accordingly, the final order in this case should conclude that the Respondents are guilty of the violations charged in Counts V and VI of the Administrative Complaint.

22. With regard to Counts VII and VIII of the Administrative Complaint, the evidence is sufficient to establish that the Respondents violated Rule 61J2-14.012(4), Florida Administrative Code, by failing to keep the books, accounts, and records required by that rule. This violation of Rule 61J2-14.012(4), Florida Administrative Code, constitutes a violation of Section 475.25(1)(e), Florida Statutes, as alleged in Counts VII and VIII of the Administrative Complaint. Accordingly, the final order in this case should conclude that the Respondents are guilty of the violations charged in Counts VII and VIII of the Administrative Complaint.

23. At pages 8 and 9 of its proposed recommended order, the Petitioner suggests the following as the appropriate penalty in this case:

It is further recommended that Respondent Hilda H. Bell be fined \$3,000.00 and that Respondent Hilda Bell's real estate brokerage license be suspended for a period of six (6) months.

It is further recommended that following Respondent Hilda H. Bell's suspension period, that she be placed on probation for a period of one (1) year and that Respondent Hilda H. Bell, during such probationary period, provide satisfactory evidence of having completed a 7 hour real estate brokerage escrow management course, the 7 hours being in addition to any other education required of the Respondent to remain current and active as a real estate broker in the State of Florida.

It is also recommended that Sharmic Realty, Inc., be reprimanded.

The penalty proposed in the language quoted immediately appears to be appropriate under the circumstances of this case.

RECOMMENDATION

On the basis of all of the foregoing, it is RECOMMENDED that the Florida Real Estate Commission issue a final order in this case to the following effect:

- (1) Dismissing Counts III and IV of the Administrative Complaint;
- (2) Concluding that the Respondents are guilty of the violations charged in Counts I, II, V, VI, VII, and VIII of the Administrative Complaint; and

(3) Imposing administrative penalties consisting of the following:

(a) An administrative fine against Respondent Hilda H. Bell in the amount of three thousand dollars (\$3,000.00);

(b) A six month suspension of the real estate brokerage license of Respondent Hilda H. Bell;

(c) A one year period of probation for the Respondent Hilda H. Bell, to begin immediately following the period of suspension;

(d) A requirement that the Respondent Hilda H. Bell complete additional education in the form of a seven hour course in real estate brokerage escrow management during her period of probation; and

(e) A reprimand of Respondent Sharmic Realty, Inc.

DONE AND ENTERED this 2nd day of April 1996 in Tallahassee, Leon County, Florida.

MICHAEL M. PARRISH, 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 2nd day of April 1996.

ENDNOTES

1/ At the commencement of the hearing, counsel for the Petitioner voluntarily dismissed two counts and the case went to hearing on the remaining six counts.

2/ In a case of this nature, the Petitioner must prove its case even where, as here, the Respondents fail to appear at the hearing. There is persuasive competent substantial evidence to support all of the findings of fact proposed by the Petitioner, all of which were adopted by the Hearing Officer. Further, such evidence is clear and convincing.

COPIES FURNISHED:

Daniel Villazon, Esquire
Department of Business and
Professional Regulation
Division of Real Estate
400 West Robinson Street, N-308
Post Office Box 1900
Orlando, Florida 32802-1900

Ms. Hilda H. Bell
8701 Wiles Road, No. 16-308
Coral Springs, Florida 33067

Henry M. Solares, Division Director
Department of Business and
Professional Regulation
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.