

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) CASE NO. 96-3152
)
JOSEPH L. DUME AND SOUTHWEST)
FLORIDA HOME REALTY, INC.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Port Charlotte, Florida, on September 4, 1996.

APPEARANCES

For Petitioner: Steven D. Fieldman
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For Respondents: Frederick H. Wilsen
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STATEMENT OF THE ISSUE

The issue is whether Respondents are guilty of dishonest dealing by trick, scheme or device, culpable negligence, or breach of trust in any business transaction, in violation of Section 475.25(1)(b); failing to maintain trust accounts in an escrow account until disbursement is authorized, in violation of Section 475.25(1)(k); operating as a broker without holding a valid broker's license, in violation of Sections 475.42(1)(a) and 475.25(1)(e); failing to prepare the required written monthly escrow-statement reconciliations, as required by Rule 61J2-14.012(2) and (3), and thus Section 475.25(1)(e); failing to give written notice to a party to a transaction, before the party signs a contract, that the broker is a representative of another party, in violation of Rule 61J2-10.033 and Section 475.25(1)(q); failing to comply with Section 475.25(1)(q), and thus Section 475.25(1)(e); and, as to Respondent Dume, engaging for a second time in misconduct that warrants his suspension or

engaging in conduct or practices that show he is so incompetent, negligent, dishonest, or untruthful that clients and their money cannot safely be entrusted to him, in violation of Section 475.25(1)(o). If either Respondent is guilty of any of these alleged violations, an additional issue is what penalty should be imposed.

PRELIMINARY STATEMENT

By Administrative Complaint dated December 15, 1995, Petitioner alleged that Respondent Dume operated as qualifying broker of Respondent Southwest Florida Home Realty, Inc. The Administrative Complaint alleges that the real estate broker's license of Respondent Dume expired on September 30, 1995, and the corporate brokerage license of Respondent Southwest Florida Home Realty, Inc. expired on March 31, 1995. The Administrative Complaint alleges that Respondent Dume's last license was as an involuntary inactive broker and Respondent Southwest Florida Home Realty's last license was voided due to nonrenewal.

The Administrative Complaint alleges that the corporate Respondent's rental management account was short \$31,450.98, as of November 1, 1995. The Administrative Complaint alleges that Respondent Dume transferred money from the escrow account of the corporate Respondent to an account in the name of another corporation owned by Respondent Dume, who then used the money for personal purposes. The Administrative Complaint alleges that Respondents failed to prepare written monthly reconciliation statements of the escrow account and provide their clients with agency disclosure statements.

The Administrative Complaint also alleges that the Florida Real Estate Commission entered a final order on September 8, 1994, reprimanding Respondent Dume, placing his license on probation for one year, fining him \$300, and requiring him to complete ten hours of post-licensing broker's education. (The date of the order is August 8, 1994; it became effective 30 days later. The order is thus referred to as the August 8 final order.)

Respondents did not file an answer to the Administrative Complaint. However, they filed an Election of Rights disputing the allegations of the Administrative Complaint. In their proposed recommended order, Respondents asserted that they "are now and have been at all material times" licensed in Florida as real estate brokers.

At the hearing, Petitioner called one witness, who was its investigator. Petitioner offered into evidence one exhibit, which was admitted. The exhibit is the final order that the Florida Real Estate Commission entered on August 8, 1994. Respondent called no witnesses and offered into evidence no exhibits.

The Administrative Law Judge admitted evidence concerning the violation of the August 8 final order only after Petitioner stipulated that it would dismiss with prejudice an administrative complaint alleging such a violation and would not file charges against Respondent Dume alleging this same violation.

Respondent Dume did not appear at the final hearing. He filed a motion for a continuance, which was denied. The only response to the initial order was filed by Petitioner and indicated that September 4, 1996, was available for the final hearing. Respondent Dume possibly joined in this response; the response purports to be a joint response in the heading, although it makes no further mention of Respondents.

If the response were a joint response, Respondent Dume indicated that he was available on that date. If it were not a joint response, Respondent Dume failed to set forth his dates of unavailability, which, pursuant to the initial order, means that the final hearing "will be set . . . at a date, time and duration established by the Division [of Administrative Hearings]."

After hearing the testimony, the Administrative Law Judge left the record open for 16 days so that Respondents' counsel could take the deposition of Respondent Dume, but Respondents later elected not to avail themselves of this opportunity. The Administrative Law Judge entered an order closing the record on September 25, 1996.

FINDINGS OF FACT

1. Respondent Dume has been licensed in Florida as a real estate broker, and Respondent Southwest Florida Home Realty, Inc. has been licensed in Florida as a corporate broker.

2. Petitioner did not file licensing documentation as an exhibit. Petitioner's witness testified that the licenses expired on September 30, 1995, for Respondent Dume and March 31, 1995, for Respondent Southwest Florida Home Realty. This testimony is hearsay and does not establish the licensing status of Respondents.

3. In their proposed recommended order, Respondents propose a finding that they are now and have been at all material times licensed real estate brokers in Florida. The evidence does not support this assertion.

4. However, the pleadings of the parties establish that Respondents were licensed at least up to the dates alleged by Petitioner.

5. The Administrative Complaint alleges that Respondent Dume's license expired on September 30, 1995, and Respondent Southwest Florida Home Realty's license expired on March 31, 1995. The obvious inference from these allegations is that Respondents were licensed up to those dates.

6. Combining these inferred allegations in the Administrative Complaint with the assertion of Respondents in their proposed recommended order that they are now and have been at all material times licensed, it is clear that the parties do not dispute that Respondents were licensed at least up to the dates set forth in the Administrative Complaint. The only real dispute as to licensing is whether Respondents were licensed after these dates, and the record supplies no answer to this question.

7. By final order filed August 8, 1994, the Florida Real Estate Commission found both Respondents guilty of violating Sections 475.25(1)(b), (e), and (k) and Rule 61J2-14.012(2) and (3). The final order is based on an administrative complaint alleging, as of February 1 and 2, 1994, a shortage of about \$6000 in one escrow account and an overage of about \$400 in another escrow account. The administrative complaint alleges that Respondent Dume prepared written monthly escrow-account reconciliation statements.

8. The final order reprimands each Respondent. As to Respondent Dume only, the final order imposes a \$300 fine, suspends his license until the fine is paid, and places Respondent Dume's license on probation for one year, during which time he was required to "enroll in and satisfactorily complete a 30-hour

broker management course." The final order states that a failure to complete all conditions of probation may result in the filing of a new complaint.

9. The final order establishes that Respondents have been licensed brokers in Florida, but does not establish their licensing status as of anytime after the expiration of Respondent Dume's probation, which ended on September 8, 1995.

10. In mid-September 1995, an investigator employed by Petitioner contacted Respondent Dume to determine whether he had complied with the final order of August 8, 1994. Respondent Dume admitted that he had not undertaken the required education. The investigator set up an office audit for November 1, 1995.

11. On November 1, 1995, the investigator visited Respondents' office to conduct the audit. She had access to all relevant documents and found that Respondent Southwest Florida Home Realty, Inc. maintained an escrow account for real estate rental deposits. The investigator audited the period from January 31, 1995, through September 30, 1995.

12. The investigator found that neither Respondent conducted written reconciliations of the escrow account during this period of time.

13. The investigator found checks drawn on the escrow account improperly paid to another corporation owned by Respondent Dume and, in one case, paid to Respondent Dume personally. Two of the checks payable to the other corporation, which was not a licensed corporate broker, were dated September 30 and October 31, 1994. The investigator did not testify as to the date of the check paid personally to Respondent Dume.

14. The investigator asked Respondent Dume about these disbursements. As to the check made to him personally, he explained that a bank would not cash his check and he needed funds.

15. All of the checks paid to the other corporation or Respondent Dume personally were unauthorized and an improper use of escrow funds. Petitioner proved that the two checks to the corporation owned by Respondent Dume related to a time period not covered in the case resulting in the August 8 final order.

16. When the investigator attempted to reconcile the escrow account for the period from January 31 through September 30, 1995, she found a shortage of about \$31,500. Respondent Dume told her that he had repaid the escrow account about \$20,000, but this was in January 1994.

17. There is no evidence that any client has suffered any losses due to Respondents' failure to maintain the escrow account in the manner required by law.

18. As already noted, the parties in effect agree that Respondents were licensed until certain dates in 1995, but the evidence fails to establish that Respondents' licenses expired after that time. But even if the evidence had proved the alleged expiration dates, the evidence would still be less than clear and convincing that Respondents conducted real estate business after those dates. There is even less evidence that Respondents failed to make required written disclosures in real estate transactions, as Petitioner has failed to prove any real estate transactions or the absence of any such disclosures.

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the subject matter. Section 120.57(1)(k), Florida Statutes. (All references to Sections are to Florida Statutes.)

20. Section 475.25(1)(a), (b), (e), (k), and (o) provides that the Florida Real Estate Commission may impose discipline if it finds that "the licensee, registrant, permittee, or applicant:"

(a) Has violated any provision of s. 475.42 or of s. 455.227(1).

(b) Has been guilty of . . . dishonest dealing by trick, scheme, or device, culpable negligence, or breach of trust in any business transaction It is immaterial to the guilt of the licensee that the victim or intended victim of the misconduct has sustained no damage or loss.

(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 . . . entrusted to him by any person dealing with him as a broker in escrow with [an approved entity], or to deposit such finds in a trust or escrow account maintained by him with some bank . . . , wherein such funds shall be kept until disbursement thereof is properly authorized The commission shall establish rules to provide for records to be maintained by the broker and the manner in which such deposits shall be made.

(o) Has been found guilty, for a second time, of any misconduct that warrants his suspension or has been found guilty of a course of conduct or practices which show that he is so incompetent, negligent, dishonest, or untruthful that the money, property, transactions, and rights of investors, or those with whom he may sustain a confidential relation, may not safely be entrusted to him.

21. Rule 61J2-14.012(2) requires a broker to prepare, at least monthly, written reconciliation statements of his escrow accounts. Rule 61J-14.012(3) provides, if the reconciliation uncovers any discrepancies, that the broker must explain the discrepancies in writing on the reconciliation and record the corrective action that he has taken.

22. Petitioner must prove the material allegations by clear and convincing evidence.

23. The most significant shortcoming in Petitioner's proof is its failure to prove that Respondents' licenses expired. This failure clearly means that

Petitioner cannot prevail on its claim that Respondents operated as brokers with expired licenses. This failure also has some bearing on the remaining allegations because of Petitioner's failure to show that certain acts or omissions took place while Respondents were licensed. However, as previously discussed, the Administrative Complaint and Respondents' proposed recommended order establish that Respondents were licensed at least through the dates of the alleged license expirations.

24. If licensed only through the two dates in 1995, Respondents nonetheless are guilty of violations of the laws regulating licensed brokers.

25. Petitioner proved that each Respondent violated Rule 61J2-14.012(2) by failing to perform the required written monthly reconciliations. The only evidence of a shortage or any other discrepancy is for the end of the audit period, which is September 30, 1995. Thus, Petitioner proved that Respondent Dume also violated Rule 61J2-14.012(3) by failing to write on the reconciliation the reason for the discrepancy and what he would do to fix it. However, Petitioner's proof of a violation of Rule 61J2-14.012(3) by Respondent Southwest Florida Home Realty fails because, by the time of the only proved discrepancy, the record fails to show that Respondent Southwest Florida Home Realty was still licensed and subject to this rule.

26. Thus, Petitioner has proved that each Respondent violated Section 475.25(1)(e), which requires compliance with agency rules, by failing to prepare monthly reconciliations in violation of Rule 61J2-14.012(2). And, in the case of Respondent Dume, Petitioner has also proved a violation of Rule 61J2-14.012(3), and thus Section 475.25(1)(e).

27. Petitioner also proved that Respondents maintained an escrow account on which they permitted Respondent Dume to make unauthorized disbursements, as evidenced by the substantial shortage, Respondent Dume's admission of a specific improper disbursement, and the investigator's finding of at least one other improper disbursement. All of these items of proof took place while Respondent Dume was licensed. Although the timing of the shortage is not linked to the period of Respondent Southwest Florida Home Realty's licensure, the two checks in the last quarter of 1994 are, so the corporate Respondent is also guilty of this violation.

28. The unauthorized disbursements violate Section 475.25(1)(a), which prohibits dishonest dealing, culpable negligence, or breach of trust, and Section 475.25(1)(k), which prohibits unauthorized disbursements on an escrow account. The shortage itself, for which Respondent Southwest Florida Home Realty is not responsible because it was not licensed at the time, constitutes a separate basis for finding a violation of these statutes by Respondent Dume.

29. Respondents argue that Petitioner's proof of the failure to perform reconciliations and unauthorized disbursements fails because it failed to introduce documentary evidence of these violations. Clear and convincing evidence may, in appropriate circumstances, consist of a witness's testimony of the results of her escrow-account reconciliation. Obviously, Petitioner could not be expected to produce documentary evidence of a failure to prepare monthly written reconciliations. And the testimony of Petitioner's witness as to admissions of Respondent Dume regarding the use of trust funds, at least where unrebutted, as in this case, is also capable of sustaining the relevant standard of proof, as is her testimony concerning the several unauthorized checks and the substantial shortage.

30. However, Petitioner has failed to prove that Respondents operated without valid licenses or failed to provide the required written disclosures. As noted above, the investigator's testimony on licensure is an improper basis for a finding of fact as it is inadmissible hearsay. And her testimony as to the absence of required written disclosures fails to show, among other things, the transactions giving rise to the requirement to disclose.

31. As to Respondent Dume, Petitioner also proved that he has violated Section 475.25(1)(o) because he has been found guilty for a second time of misconduct warranting his suspension or has been found guilty of a course of conduct or practices which show that he is so incompetent, negligent, dishonest, or untruthful that clients may not safely entrust with him their money.

32. A serious aggravating factor in setting the discipline for both Respondents is their commission in this case of worse escrow-account violations than the ones for which they were disciplined in the August 8, 1994, final order.

33. In the prior disciplinary case, Respondents performed monthly escrow-account reconciliations and allowed an escrow shortage of \$6000 to develop. After receiving reprimands for these violations, and more serious discipline as to Respondent Dume, Respondents are no longer performing monthly escrow-account reconciliations and have allowed an escrow shortage of \$31,500 to develop. Another aggravating factor concerning Respondent Dume is his admitted failure to comply with the condition of probation set forth in the August 8 final order.

34. Section 475.25(1) provides that the Florida Real Estate Commission may, after finding a violation of any provision of Section 475.25(1), enter an order revoking a license, suspending a license for not more than 10 years, placing a licensee on probation, imposing an administrative fine of not more than \$1000 for each count of separate offense, and reprimanding the licensee.

RECOMMENDATION

It is

RECOMMENDED that the Florida Real Estate Commission enter a final order revoking the licenses of Respondent Dume and Respondent Southwest Florida Home Realty, Inc.

ENTERED on December 2, 1996, in Tallahassee, Florida

ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of December, 1996.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order must be filed with the agency that will issue the final order in this case.