

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA DEPARTMENT OF BUSINESS)	
AND PROFESSIONAL REGULATION,)	
DIVISION OF REAL ESTATE,)	
)	
Petitioner,)	
)	CASE NO. 96-3814
vs.)	
)	
PRUDENCIO GARCIA,)	
)	
Respondent.)	
_____)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on November 27, 1996, via video teleconference in Miami, Florida, before Patricia Hart Malono, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, who was present in Tallahassee, Florida.

APPEARANCES

For Petitioner: Daniel Villazon, Senior Attorney
Department of Business and
Professional Regulation
400 West Robinson Street
Post Office Box 1900
Orlando, Florida 32802

For Respondent: Prudencio Garcia, pro se
807 Santiago Street
Coral Gables, Florida 33136

STATEMENT OF THE ISSUE

Whether the respondent committed the acts alleged in the Administrative Complaint dated June 21, 1996, and, if so, the penalty which should be imposed.

PRELIMINARY STATEMENT

In an Administrative Complaint dated June 21, 1996, the Department of Business and Professional Regulation, Division of Real Estate ("Department"), charged Prudencio Garcia with violating section 475.25(1)(b), (e), and (k), Florida Statutes (1995), and rule 61J2-14.009, Florida Administrative Code. The charges are based on allegations that Mr. Garcia received \$2,500 in cash in connection with a lease/purchase real estate transaction, that he failed either to turn the \$2,500 over to his employer for deposit into its escrow account or to turn it over to the owners of the property, and that he gave the owners \$2,425 in cash only after they threatened him with legal action. Mr. Garcia timely requested a formal administrative hearing, and the request was forwarded to the Division of Administrative Hearings for assignment of an Administrative Law Judge.

At the hearing, the Department presented the testimony of Gladys Rodriguez, one of the owners of the property which was the subject of the lease/purchase transaction, and Elana Pernas, the broker of record of Continental Landmark Realty at the time the events alleged in the Administrative Complaint occurred. Petitioner's exhibits 1 through 4 were offered and admitted into

evidence. Mr. Garcia testified in his own behalf but did not offer any exhibits into evidence.

No transcript was filed with the Division. The parties timely submitted proposed findings of fact and conclusions of law, which have been duly considered.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. The Department of Business and Professional Regulation is a state government licensing and regulatory agency charged with the responsibility and duty to prosecute administrative complaints pursuant to chapters 120, 455, and 475, Florida Statutes. The Florida Real Estate Commission operates within the Department and is the entity directly responsible for licensing and disciplining those licensed under chapter 475. Section 475.02, Fla. Stat. The Division of Real Estate operates within the Department and assists the Commission in carrying out its statutory duties. Section 475.021, Fla. Stat.

2. Prudencio Garcia is now and was at all times material to this proceeding a licensed Florida real estate broker, having been issued license numbered 0203682. He is currently licensed as a broker-salesperson with Hamilton Realty, Inc. At all times material to this proceeding, Continental Landmark Realty, Inc., was Mr. Garcia's registered employer.

3. Mr. Garcia has been licensed as either a real estate salesperson or a real estate broker for eighteen years, and he has not previously been the subject of a license disciplinary action.

4. Either on or about November 1, 1994, or on or about December 1, 1994,¹ a Residential Lease, an Option to Purchase, and a Contract for Sale and Purchase were executed whereby Sergio Montero and Mayte Rosabal agreed to lease real property owned by Ramon and Gladys Rodriguez for a term of six months and to purchase the property subject to the terms of the Option to Purchase. and the Contract for Sale and Purchase.

5. Mr. Garcia solicited Mr. Montero and Ms. Rosabal for this transaction on behalf of Mr. and Mrs. Rodriguez, who needed to sell their house as soon as possible because they had purchased and moved into another home and were having trouble paying two mortgages. Mr. Garcia was acquainted with Mr. and Mrs. Rodriguez and Mr. Montero and Ms. Rosabal.

6. The lease, option, and contract were signed at the offices of Continental Landmark Realty. Mr. Garcia signed the option and the contract on behalf of Continental Landmark Realty, which was his employer at the time. Both the option and the contract provided that Continental Landmark Realty would receive a \$6,000 commission upon the sale of the property. Neither Continental Landmark Realty nor Mr. Garcia were to receive any

fee or commission in connection with the lease of the subject property.

7. Mr. and Mrs. Rodriguez expected to receive \$4,000 at the time the lease, option, and contract were executed.² Mr. Montero gave them \$700 in cash at the time of execution and \$800 in cash the day after the documents were executed.

8. Mr. Montero gave Mr. Garcia the remaining \$2,500 owed to Mr. and Mrs. Rodriguez, in cash. Mr. Garcia did not promptly deliver these monies to Continental Landmark Realty for deposit in the company's escrow account. He did not promptly deliver the \$2,500 to Mr. and Mrs. Rodriguez, despite their repeated requests that he do so. Rather, he claimed that he was robbed and the money taken from him.³ After Mr. and Mrs. Rodriguez threatened to take legal action against him, Mr. Garcia gave them \$2,425 of the \$2,500 he had received on their behalf.⁴

9. The broker of record for Continental Landmark Realty was not aware of the transaction between Mr. and Mrs. Rodriguez and Mr. Montero and Ms. Rosabal until Mrs. Rodriguez went to her office and complained about not having received the \$2,500 from Mr. Garcia.

10. The evidence is sufficient to establish that Mr. Garcia was acting as an agent of Continental Landmark Realty in connection with the subject real estate transaction, that he received monies in connection with the transaction and failed to deliver them promptly to Continental Landmark Realty, and that he

committed a breach of trust by failing to deliver the monies promptly to Mr. and Mrs. Rodriguez, the parties to the real estate transaction entitled to receive them.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to section 120.57(1), Florida Statutes (Supp. 1996).

12. The Florida Real Estate Commission ("Commission") may deny, suspend, or revoke a license, registration, or permit issued pursuant to chapter 475, Florida Statutes, may impose an administrative fine, and/or may issue a reprimand. Section 475.25(1), Fla. Stat.

13. As the prosecuting agency for the Commission, the Department seeks to have the Commission impose administrative penalties which may include suspension or revocation of Mr. Garcia's license and/or the imposition of an administrative fine. Therefore, it has the burden of proving by clear and convincing evidence that he committed the violations alleged in the administrative complaint. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

14. In Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116, n. 5 (Fla. 1st DCA 1989), the court explained

[C]lear 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 evidence 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 produces in the mind of the trier of fact the firm belief of [sic] conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

15. Section 475.25(1) authorizes the Commission to impose administrative sanctions if it finds that a licensee

(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 salesperson, to immediately place with his registered employer any money, fund, deposit, check, or draft entrusted to him by any person dealing with him as agent of his registered employer.

16. Rule 61J2-14.009, Florida Administrative Code, requires that "every salesperson who receives any deposit as defined above, shall immediately at the first opportunity deliver the same to the broker or employer." A "deposit" is defined in rule

61J2-14.008(1) to include monies "delivered to a real estate licensee, as earnest money, or a payment, or a part payment, in connection with any real estate transaction named or described in [section] 475.01(1)(c), Fla. Stat.," Both a sale/purchase and a lease with option to purchase are real estate transactions described in section 475.01(1)(c).

17. Based on the facts found herein, the Department has proven by clear and convincing evidence that Mr. Garcia violated section 475.25(1)(b), (e), and (k) and rule 61J2-14.009. Accordingly, grounds exist to justify the imposition of penalties on Mr. Garcia.

18. Based upon careful consideration of the facts of this case, the seriousness of the violations proven, the lack of any previous disciplinary actions against Mr. Garcia, and the penalties which may be imposed for violations of section 475.25(1), Mr. Garcia's license should be subject to a period of suspension and probation, and he should be assessed an administrative fine.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is **RECOMMENDED** that the Florida Real Estate Commission enter a final order finding Prudencio Garcia guilty of violating section 475.25(1)(b), (e), and (k), Florida Statutes (1995), and rule 61J2-14.009, Florida Administrative Code, and

1. Suspending Mr. Garcia's real estate broker's license for a period of one (1) month;

2. Following the suspension, placing Mr. Garcia on probation for a period of one (1) year with a condition of probation that he successfully complete a thirty-hour broker management course during the term of probation; and

3. Imposing an administrative fine in the amount of \$1,000.

DONE AND ENTERED this 18th day of March, 1997, in Tallahassee, Leon County, Florida.

PATRICIA HART MALONO

Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of March, 1997.

ENDNOTES

¹ The date of execution of these documents is illegible, and it is not possible to determine from the evidence presented the exact date on which these documents were signed.

² Although there is no dispute that Mr. and Mrs. Rodriguez were to receive \$4,000 when the documents were executed, it is not clear from the record as to how this sum was allocated among the amounts due under the three documents. The Contract for Sale and Purchase provided that an initial deposit of \$1,500 was to be made and held by the attorney retained by Mr. and Mrs. Rodriguez; the contract does not, however, reflect that such a deposit was received. The consideration to be paid under the Option to Purchase was \$1,500, receipt of which was acknowledged by execution of the option by Mr. and Mrs. Rodriguez. The lease provided that \$1,500 was to be paid to Mr. and Mrs. Rodriguez upon execution of the lease and that a \$3,000 advance payment of rent would be paid prior to Mr. Montero and Ms. Rosabal taking possession of the property.

³ Although Mr. Garcia testified that he reported the robbery to the police, he could not produce either the police report or the name of the officer who allegedly prepared the report. He testified that he was unable to obtain the police report because the police department told him that they had no record that a report had been made. In the absence of any corroborating evidence, Mr. Garcia's testimony that he was unable to deliver the \$2,500 to either his employer or Mr. and Mrs. Rodriguez

because it was taken from him in a robbery is rejected as not credible.

⁴ Although there is no dispute that Mr. Garcia received the \$2,500 in cash, the evidence is not clear as to when he received the money or when he delivered \$2,425 to Mr. and Mrs. Rodriguez.

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 should be filed with the agency that will issue the final order in this case.