

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA DEPARTMENT OF BUSINESS)
AND PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) Case No. 97-2159
)
CMT HOLDING, LTD., T/A THE)
PRUDENTIAL FLORIDA REALTY;)
CMT HOLDINGS, INC.; and)
PATRICIA A. BROTHERTON,)
)
Respondents.)
_____)

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted a formal hearing in this case on August 21, 1997, in Naples, Florida.

APPEARANCES

For Petitioner: Geoffrey T. Kirk, Senior Attorney
Daniel Villazon, Senior Attorney
Department of Business and
Professional Regulation
Post Office Box 1900
Orlando, Florida 32802-1900

For Respondent: Jeffrey D. Fridkin
Thomas G. Norsworthy
Grant, Fridkin & Pearson, P.A.
Pelican Bay Corporate Centre
5551 Ridgewood Drive, Suite 501
Naples, Florida 34108

STATEMENT OF THE ISSUES

Whether Respondents improperly charged a real estate client a fee for document preparation and storage and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

By Administrative Complaint filed April 18, 1997, Petitioner alleged that, on October 2, 1995, John Iraci, as buyer, entered into a contract with Donald J. and Beryl B. Cullette, as sellers, for the sale of a residential property. The Administrative Complaint alleges that Respondent CMT Holding, Ltd., which was the selling broker and escrow agent, sent the closing agent, attorney Louis X. Amato, a document entitled, "Fund Disbursement Instructions," which was signed by Respondent Patricia Brotherton as branch manager.

The Administrative Complaint alleges that the Fund Disbursement Instructions contained a demand by Respondent CMT Holding, Ltd. that Mr. Iraci pay it a \$110 "Processing and Documentation Preparation Fee." The Administrative Complaint alleges that at the time, Respondent CMT Holding, Ltd., had no contract or agreement with Mr. Iraci in which he agreed to pay this fee. The Administrative Complaint alleges that Respondent CMT Holding, Ltd., was thus attempting to obtain an improper fee.

The Administrative Complaint alleges that Respondent CMT Holding, Ltd., failed to advise Mr. Iraci in a clear & timely fashion of the existence, amount, and purpose of the \$110 fee.

The Administrative Complaint also alleges that Respondent CMT Holding, Ltd., was trying to obtain an "unearned fee" for "settlement services," in violation of the Real Estate Settlement Procedures Act of 1974, 12 United States Code, Sections 2601 et seq.

The Administrative Complaint alleges that Respondent Patricia A. Brotherton allegedly aided, assisted, or conspired with Respondent CMT Holding, Ltd.

Count I of the Administrative Complaint alleges that Respondent CMT Holding, Ltd., is guilty of making deceptive, untrue, or fraudulent representations in or related to the practice of real estate or employing a trick or scheme in or related to said practice, in violation of Sections 455.227(1)(m) and 475.25(1)(a), Florida Statutes.

Count II alleges that Respondent CMT Holding, Ltd., is guilty of fraud, misrepresentation, concealment, false promises, false pretenses, dishonest dealing by trick, scheme or device, culpable negligence, or breach of trust or fiduciary duty to a buyer, in violation of Section 475.25(1)(b), Florida Statutes.

Count III alleges that Respondent CMT Holding, Ltd., is guilty of violation a duty imposed by law--namely, the Real

Estate Settlement Procedures Act of 1974--in violation of Section 475.25(1))b), Florida Statutes.

Count IV alleges that Respondent Patricia A. Brotherton is guilty of aiding, assisting, or conspiring with Respondent CMT Holding, Ltd., to violate the duties of Sections 475.25(1)(b) and 455.227(1), Florida Statutes.

Count V alleges that Respondent Patricia A. Brotherton is guilty of fraud, misrepresentation, concealment, false promises, false pretenses, dishonest dealing by trick, scheme or device, culpable negligence, breach of trust, or breach of fiduciary duty to a buyer, in violation of Section 475.25(1)(b), Florida Statutes.

Count VI alleges that the Florida Real Estate Commission entered a final order on July 16, 1996, finding Respondent CMT Holding, Ltd., guilty of violating Rule 61J2-10.032 and Section 475.25(1)(e). Count VI alleges that Respondent CMT Holding, Ltd., is thus guilty of being found guilty for a second time of misconduct warranting suspension or is guilty of a course of conduct or practices that shows that it is so incompetent, negligent, dishonest, or untruthful as to jeopardize the money, property, transactions, and rights of investors or those with whom it may sustain a confidential relation, in violation of Section 475.25(1)(o), Florida Statutes.

At the hearing, Petitioner called no witnesses and offered into evidence 11 exhibits. Respondent called one witness and

offered into evidence 10 exhibits. All exhibits were admitted into evidence.

The court reporter filed the transcript on September 10, 1997.

FINDINGS OF FACT

1. Respondent CMT Holding, Ltd., trading as the Prudential Florida Realty (CMT), is a limited partnership registered as a real estate broker, holding license number 0266433. Respondent CMT Holdings, Ltd., is registered as a real estate broker, holding license number 0266412.

2. Respondent Patricia A. Brotherton (Brotherton) is registered as a real estate broker, holding license number 0601688. At all material times, Brotherton was the Naples branch manager for CMT. At all material times, Judith Price was a real estate salesperson employed by CMT.

3. On October 3, John Iraci, as buyer, and Donald J. and Beryl B. Cullette, as sellers, entered into a contract for the sale of a condominium for \$210,000. The contract acknowledges that CMT is the selling broker and an unrelated broker is the listing broker. CMT also executed the contract as the escrow agent holding the \$1000 deposit. The Cullettes signed the contract on October 3 and counteroffered \$210,000, rejecting Iraci's offer of \$200,000. Iraci accepted the counteroffer.

4. Price and CMT entered into an agency agreement with Iraci the previous month. The Agency Disclosure form that they

signed promised that Price and CMT would make full disclosure to Iraci.

5. On October 2, Price presented Iraci with a Real Property Disclosure Statement. She reviewed with him the expenses to be paid by buyer, including an item identified as "Processing and document preparation fee." Although the form does not disclose actual expenses, except for the rate at which statutorily imposed charges are imposed, Price explained to Iraci that the processing and document preparation fee was \$110 paid to CMT. Iraci expressed no objection to the charges, and Price prepared the October 3 sales contract.

6. On January 3, 1996, Respondent sent the closing agent, attorney Louis X. Amato, a document entitled, "Fund Disbursement Instructions." The document instructed Amato to divide the \$12,600 real estate commission equally between the two brokers and pay CMT an additional \$110 for a processing and document preparation fee, which will be a buyer's expense on the closing statement.

7. Amato refused to add the \$110 fee to the closing statement or charge Iraci for this expense. On January 8, 1996, Amato sent a letter to Petitioner complaining of this practice. On the next day, the sale closed without payment of the \$110 fee to CMT. At the closing, Iraci executed a first mortgage note and lien.

8. Iraci visited Price on the day of the closing to discuss Amato's refusal to collect this fee. Price said that she would pay the fee, if Iraci did not. Iraci returned to Price's office on January 15 and paid the fee.

9. Four months later, Price and CMT sold Iraci's former condominium. Iraci paid the \$110 fee on this transaction. No litigation or complaint ensued.

10. The purpose of the \$110 fee is to compensate CMT for the costs of preparing and storing documents. There is no evidence that the fee is disproportionate to the preparation and storage expenses. On occasions where the \$110 fee has been inadvertently omitted from the closing statement, Price has paid it herself.

11. Petitioner filed the Administrative Complaint more than one year after the closing and payment of the fee by Iraci.

CONCLUSIONS OF LAW

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

13. Section 475.25(1) authorizes the Florida Real Estate Commission to impose discipline if it finds that a licensee

- (a) Has violated any provision of . . . s. 475.25(1) [or]
- (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 . . . ; has aided, assisted, or conspired with any other person engaged in any such misconduct and in furtherance thereof

14. Section 455.227(1)(m) authorizes discipline for "[m]aking deceptive, untrue, or fraudulent representations" in the practice of a profession.

15. Petitioner is required to prove the material allegations by clear and convincing evidence. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

16. Petitioner has failed to prove any form of fraud or culpable negligence by any Respondent. Petitioner has raised a justiciable issue of fact as to the timeliness of the disclosure of the \$110 fee. Price mentioned this item as she was about to prepare the contract offer. An earlier disclosure would have given Iraci a more effective option of taking his business elsewhere. But the expense was only \$110, so a later disclosure of this relatively small amount was timely, especially where, as here, the charge appears optional; if the client fails to pay it, the salesperson pays it.

17. Even if CMT prepared no documents in this case, the fee is reasonably related to CMT's obligation to maintain and access old records. Petitioner presented no evidence that the commission was excessive or that CMT necessarily under the law, must absorb this expense in its commission.

18. The record does not establish a violation of any provision of the federal Real Estate Settlement Procedures Act (RESPA).

19. The \$110 fee seems to be for "settlement services," as defined in 12 United States Code (U.S.C.), Section 2602(3) and 24 Code of Federal Regulations(C.F.R.), Section 3500.2(b)(15). The kickback prohibitions of 12 U.S.C. Section 2607(b) and 24 C.F.R. Section 3500.14(c) do not apply to payments "for services actually performed."

20. Minimal preparation and storage services might preclude liability for nonstatutory fraud, but still constitute a RESPA violation. RESPA demands closer scrutiny of the actual preparation and storage services performed by CMT, especially whether CMT's services duplicate the services of the closing attorney and lender in document preparation and storage. Petitioner has raised a justiciable fact question regarding a possible RESPA violation, but the record is not sufficiently developed to find that any Respondent actually committed such a violation.

21. Respondents claim that RESPA has a one-year jurisdictional statute of limitations. While this is true for private actions, certain federal and state officials (not Petitioner) may charge Respondents with violations up to three years after the offense, as provided by 12 U.S.C. Section 2614.

22. Because Petitioner raised a justiciable issue as to the RESPA violation and the timeliness of Price's disclosure of the \$110 fee, Respondents' claim for attorneys' fees is denied.

RECOMMENDATION

It is

RECOMMENDED:

That the Florida Real Estate Commission enter a final order dismissing the Administrative Complaint against Respondents and denying their request for attorney's fees.

DONE AND ORDERED this 6th day of November, 1997, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(904) 488-9675 SUNCOM 278-9675
Fax Filing (904) 921-6847

Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of November, 1997.

COPIES FURNISHED:

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

James H. Gillis, Esquire
Gillis and Wilsen
Suite B
1415 East Robinson Street
Orlando, Florida 32801

Jeffrey D. Fridkin, Attorney
Thomas G. Norsworthy, Attorney
Grant Fridkin & Pearson, P.A.
Pelican Bay Corporate Centre
5551 Ridgewood Drive, Suite 501
Naples, Florida 34108

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

Henry M. Solares, Division Director
Division of Real Estate
Department of Business and Professional Regulation
Post Office Box 1900
Orlando, Florida 32802-1900

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.