

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) Case No. 97-2549
)
LYNTON OLIVER THOMAS and)
L T EXPRESS REALTY CORP.,)
)
Respondents.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on September 22, 1997, by video, in Tallahassee, Florida, and in Miami, Florida, before Claude B. Arrington, a duly designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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

For Respondent: No appearance.

STATEMENT OF THE ISSUES

Whether the Respondents committed the offenses alleged in the Administrative Complaint and, if so, the penalties that should be imposed.

PRELIMINARY STATEMENT

At all times pertinent to this proceeding, Respondent, Lynton Oliver Thomas, was licensed by Petitioner as a real estate broker, and L T Express Realty Corp. was the corporate entity licensed by Petitioner through which Mr. Thomas conducted his real estate business. The Administrative Complaint filed by Petitioner against Respondents on July 19, 1996, contained eight counts. Based on facts alleged in the Administrative Complaint Petitioner charged Mr. Thomas (in the odd-numbered counts) and his corporation (in the even-numbered counts) as follows: Counts I and II with violating Section 475.25(1)(b), Florida Statutes; Counts III and IV with violating Rule 61J2-10.032(1), Florida Administrative Code, and Section 475.25(1)(e), Florida Statutes; Counts V and VI with Rule 61J2-10.022, Florida Administrative Code, and Section 475.25(1)(e), Florida Statutes; and in Counts VII and VIII with violating Section 475.25(1)(k), Florida Statutes.

Respondents timely requested a formal administrative hearing to contest the allegations of the Administrative Complaint, and the matter was referred to the Division of Administrative Hearings, and this proceeding followed.

At the formal hearing, the Petitioner presented the testimony of Patrick Killen, Marie Suzette Saintel, and Kenneth Rehm. Mr. Killen is a real estate broker who was involved in the transaction that underlies this proceeding, and Ms. Saintel was

one of the parties to that transaction. Mr. Rhem is an investigator employed by Petitioner. Petitioner presented two exhibits, both of which were admitted into evidence. Although this proceeding had been duly noticed for hearing, Respondent did not appear at the formal hearing.

A transcript of the proceedings has been filed. The Petitioner filed a proposed recommended order, which has been duly considered by the undersigned in the preparation of this Recommended Order. Respondent did not file a post-hearing submittal.

FINDINGS OF FACT

1. Petitioner is the state licensing and regulatory agency charged with the responsibility and duty to regulate the practice of real estate, pursuant to the laws of the State of Florida.

2. At all times pertinent to this proceeding, Respondent, Lynton Oliver Thomas, was a licensed real estate broker, having been issued license number 0504596 in accordance with Chapter 475, Florida Statutes.

3. The last license issued to Respondent Thomas was as a broker-salesperson at Pagliari Realty, Inc., 323 Northeast 167 Street, North Miami Beach, Florida 33162.

4. At all times pertinent to this proceeding, Respondent, L T Express Realty Corp., was a corporation registered as a Florida real estate broker, having been issued license number 0273473 in accordance with Chapter 475, Florida Statutes.

5. At all times pertinent to this proceeding, Respondent Thomas was licensed and operating as qualifying broker and officer of Respondent L T Express Realty Corp. The office for this corporate entity was located at 2124 Northeast 123 Street, North Miami Beach, Florida. There was no evidence that Respondent Thomas operated his corporate entity from any other office.

6. On May 7, 1995, Respondent Thomas, a licensed real estate broker, d/b/a L T Express Realty Corp., negotiated a contract for the sale of a house between Bruce and Ann McCormick (as sellers) and Marie S. Saintel and Carita Luc (as buyers).

7. The buyers gave Respondent Thomas an earnest money deposit in the amount of \$5,528.00.

8. The transaction failed to close.

9. The sellers, through their agent, attempted to make a demand upon Respondent Thomas for delivery of the earnest money deposit. The sellers' agent was unable to serve the demand on the Respondents because the Respondents had closed their offices and could not be located. Respondents had, or should have had, a good faith doubt as to the proper way to disburse the escrowed funds.

10. Respondent Thomas, without authorization from the sellers, returned \$3,000.00 of the original \$5,528.00 deposit to the buyers. The balance of the earnest money deposit, in the amount of \$2,528.00, has not been recovered from the Respondents.

Rule 61J2-10.032(1), Florida Administrative Code, provides the procedure real estate brokers are required to follow when competing demands are made for funds that have been received in escrow or when a broker has a good faith doubt as to how escrowed funds should be disbursed. At no time did Respondents attempt to invoke those procedures.

11. Kenneth G. Rehm, Petitioner's investigator, visited Respondent L T Express Realty Corp. and discovered that Respondent Thomas had abandoned his registered office.

12. Respondent Thomas failed to notify Petitioner that he closed his real estate office at 2124 Northeast 123 Street, North Miami Beach, Florida.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction of the parties to and the subject of this proceeding. Section 120.57(1), Florida Statutes.

14. The Petitioner has the authority to bring this disciplinary action against Respondents pursuant to the provisions of Chapter 475, Florida Statutes.

15. Section 475.25, Florida Statutes (1995), provides that the Florida Real Estate Commission may suspend a license for a period not exceeding ten (10) years; revoke a real estate license; may impose an administrative fine not to exceed \$1,000 for each count or separate offense; and may impose a reprimand or, any or all of the foregoing, if it finds that a licensee has

violated Sections 475.25(1)(b), (k), or (e), Florida Statutes.

16. Petitioner has the burden of proving by clear and convincing evidence the allegations against Respondents. See Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112 (Fla. 1st DCA 1989).

17. Section 475.25, Florida Statutes, provides, in pertinent part, as follows:

(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. . . .

* * *

(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. . . .

18. Petitioner established by clear and convincing evidence that Respondents violated the provisions of Section 475.25(1)(b), Florida Statutes, as alleged in Counts I and II of the Administrative Complaint. There remains missing from the funds that were deposited with Respondents the sum of \$2,528.00. The failure to account for those funds, at a minimum, establishes culpable negligence and breach of trust in a business transaction within the meaning of Section 475.25(1)(b), Florida Statutes. As argued by Petitioner, the conclusion that Respondent absconded with the missing money is inescapable in the absence of a plausible explanation to the contrary.

19. Petitioner established by clear and convincing evidence that Respondents should have invoked the provisions of Rule 61J2-10.032(1), Florida Administrative Code, to properly disburse the escrowed funds. The failure of these Respondents to follow the procedures set forth in Rule 61J2-10.032(1), Florida Administrative Code, constitutes a violation of Section 475.25(1)(e), Florida Statutes, as alleged in Counts III and IV of the Administrative Complaint.

20. Rule 61J2-10.022, Florida Administrative Code, requires a broker to have an office and to register that office with the Petitioner. The failure to comply with that rule is a violation of Section 475.25(1)(e), Florida Statutes. Petitioner

established by clear and convincing evidence that Respondents

violated that rule, thereby violating that statutory provision, as alleged in Counts V and VI of the Administrative Complaint.

21. Counts VII and VIII alleged that the Respondents failed to maintain the escrowed funds in an escrow account until disbursement was properly authorized in violation of Section 475.25(1)(k), Florida Statutes. Petitioner established those violations by clear and convincing evidence.

22. Petitioner correctly asserts in its post-hearing submittal that revocation of licensure is the appropriate penalty for these serious violations. No administrative fine is being recommended because Petitioner did not include an administrative fine in the disposition portion of its Proposed Recommended Order.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a Final Order be entered that finds Respondents guilty of the violations alleged in Counts I-VIII of the Administrative Complaint. As a penalty for these violations, the Final Order should revoke all licenses issued by Petitioner to Respondents.

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

CLAUDE B. ARRINGTON
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 November, 1997

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.