

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)	
PROFESSIONAL REGULATION,)	
DIVISION OF REAL ESTATE,)	
)	
Petitioner,)	
)	
vs.)	Case No. 97-4384
)	
DESSIE B. CASTELL and A. PLUS)	
SERVICE NETWORK REALTY, INC.,)	
)	
Respondents.)	
_____)	

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Administrative Law Judge, Mary Clark, conducted a formal hearing in the above-styled case on January 7, 1998, by videoconference. The parties, their counsel, witnesses and court reporter participated from the Zora Neale Houston Building, Orlando, Florida; the judge presided from Tallahassee, Florida.

APPEARANCES

For Petitioner: Laura McCarthy, Esquire
Senior Attorney
Florida Department of Business
and Professional Regulation
Division of Real Estate
Post Office Box 1900
Orlando, Florida 32802

For Respondent: Dean F. Mosley, Esquire
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Suite 211
47 East Robinson Street
Orlando, Florida 32801

STATEMENT OF THE ISSUES

An Administrative Complaint dated June 20, 1997, alleges that the Respondents, Dessie B. Castell and A. Plus Service Network Realty, Inc., violated certain provisions of Chapter 475, Florida Statutes, and Rule 61J2-10.032(1), Florida Administrative Code, by failing to notify the Florida Real Estate Commission within 15 business days of a good faith doubt as to appropriate disbursement of trust funds in an escrow account, and by failing to maintain those trust funds until disbursement was properly authorized. The issues for determination are whether those violations occurred and, if so, what discipline should be imposed upon the licensees.

PRELIMINARY STATEMENT

In response to the administrative complaint, Respondents requested a formal administrative hearing and the case was referred to the Division of Administrative Hearings (DOAH).

Petitioner presented the testimony of Valerie Crane and, by stipulation, six exhibits were received in evidence as Petitioner's exhibits numbers 1 through 6.

Respondent, Dessie B. Castell, testified and presented the additional testimony of Rosemarie Jackson and Elizabeth Sanabria Dreier. Respondents also presented a single exhibit, a letter dated September 25, 1996, signed by Elizabeth Sanabria Dreier, President of ESD Lending Corporation, Inc. The exhibit, marked for identification as Respondents' exhibit number 1, was objected

to by Petitioner. Ms. Dreier, in her testimony, acknowledged that she signed the letter prepared by office staff, but had no recollection of any of the facts stated in the letter. The letter has been read and considered by the Administrative Law Judge and is received into evidence as it corroborates testimony by Ms. Castell and Ms. Jackson.

The transcript of hearing was filed on January 26, 1998, and Petitioner filed its proposed recommended order on January 28, 1998.

FINDINGS OF FACT

1. Respondent Dessie B. Castell is, and was at all material times, a licensed real estate broker in Florida, having been issued license number 0342283 in accordance with Chapter 475, Florida Statutes. Ms. Castell is owner, president and qualifying broker of A. Plus Service Network Realty, Inc., which corporation is registered and licensed in accordance with Chapter 475, Florida Statutes, at 901 Mock Avenue, Orlando, Florida.

2. Ms. Castell negotiated a contract for sale and purchase of a home at 638 18th Street in Orlando, Florida. Rosemary Jackson was the proposed buyer and Valerie Crane, trustee, was the seller. At the time of the contract dated June 26, 1996, Ms. Castell had already been working with Rosemary Jackson and held a \$500.00 escrow deposit from Ms. Jackson in her broker's escrow account.

3. Also, at the time of the contract on June 26, 1996,

Ms. Jackson had been pre-qualified for an FHA loan through ESD Lending Corporation, Inc.

4. The contract for sale and purchase between Ms. Jackson and Ms. Crane established July 2, 1996, as the closing date. Ms. Jackson liked the house and needed to move in quickly.

5. The contract failed to close on July 2, 1996. Both Ms. Jackson and Ms. Castell understood that the ESD lending Corporation did not have an approved appraisal required by FHA for the loan.

6. There was an appraisal done on the property for a previous prospective buyer and Ms. Crane furnished that appraisal to ESD before July 2, 1996. Ms. Crane's own testimony was confused and conflicting as to whether the appraisal she furnished was approved. Ms. Jackson's and Ms Castell's testimony was clear and credible that they were never informed that the appraisal was approved, and Ms. Castell did not receive the HUD settlement papers required for closing.

7. Soon after July 2, 1996, someone came to Ms. Jackson's workplace identifying himself as a representative of Ms. Crane and offering to extend the closing and to provide a refrigerator and some other items. Ms. Jackson was suspicious of this person as she felt that he was trying to circumvent the mortgage company staff with whom she had been dealing.

8. Ms. Jackson had looked at another house earlier that she did not like as well as the house offered by Ms. Crane; but since

she needed to move quickly, Ms. Jackson told Ms. Castell to transfer her escrow deposit to a contract on this prior house. Ms. Castell did that on July 5, 1996, and that contract closed shortly thereafter.

9. On July 6, 1996, Ms. Crane faxed to Ms. Castell a letter offering to add the refrigerator and to extend closing to the next Friday. The letter asked that the offer be accepted by 5:00 p.m. on that same day, the 6th or if not accepted, that the \$500.00 deposit be released to Ms. Crane.

10. When she received no response, Ms. Crane sent another letter to Ms. Castell on July 13, 1996, demanding the \$500.00 escrow deposit, reiterating that Ms. Jackson forfeited her deposit when she did not close on the property after qualifying for the loan and reminding Ms. Castell of her obligation as escrow agent pursuant to Section 475.25, Florida Statutes, in the event of a dispute over the deposit. Ms. Crane sent a copy of her letter to the Florida Real Estate Commission.

11. Ms. Castell and her company did not notify the Florida Real Estate Commission regarding a dispute over the \$500.00 escrow deposit. She felt that it was Ms. Crane's failure to provide an approved appraisal that caused the contract to expire on July 2, 1996, and thereafter, that she and the buyer were entitled to transfer the funds to another contract.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has

jurisdiction in this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

13. In license discipline cases such as this, the agency must prove the allegations of its complaint with evidence that is clear and convincing. Department of Banking and Finance v. Osborne Stern, 670 So. 2d 932 (Fla. 1996).

14. Section 475.25, Florida Statutes, provides that the agency may suspend a license for a period not exceeding ten (10) years, may 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 committed any of a series of violations described in Section 475.25(1), Florida Statutes.

15. Subsection 475.25(1)(a)1, Florida Statutes (1994), provides that if a licensee:

. . . in good faith, entertains doubt as to what person is entitled to the . . . delivery of the escrowed property, or if conflicting demands have been made upon him for the escrowed property, which property he still maintains in his escrow or trust account, the licensee shall promptly notify the [agency] of such doubts or conflicting demands and shall promptly:

- a. Request that the [agency] issue an escrow disbursement order determining who is entitled to the escrowed property;
- b. With the consent of all parties, submit the matter to arbitration;
- c. By interpleader or otherwise, seek adjudication of the matter by a court; or
- d. With the written consent of all parties, submit the matter to mediation . . .

16. Subsection 475.25(1)(e), Florida Statutes (1994), allows the agency to discipline a license if a licensee has violated any provisions of Chapter 475 or any lawful order or rule made or issued under the provisions of Chapter 475 or 455.

17. Rule 61J2-10.032(1), Florida Administrative Code, provides, in part:

(b) A broker, who has a good faith doubt as to whom is entitled to any trust funds held in the broker's escrow account, must provide written notification to the agency within 15 business days after having such doubt and must institute one of the settlement procedures as set forth in s. 475.25(1)(d)1, Florida Statutes, within 15 business days after the date the notification is received by the Division. The determination of good faith doubt is based upon the facts of each case brought before the [agency.] Based upon prior decisions of the [agency,] good faith doubt shall be deemed to exist in the following situations:

1. the closing or consummation date of the sale, lease or other real estate transaction has passed, and the broker has not received conflicting or identical instructions from all of the parties concerning the disbursement of the escrowed funds;

2. the closing or consummation date of the sale, lease, or other real estate transaction has not passed, but one or more of the parties has expressed its intention not to close or consummate the transaction and the broker has not received conflicting or identical instructions concerning the disbursement of the escrowed funds; and

(c) If one of the parties to a failed real estate sales transaction does not respond to the broker's inquiry as to whether that party is placing a demand on the trust funds or is

willing to release them to the other party, the broker may send a certified notice letter, return receipt requested, to the non-responding party. This notice should include the information that a demand has been placed by the other party, that a response must be received by a certain date, and that failure to respond will be construed as authorization for the broker to release the funds to the other party. Before releasing said trust funds, the broker must have the return receipt as proof the notice was delivered.

18. Section 475.25(1)(k), Florida Statutes, provides that the agency may discipline a licensee if it finds that the licensee:

[h]as 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 the state . . . wherein the funds shall be kept until disbursement thereof is properly authorized.

19. The evidence as described in the findings of fact, above, established that by the time Ms. Crane demanded disbursement of the escrow deposit, the funds had already been distributed on behalf of the buyer, Ms. Jackson, in the form of a deposit on another property. At the time that the funds were disbursed to Ms. Jackson, Ms. Castell had no "good faith doubt" as to the appropriate disbursement. The agency has thus failed to meet its burden of proof.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions

of Law, it is hereby RECOMMENDED:

That the Department of Business and Professional Regulation enter a final order dismissing the administrative complaint in this case.

RECOMMENDED this 16th day of February, 1998, in Tallahassee, Leon County, Florida.

MARY CLARK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of February, 1998.

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.