

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)	
PROFESSIONAL REGULATION,)	
DIVISION OF REAL ESTATE,)	
)	
Petitioner,)	
)	
vs.)	Case No. 98-2722
)	
NOEL D. CLARK, JR. and)	
ABC HOME BROKERS, INC.,)	
)	
Respondents.)	
<hr/>		
DEPARTMENT OF BUSINESS AND)	
PROFESSIONAL REGULATION,)	
DIVISION OF REAL ESTATE,)	
)	
Petitioner,)	
)	
vs.)	Case No. 98-4081
)	
NOEL D. CLARK, JR.; BETSY L.)	
BRENNAN; and ABC HOME)	
BROKERS, INC.,)	
)	
Respondents.)	
<hr/>		

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing by videoconference in Tallahassee, Florida, on May 7, 1999. The parties, attorneys for the parties, witnesses, and court reporter participated by videoconference in Fort Myers, Florida.

APPEARANCES

For Petitioner: Geoffrey T. Kirk, Senior Attorney
Division of Real Estate
Department of Business and

Professional Regulation
Post Office Box 1900
Orlando, Florida 32802-1900

For Respondents: Noel D. Clark, pro se
Betsy L. Brennan, pro se
18060 North Tamiami Trail
North Fort Myers, Florida 33917

STATEMENT OF THE ISSUES

The issues are whether Respondents failed to comply with the requirements of keeping and producing records, committed fraud in any business transaction, and, if so, the penalty.

PRELIMINARY STATEMENT

Petitioner commenced DOAH Case No. 98-2722 by filing, on May 5, 1998, an Administrative Complaint alleging that Respondent Noel D. Clark, Jr., is a licensed real estate broker serving as the qualifying broker of Respondent ABC Home Brokers, Inc., which is a corporation registered as a Florida real estate broker.

The Administrative Complaint alleges that Petitioner's investigator served a subpoena upon Respondents requiring the production of depository information in the transaction from Betty A. Smith, Trustee, to John E. and Elizabeth M. Crawford and escrow records and monthly reconciliations from October 1, 1997, through March 27, 1998. This was subpoena number 041706.

The Administrative Complaint alleges that Respondents did not produce the subpoenaed items on March 31, 1998, except for a copy of the Crawford contract and incomplete trust account records.

The Administrative Complaint alleges that another investigator served two more subpoenas on April 6, 1998, ordering the production of all bank statements, canceled checks, receipts, deposit book slips, checkbooks, and reconciliations from January 1, 1997, through April 7, 1998. These were subpoena numbers 041707 and 041708.

The Administrative Complaint alleges that Respondents did not produce the subpoenaed items on April 9, 1998. The investigator asked Respondent Clark to set an alternative date for production, but he did not do so.

The Administrative Complaint alleges that Respondents Clark and ABC Home Brokers failed to prepare the required written monthly escrow-statement reconciliations, in violation of Section 475.25,(1)(e), Florida Statutes, and Rule 61J2-14.012(2) and (3), Florida Administrative Code; failed to preserve and make available to Petitioner all books, records, and supporting documents and failed to keep an accurate account of all trust fund transactions, in violation of Section 475.25(1)(e), Florida Statutes, and Rule 61J2-14.012(1), Florida Administrative Code; and failed to keep and make available to Petitioner such books, accounts, and records as would enable Petitioner to determine whether the broker is in compliance with the provisions of Chapter 475, Florida Statutes, in violation of Section 475.5015, Florida Statutes, and thus Section 475.25(1)(e), Florida Statutes.

Petitioner commenced DOAH Case No. 98-4081 by filing, on July 9, 1998, an Administrative Complaint alleging that Respondents Clark and ABC Home Brokers are real estate brokers, as noted above, and Betsy L. Brennan is a licensed real estate salesperson.

The Administrative Complaint alleges that, on December 4, 1997, Respondent Brennan, as Trustee of the Driftwood Family Trust, offered to purchase a mobile home owned by Lauren and Patricia Hanson. The Administrative Complaint alleges that Respondent Clark had a verbal listing with Patricia Hanson to sell the mobile home and informed her that Respondent Brennan would offer \$30,000, less his commission. Although Lauren Hanson allegedly never signed the contract, Respondent Clark nonetheless allegedly allowed Charles and Cynthia Harvey to move into the mobile home.

The Administrative Complaint alleges that Respondents had offered to sell the Harveys the mobile home for \$42,000, despite the fact that the Hansons had not sold the mobile home. The Administrative Complaint alleges that the Harveys paid \$12,000 down, in the form of a truck and other credits. The Administrative Complaint alleges that Respondents never advised the Hansons of the price or terms of the resale to the Harveys. The Administrative Complaint alleges that Respondent Brennan tried to void the sale to the Harveys, but Respondents kept

furniture of the Hansons and declined to return the truck to the Harveys.

The Administrative Complaint alleges that Respondents Clark, Brennan, and ABC Home Brokers are 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 violation of Section 475.25(1)(b), Florida Statutes.

Respondents demanded a formal hearing.

The Administrative Law Judge consolidated the two cases.

At the hearing, Petitioner called six witnesses and offered into evidence 14 exhibits: Petitioner Exhibits 2-4, 9, 13-14, 16-21, and 23-24. Respondents called four witnesses and offered into evidence four exhibits: Respondents Exhibits 4, 5, 15, and 16. All exhibits were admitted except Petitioner Exhibit 21 and Respondents Exhibit 15, which were proffered.

The court reporter filed the Transcript on June 15, 1999.

FINDINGS OF FACT

1. Respondent Noel D. Clark, Jr. (Clark), has been a licensed real estate broker at all material times. From August 24, 1994, through November 9, 1997, he was the qualifying broker for ABC Brokers, Inc. From November 10, 1997, through April 21, 1998, Clark was the qualifying broker for Respondent ABC Home Brokers, Inc. (ABC). From April 22, 1998, through the present, Clark has been an individual real estate broker.

2. ABC was a licensed real estate brokerage corporation from November 10, 1997, through April 21, 1998. Since April 22, 1998, ABC has not held a valid registration due to the lack of a qualifying broker.

3. Respondent Betsy L. Brennan (Brennan) has been a licensed real estate salesperson since December 8, 1997. From December 8, 1997, through April 13, 1998, she was a salesperson under ABC. Since April 14, 1998, Brennan has been a licensed real estate salesperson under Clark.

4. At all material times, Patricia and Lauren Hanson owned a mobile home located on a rented lot in North Fort Myers. By a listing agreement entered into in October 1996, the Hansons listed the home for sale with ABC. The listing price was \$34,500 cash.

5. Charles and Cynthia Harvey contacted Brennan and expressed an interest in purchasing the mobile home. They told Brennan that they were interested in buying a home after they sold Mr. Harvey's 1977 Ford dump truck.

6. Brennan and Clark showed them several mobile homes. The Harveys decided that they wanted to purchase the Hansons' home. Brennan told the Harveys that she, as Trustee of the Driftwood Family Trust, would sell them the mobile home after buying it from the current owner. Most of the beneficiaries of the Driftwood Family Trust are related to Clark or Brennan.

7. On December 4, 1997, Brennan, as Trustee of the Driftwood Family Trust, as purchaser, executed an ABC dealer order form to purchase the Hansons' mobile home for \$28,000, which with tax and miscellaneous items rose to \$30,430. On December 6, 1997, Brennan, as Trustee of the Driftwood Family Trust, as purchaser, executed an Agreement and Promissory Note reflecting the same purchase price. ABC faxed these materials to the Hansons on or about December 6.

8. On December 5, 1997, Brennan, as Trustee of the Driftwood Family Trust, as seller, and Charles and Cynthia Harvey, as buyers, entered into an Agreement and Promissory Note for the purchase and sale of the Hansons' mobile home. The price was \$42,000 with a \$12,000 down payment. In the agreement, Brennan, as Trustee, warrants that she is the lawful owner of the property with the right to convey it.

9. For the down payment, the Harveys delivered to Brennan the executed title to the dump truck, which Brennan accepted, somewhat generously given the value of the truck, in full payment of the \$12,000 down payment. The delivery of the title certificate did not take place until January 10, 1998, by which time, probably due to her awareness of problems with the deal, Brennan decided not to cause the issuance of a new title in her name.

10. The Harveys began moving into the mobile home on December 6. The evidence is especially vague as to the dealings

between Respondents and the Hansons during this period of time. Except for faxing the Driftwood Trust offer to purchase, the record reveals only that, on or about the day that the Harveys moved into her mobile home, Patricia Hanson consented to their doing so.

11. Three or four days later, though, Patricia Hanson's sister visited the Harveys and told them that her sister had not sold the mobile home. The Harveys informed her that they had a binding contract to purchase the mobile home.

12. That evening, the Harveys telephoned Clark. He assured them that everything would work out. However, the Harveys refused to pay on the note, and Clark called them and informed them that he would foreclose.

13. By letter dated January 26, 1998, Brennan, as Trustee, informed the Harveys that the December 5 agreement was "void ab initio" because they had induced the agreement through fraudulent inducements of "their credit and financial situation, employability and job stability."

14. The January 26 letter states that the December 5 agreement was contingent upon Brennan's closing on the mobile home with the Hansons and that the Harveys understood that they were not to disturb the Hansons' property or furnishings until Brennan acquired the property from the Hansons. The January 26 letter states that the Harveys misrepresented to Brennan that they had good credit, that Mr. Harvey earned \$42 per hour with

the truck, and that Mr. Harvey would earn \$15 per hour driving a dump truck for someone else.

15. The January 26 letter states that Brennan has hired an attorney to litigate and "will be entitled to an award of costs and attorney fees since the agreement contains a 'prevailing party' provision which by its nature survives the voiding of the agreement." The December 5 agreement contains a provision for attorneys' fees, although the provision does not appear to survive its voiding. In any event, the Harveys made no representations in the Agreement concerning their creditworthiness, and no misrepresentation concerning creditworthiness constitutes a breach of the December 5 agreement.

16. Eventually, Brennan offered to rescind the deal and return to the Harveys their money and truck. They got the truck back several months later.

17. In the meantime, Mr. Harvey contacted Patricia Hanson, and they agreed on a lease/purchase arrangement. The Harveys continue to occupy the mobile home under this arrangement.

18. Analysis of the fraudulent misrepresentations in the Hanson/Harvey transactions case requires close consideration of the allegations of the Administrative Complaint in DOAH Case No. 98-4081.

1. The first material allegation is that Brennan, as Trustee, offered to purchase the mobile home from the Hansons. Petitioner has established this fact.

2. The second material allegation is that Clark had a verbal listing from the Hansons to sell their mobile home. Petitioner has established this fact by reasonable inference.

3. The third material allegation is that Clark told Hanson that Brennan would offer \$30,000, less the commission. Petitioner has not established Clark's role in this offer, but Petitioner has established that Brennan, as Trustee, made such an offer.

4. The fourth material allegation is that, even though the Hansons had not agreed to sell, Clark allowed the Harveys to move into the Hansons' mobile home. Petitioner has established this fact, but the record reveals that this was with the permission of Patricia Hanson.

5. The fifth material allegation is that Respondents "offered" to sell the mobile home to the Harveys for \$42,000. Petitioner has established this fact, but the record reveals that the Harveys knew that Brennan, as Trustee, was acquiring the mobile home from a third party. However, this allegation does not inform Brennan that she is facing a charge of misrepresentation in the contract, in which she warrants title that she does not have. This allegation only states that the "Harveys had been offered the mobile home by the Respondents for

\$42,000, despite the fact that a bona fide sale had never taken place between . . . Brennan and the Hansons."

6. The sixth material allegation is that the Harveys paid \$12,000 down in the form of the truck and other credits. Petitioner established these facts, except that the value of the truck was less than \$12,000 and no other credits existed.

7. The seventh material allegation is that Respondents did not advise the Hansons of the price or financing on the Harvey sale. Petitioner did not establish these facts.

8. The eighth material allegation is that Brennan tried to void the purported sale, but Respondents kept the Hansons' furniture and refused to return the truck to the Harveys. Petitioner established that Brennan tried to void the Harvey transaction. Petitioner did not establish that Respondents kept the Hansons' furniture, and the evidence established that Respondents returned the Harveys' truck. This allegation informs Brennan that she allegedly committed fraud in trying to void the transaction without returning the parties to the status quo, but this allegation does not inform her that she is facing a charge of misrepresentation for her misstatements in the letter itself.

9. For the reasons stated, Petitioner has failed to prove the material allegations 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.

10. By subpoena issued March 27, 1998, Petitioner ordered "Noel D. Clark" and ABC to produce, on the same date, all records concerning a sale from Betty A. Smith, Trustee, to John E. and Elizabeth M. Crawford.

11. The copy of the subpoena contains no return of service. Petitioner's investigator testified that he served the subpoena on Clark, who is "Noel D. Clark, Jr."

12. Neither Clark nor ABC produced records in connection with the March 27 subpoena.

13. Justifiably concerned with the enforceability of the subpoena, Petitioner issued two more subpoenas, both dated April 6, 1998, to produce documents relating to the Crawford transaction. One subpoena was directed to Clark and the other to ABC.

14. The Clark subpoena bears a return of service, but it shows that the investigator served the subpoena on April 6 on Brennan, not Clark. The ABC subpoena bears no return of service, and the investigator who purportedly served the subpoena did not testify.

CONCLUSIONS OF LAW

33. 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. All references to Rules are to the Florida Administrative Code.)

34. Section 475.25(1) provides in part:

(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 her or him by law or by the terms of a listing contract, written, oral, express, or implied, in a real estate transaction; has aided, assisted, or conspired with any other person engaged in any such misconduct and in furtherance thereof; or has formed an intent, design, or scheme to engage in any such misconduct and committed an overt act in furtherance of such intent, design, or scheme. It is immaterial to the guilt of the licensee that the victim or intended victim of the misconduct has sustained no damage or loss; that the damage or loss has been settled and paid after discovery of the misconduct; or that such victim or intended victim was a customer or a person in confidential relation with the

licensee or was an identified member of the general public.

(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 part I of chapter 455.

35. Section 475.5015 provides:

Each broker shall keep and make available to the department such books, accounts, and records as will enable the department to determine whether such broker is in compliance with the provisions of this chapter. Each broker shall preserve at least one legible copy of all books, accounts, and records pertaining to her or his real estate brokerage business for at least 5 years from the date of receipt of any money, fund, deposit, check, or draft entrusted to the broker or, in the event no funds are entrusted to the broker, for at least 5 years from the date of execution by any party of any listing agreement, offer to purchase, rental property management agreement, rental or lease agreement, or any other written or verbal agreement which engages the services of the broker. If any brokerage record has been the subject of or has served as evidence for litigation, relevant books, accounts, and records must be retained for at least 2 years after the conclusion of the civil action or the conclusion of any appellate proceeding, whichever is later, but in no case less than a total of 5 years as set above. Disclosure documents required under ss. 475.2755, 475.276, and 475.278 shall be retained by the real estate licensee in all transactions that result in a written contract to purchase and sell real property.

36. Rule 61J2-14.012 provides:

(1) A broker who receives a deposit as previously defined shall preserve and make available to the BPR, or its authorized representative, all deposit slips and statements of account rendered by the

depository in which said deposit is placed, together with all agreements between the parties to the transaction. In addition, the broker shall keep an accurate account of each deposit transaction and each separate bank account wherein such funds have been deposited. All such books and accounts shall be subject to inspection by the DPR or its authorized representatives at all reasonable times during regular business hours.

(2) Once monthly, a broker shall cause to be made a written statement comparing the broker's total liability with the reconciled bank balance(s) of all trust accounts. The broker's trust liability is defined as the sum total of all deposits received, pending and being held by the broker at any point in time. The minimum information to be included in the monthly statement-reconciliation shall be the date the reconciliation was undertaken, the date used to reconcile the balances, the name of the bank(s), the name(s) of the account(s), the account number(s), the account balance(s) and date(s), deposits in transit, outstanding checks identified by date and check number, an itemized list of the broker's trust liability, and any other items necessary to reconcile the bank account balance(s) with the balance per the broker's checkbook(s) and other trust account books and records disclosing the date of receipt and the source of the funds. The broker shall review, sign and date the monthly statement-reconciliation.

(3) Whenever the trust liability and the bank balances do not agree, the reconciliation shall contain a description or explanation for the difference(s) and any corrective action taken in reference to shortages or overages of funds in the account(s). Whenever a trust bank account record reflects a service charge or fee for a non-sufficient check being returned or whenever an account has a negative balance, the reconciliation shall disclose the cause(s) of the returned check or negative balance and the corrective action taken.

37. Petitioner must prove the material allegations by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Company, Inc., 670 So. 2d 932 (Fla. 1996) and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

38. Petitioner has failed to prove the material allegations of the Administrative Complaints.

RECOMMENDATION

It is

RECOMMENDED that the Florida Real Estate Commission enter a final order dismissing the Administrative Complaints in DOAH Case Numbers 98-2722 and 98-4081.

DONE AND ENTERED this 28th day of July, 1999, 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
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of July, 1999.

COPIES FURNISHED:

William Woodyard, General Counsel
Department of Business and
Professional Regulation

1940 North Monroe Street
Tallahassee, Florida 32399-0792

Herbert S. Fecker, Division Director
Division of Real Estate
Department of Business and
Professional Regulation
Post Office Box 1900
Orlando, Florida 32802-1900

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

Noel D. Clark
Betsy L. Brennan
ABC Home Brokers, Inc.
18060 North Tamiami Trail
North Fort Myers, Florida 33917

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.