STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF REAL ESTATE,	)	
Petitioner,	)	
vs.	)	Case No. 98-3870
TRACY ANNE HARDMAN, RUBY JOYCE LITTON, and CARRABELLE REALTY, INC.,	)	
Respondents.	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on November 30, 1998, in Carrabelle, Florida, before Donald R. Alexander, the assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Ghunise Coaxum, Esquire
400 West Robinson Street
Suite N-308
Orlando, Florida 32801-1772

For Respondent: (Hardman) Tracy Ann Hardman, pro se
865 CC Land Road
Eastpoint, Florida 32328

For Respondents: (Litton and Carrabelle) Ruby J. Litton, pro se
Post Office Box 490
Carrabelle, Florida 32322

STATEMENT OF THE ISSUE

The issue is whether Respondents' real estate licenses should be disciplined on the ground that Respondents violated a

rule and various provisions within Chapter 475, Florida Statutes, as alleged in the Administrative Complaint.

PRELIMINARY STATEMENT

This matter began on July 23, 1998, when Petitioner, Department of Business and Professional Regulation, Division of Real Estate, issued an Administrative Complaint charging that Respondents, Tracy Ann Hardman, Ruby Joyce Litton, and Carrabelle Realty, Inc., all licensed as realtors, had violated a rule and various provisions within Chapter 475, Florida Statutes, when they handled a real estate transaction in 1996.

Respondents denied the allegations and requested a formal hearing under Section 120.569, Florida Statutes, to contest the charges. The matter was referred by Petitioner to the Division of Administrative Hearings on August 31, 1998, with a request that an Administrative Law Judge be assigned to conduct a formal hearing. By Notice of Hearing dated September 24, 1998, a final hearing was scheduled on November 30, 1998, in Carrabelle, Florida.

At final hearing, Petitioner presented the testimony of Benjamin F. Clanton, an agency investigator. Also, it offered Petitioner's Exhibits 1-6. All exhibits were received in evidence. Exhibit 6 is the deposition testimony of Thomas E. Gavers, the complaining consumer. Respondents Hardman and Litton testified on their own behalf. Finally, Joint Exhibits 1 and 2 were received in evidence.

The transcript of hearing was filed on December 14, 1998. Proposed findings of fact and conclusions of law were filed by Petitioner on December 24, 1998, and they have been considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

Based upon all of the evidence, the following findings of fact are determined:

1. When the events herein occurred, Respondents, Tracy Anne Hardman and Ruby Joyce Litton, were licensed as a real estate salesperson and broker, respectively, having been issued license numbers 0458811 and 0424762 by Petitioner, Department of Business and Professional Regulation, Division of Real Estate (Division). Litton served as the qualifying broker/owner of Respondent, Carrabelle Realty, Inc., a corporation registered as a real estate broker and located at 104 West Highway 98, Carrabelle, Florida. The corporation holds license number 1008111, also issued by the Division.

2. On December 14, 1995, Thomas E. Gavers, who resides in East Troy, Wisconsin, executed a contract offering to purchase a vacant lot on U. S. Highway 98 in Franklin County, Florida, from John M. Brannen for the price of $22,000.00. After a counteroffer was made by Brannen raising the price to $25,000.00, the contract was accepted by Gavers on January 6, 1996. It can be inferred from the evidence that Gavers was an experienced investor since he also owned "quite a bit of other property" in

the county.

3. The contract called for Gavers to pay $500.00 as an earnest money deposit, to be held in escrow by Respondents. The contract further provided that the transaction "shall be closed on or before Feb. 15, 1996, unless extended by adding an addendum to the contract." A special condition added by Gavers provided that the "contract [is] contingent on [the] lot being buildable and [the buyer] obtaining [a] permit to fill [the] lot and build [a] driveway." Finally, paragraph 17 of the contract provided in part that if the buyer "fails to perform any covenants of this contract within the time specified, all deposits shall be forfeited." Hardman was the seller's agent in the transaction.

4. At some point in the process, but probably when the contract was signed, Gavers sent Hardman a note which asked her to "[c]heck to see if lot is buildable & permit is okayed to fill lot & build driveway before spending monies to [sic] survey & title ins." Although paragraph 16 of the contract clearly provided that this responsibility fell upon the buyer, Hardman undertook the process of assisting Gavers since he was then residing in Wisconsin, and her only means of communicating with him was by telephone or mail. In doing so, Hardman made clear that she would assist the buyer as much as possible, but it was the buyer's responsibility to actually secure the permits.

5. Because of time constraints in attempting to secure the information necessary to satisfy the special condition, it was

necessary for Gavers to extend the closing date to March 15, 1996. This was accomplished by an addendum to the contract executed by the parties around February 14, 1996.

6. After expending a considerable amount of time and effort in assisting Gavers, Hardman eventually obtained most of the information pertaining to requirements for filling and building on the lot. She learned, however, that a permit would be required from the U. S. Army Corps of Engineers in order to fill the lot. Before that federal agency would even inspect the lot to see if it was permittable, it was necessary that the lot be surveyed.

7. Based on the foregoing advice, Hardman ordered a survey for a cost of $150.00. The survey was performed on or about February 7, 1996. Although Respondents paid for the survey when it was performed, they were ultimately reimbursed for this expense from Gavers' deposit. Hardman did not advise Gavers in writing that a survey was being ordered; however, Litton believed that Gavers was notified of such action by telephone, and this assertion has been accepted. This testimony is especially credible since Gavers had just authorized Hardman to spend $85.00 to file a septic tank permit application with the County. In addition, notwithstanding the instructions in his note that Hardman was not to spend any money until a permit was actually obtained, Gavers subsequently told Hardman to "proceed" and "keep going" in her efforts to help him obtain a permit. Therefore,

Hardman was not culpably negligent in ordering the survey, and she did not breach her trust in the transaction by doing so.

8. After the property was inspected by the federal agency, Hardman learned that it would be necessary for Gavers to personally fill out a portion of the application for a permit showing the type of filling and construction he desired and to return it with a filing fee to the agency's Jacksonville office.

9. Gavers obtained the necessary documentation for Gavers to complete, and she filled in a portion of the form. The packet was then mailed to Gavers on a date not of record, but probably before March 15, 1996, with instructions that he needed to complete the application in order to obtain a permit. Gavers claims that he "wasn't aware of" receiving it, but his testimony is not found to be credible. He declined to complete the application, which would have satisfied his contingency request and allowed the contract to close. From that point on, he also stopped communicating with Respondents.

10. The time for closing the contract expired on March 15, 1996. Although Gavers had probably breached the contract by that date by failing to make any reasonable effort to satisfy the contingency, as required by paragraph 16 of the contract, he telephoned Hardman on an undisclosed date and asked that she obtain another extension of time. The seller agreed to a second extension, and a second addendum to the contract was eventually prepared and executed by the seller on April 29, 1996, which

extended the closing date to May 31, 1996. The addendum was then faxed to Gavers for his signature.

11. Although Gavers acknowledged receiving the document, he says he did not receive it "until it was about ran [sic] out," he did not want to make a decision on purchasing the property "that quick," and in any event, it was the realtors' responsibility, and not his, to obtain the permits. He declined to respond in any fashion to Respondents.

12. During this same time period, Litton and Hardman repeatedly attempted to contact Gavers by telephone and mail, and in March, April, and May they left "numerous" telephone messages with Gavers' daughter at his Wisconsin home. Although Gavers says he returned every telephone call, his testimony is not deemed to be credible, and it is found that he failed to return any calls. He also claimed that he visited Florida sometime that spring and spoke to Hardman, and that she was pressuring him into making a decision. However, Respondents established that Gavers never returned to Florida to speak with them after the process began, and their testimony has been accepted on this issue.

13. By this time, the seller's property had been tied up for many months, and Brannen had another buyer ready to purchase the property for $10,000.00 more than Gavers had offered. After hearing nothing from Gavers for months, despite continued efforts to contact him, in August 1996 Litton mailed Gavers a Release From Sales Contract, which provided that Gavers would "be

released from Contract For Sale, dated 12-14-95," and that he understood that he would "forfeit any earnest money deposit [he] had given." Gavers acknowledged receiving this document, but like the other messages and packets of documents, he declined to respond in any fashion.

14. According to Gavers, he had been "patiently" waiting for a return of his deposit, and that after receiving the release, he immediately filed a complaint with the Real Estate Commission (Commission) seeking a return of his money. However, it was established that his complaint was not filed until almost two years later. In addition, the evidence shows that Gavers never once requested that Respondents return his money or even hinted to them that he thought he was entitled to a refund.

15. Gavers insisted that he "cooperated" with Respondents and "did everything [he] could" to assist Hardman in securing the information necessary to satisfy the contingency in the contract. This assertion has been rejected as not being credible. To the contrary, Gavers refused to even communicate with Respondents, and he failed to take even minimal action to satisfy his responsibility under the contract.

16. On the reasonable belief that Gavers was not making a claim on his deposit, and that he had failed to fulfill his obligation under the contract, on September 13, 1998, Litton issued checks in the amount of $172.73 to Hardman and herself

from Gavers' deposit. A part of that was used to reimburse Respondents for the expenses incurred in having a survey performed. The remaining part of the deposit, $172.74, was issued to the seller on October 21, 1996. In making this disbursement, there was no intent on the part of Litton and Carrabelle Realty, Inc. to trick or deceive the buyer, breach their trust in the transaction, or otherwise commit an unlawful act.

17. Gavers never made a demand for his deposit at any point in the process, and he had failed to make a reasonable effort to satisfy the contingency. Under these circumstances, there was no reasonable doubt in Litton's mind, nor should she have had one, as to who was entitled to the $500.00 deposit, and she was not confronted with conflicting demands for the money. Therefore, she was under no obligation to send Gavers a letter by certified mail requesting that he respond within a date certain or that his deposit would be forfeited. Likewise, there was no responsibility on Litton to request a disbursement order from the Commission.

18. After Gavers defaulted on the contract, Brannen sold his lot to another buyer. The new owner satisfied all requirements necessary to build on the lot, and he thereafter built a driveway on the lot and constructed a new dwelling. It is clear, then, that the lot was "buildable," and a permit could be obtained "to fill [the] lot and build [a] driveway," which

would have satisfied the contingencies in Gavers' contract.

19. Respondents have never been the subject of prior disciplinary action. In addition, Hardman and Litton are associated with a small real estate firm in a small community, and the imposition of an administrative fine would create a financial hardship. Finally, throughout this process, Respondents acted in good faith; they cooperated with the Division; and they expended considerable time and effort in attempting to assist a buyer who refused to return calls, acknowledge mail, or fill out the necessary documentation that was required to obtain a permit.

CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

21. Because Respondents' professional licenses are at risk, Petitioner bears the burden of proving by clear and convincing evidence that the allegations in the complaint are true. See, e.g., Ramsey v. Dep't of Prof. Reg., Division of Real Estate, 574 So. 2d 291 (Fla. 5th DCA 1991).

22. In the single count involving Hardman, she is charged with being guilty of "culpable negligence or breach of trust in any business transaction in violation of s. 475.25(1)(b), Fla. Stat." Count I is based on the allegation that Hardman ordered a survey on the property without first determining that the lot was

buildable and permits approved to fill the lot and construct a driveway.

23. Counts II and III of the complaint charge that Litton and the corporate licensee are "guilty of failure to provide written notification to the Commission upon receiving conflicting demands within 15 business days of last party's demand or upon a good faith doubt as to whom is entitled to any trust funds held in the broker's escrow account and failure to institute one of the settlement procedures as set forth in s. 475.25(1)(d)1., Fla. Stat. within 30 busines days after the last demand in violation of Fla. Admin. Code R. 61J2-10.032(1) and therefore in violation of s. 475.25(1)(e), Fla. Stat." These counts are based on the theory that Respondents "were required to notify FREC upon the failure of the contract to close, which created a good faith doubt as to whom the escrow deposit should be disbursed, since Respondent[s] had not received authorization from Gavers."

24. Counts IV and VI allege that Litton and Carrabelle Realty, Inc., are "guilty of failure to account or deliver funds in violation of s. 475.25(1)(d)1., Fla. Stat." These counts are

predicated on the theory that Respondents disbursed the escrow deposit without proper authorization.

25. Finally, Counts V and VII (the latter inadvertently numbered in the complaint as a second Count V) charge that Litton and the corporate licensee are "guilty of dishonest dealing by trick, scheme or device, culpable negligence, or breach of trust in any business transaction in violation of s. 475.25(1)(b), Fla. Stat." on the theory that they participated "in the unauthorized survey that was subsequently paid with the escrow deposit from Gavers."

26. As to Count I, the more credible evidence shows that Gavers was orally notified that a survey would be required before the U. S. Army Corps of Engineers would even inspect the property to see if a permit could be issued. In addition, the evidence shows that, notwithstanding his earlier note, Gavers instructed Hardman to "proceed" and "keep going" with her efforts to assist him in obtaining a permit. Indeed, Gavers had just authorized Hardman to pay $85.00 for a septic tank application. Therefore, by ordering a survey, Hardman was not guilty of culpable negligence or breach of trust in a business transaction, as charged in Count I. This evidence also exonerates Litton and Carrabelle Realty, Inc. from the charge that they participated in the "unauthorized" survey that was paid for with the escrow deposit and that they violated Section 475.25(1)(b), Florida Statutes. Counts V and VII should accordingly be dismissed.

27. The underlying theory for the remaining charges in Counts II, III, IV, and VI is that if a real estate contract does not close due to one party's failure to perform, the provisions of Section 475.25(1)(d)1., Florida Statutes, are automatically triggered, even where no conflicting demands for the deposit are made and the realtor entertains no good faith doubt as to whom is entitled to the deposit. Section 475.25(1)(d)1., however, may be invoked only under two specific circumstances. If the realtor "in good faith, entertains doubt as to what person is entitled to the accounting and delivery of the escrowed property," or "if conflicting demands have been made upon the licensee for the escrowed property," the licensee must then institute the statutory procedures. These determinations are wholly fact dependent.

28. In this case, the evidence does not show that "conflicting demands" were made upon Respondents. Indeed, at no time did the buyer ever make a demand for his deposit from the realtor, and he did not even lodge his complaint with the Commission until two years after he breached the contract. At the same time, there is not even an inference, much less clear and convincing evidence, that Respondents had, or should have had, a reasonable doubt as to what person what entitled to the deposit. Under this factual setting, Respondents had no obligation to institute the statutory procedures. Therefore, the allegations in Counts II, III, IV, and VI must fail and should be

dismissed.

29. Although the undersigned has recommended dismissal of all charges, Paragraph (4) of Rule 61J2-24.001, Florida Administrative Code, identifies aggravating and mitigating circumstances which if present entitle the Commission to deviate from the suggested disciplinary guidelines. Relevant to this proceeding are the mitigating circumstances set forth in Finding of Fact 19, which clearly justify a downward deviation from the penalty guidelines, assuming arguendo that a statute had been violated.

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 dismissing the administrative complaint, with prejudice.

DONE AND ENTERED this 31st day of December, 1998, in Tallahassee, Leon County, Florida.

DONALD R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of December, 1998.

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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 Florida Real Estate Commission.