

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)	
PROFESSIONAL REGULATION, FLORIDA)	
REAL ESTATE COMMISSION,)	
)	
Petitioner,)	
)	
vs.)	Case No. 99-2917
)	
MARJORIE A. KOUTROUBIS AND)	
PRESTIGE INTERNATIONAL REALTY)	
CORPORATION,)	
)	
Respondents.)	
_____)	

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly-designated Administrative Law Judge, Carolyn S. Holifield, held a formal hearing on November 23, 1999, by video teleconference, between Tallahassee and Tampa, Florida.

APPEARANCES

For Petitioner:	Ghunise Coaxum, Esquire Department of Business and Professional Regulation Division of Real Estate 400 West Robinson Street, Suite N-308 Orlando, Florida 32801
For Respondent:	Stephen F. Ricci, Qualified Representative Prestige International Realty Corporation 1111 North Westshore Boulevard Tampa, Florida 33607

STATEMENT OF THE ISSUES

This issues in this case are: (1) Whether Respondent failed to maintain trust funds in the real estate brokerage escrow bank

account or some other property depository until disbursement thereof was properly authorized in violation of Section 475.25(1)(k), Florida Statutes; (2) Whether Respondent is guilty of fraud, misrepresentation, concealment, false promises, false pretenses, dishonest dealings by trick, scheme or device, culpable negligence, or breach of trust in a business transaction in violation of Section 475.25(1)(b), Florida Statutes; and (3) If so, what penalty should be imposed on her real estate license.

PRELIMINARY STATEMENT

On August 19, 1998, Petitioner, Department of Business and Professional Regulation, Division of Real Estate (Department), filed a four-count Administrative Complaint against Respondents, Marjorie A. Koutroubis and Prestige International Realty, Corporation, alleging that they had violated Sections 475.25(1)(k) and 475.25(1)(b), Florida Statutes.

Counts I and III of the Administrative Complaint allege the Respondent Koutroubis and Respondent Prestige International Realty, Corporation, respectively, violated Section 475.25(1)(k), Florida Statutes, by failing to maintain trust funds in the real estate brokerage escrow bank account or some other depository until disbursement of such funds were properly authorized.

Counts II and IV of the Administrative Complaint alleged that Respondents violated Section 475.25(1)(b), Florida Statutes, by being guilty of misrepresentation, concealment, false pretenses,

dishonest dealings by trick, scheme or device, culpable negligence, or breach of trust in a business transaction.

Respondents challenged the allegations and requested a formal hearing and also filed a cross-complaint seeking compensation for "unjust loss of income incurred and punitive damages for the emotional, physical, and professional suffering intentionally and wrongfully imposed."

At hearing, Respondents were advised that the undersigned was without jurisdiction to decide the issues raised in the cross-complaint and to award the damages sought therein. Accordingly, Respondent's cross-complaint is hereby dismissed.

At hearing, Petitioner called two witnesses, Michael Day and George Sinder and had four exhibits received into evidence. Respondent Koutroubis testified on her own behalf and presented the testimony of two witnesses, Nora Scandella and Stephen Ricci. Respondents' Exhibits 1 and 3 were received into evidence. Respondents' Exhibit 2 was proffered.

The Transcript of the proceeding was filed on December 8, 1999. Both parties filed Proposed Recommended Orders.

FINDINGS OF FACT

1. Petitioner is a state licensing and regulatory agency charged with the responsibility and duty to prosecute administrative complaints pursuant to the laws of the State of Florida, in particular, Chapters 455 and 475, Florida Statutes, and Chapter 61J2, Florida Administrative Code.

2. Respondent Marjorie Koutroubis, is and was at all times material hereto, a licensed Florida real estate broker having been issued License No. BK-039112.

3. Respondent Prestige International Realty Corporation (Prestige International Realty), is and was at all times material hereto, a corporation registered as a Florida real estate broker having been issued Registration CQ-0274989. The business is located at 1111 North Westshore Boulevard, No. 212, Tampa, Florida 33607.

4. At all times material hereto, Respondent Koutroubis was licensed and operating as qualifying broker and officer of Prestige International Realty.

5. On or about September 11, 1997, Michael Day, an investigator with the Department, went to the office of Prestige International Realty to conduct an audit of escrow accounts being held by Respondents. However, Mr. Day was unable to complete the audit on that day because the company's records were unavailable as a result of a computer problem.

6. On January 12, 1998, Mr. Day returned to the office of Prestige International Realty, and performed an audit of two escrow accounts being held by Respondents, the security deposit account, and the disbursement account.

7. In conducting the audit, Mr. Day used and relied upon information contained in documents provided to him by Respondent Koutroubis or her employees.

8. The audit of Respondents' escrow accounts revealed that the security deposit account was balanced but the disbursement account had a shortage.

9. According to Prestige International Realty's December 1997 escrow reconciliation statement, the closing balance or the broker's trust liability was \$2,700.00 and the adjusted account balance was \$996.15. The difference between the broker's trust liability and adjusted account balance reflected a shortage of \$1,703.85 in the escrow account being maintained by Respondents.

10. The subject Prestige International Realty's reconciliation statements contained no description or explanation to explain the discrepancy described in paragraph 9. Moreover, neither Respondent Koutroubis nor Mr. Ricci could explain the reason for the apparent shortage.

11. The subject reconciliation form was prepared by Mr. Ricci and signed by Respondent Koutroubis. Prior to signing the reconciliation sheet, Respondent Koutroubis did not question the figures on the sheet. Rather she accepted the figures provided on the form by Mr. Ricci.

12. After the January 12, 1998, audit of Prestige International Realty's escrow accounts, Mr. Day met with Respondent Koutroubis and discussed the findings of the audit. Mr. Day told Respondent Koutroubis that the only way to correct or resolve the problem of the shortage of funds in the escrow

account was to deposit \$1,703.85 into Prestige International Realty's account.

13. Respondent Koutroubis did not know why there was a shortage in the escrow account. Nevertheless, in an effort to resolve the problem, she immediately wrote a check for \$1,7903.85 and deposited it into the Prestige International Realty's bank account.

14. Mr. Day recorded the findings of the Audit on the Department's Office Inspection and Escrow/Trust Account Audit Form (Audit Form). In the "Remarks" section of the form, Mr. Day noted that in one instance, the improper reconciliation form had been used. With regard to the shortage in the rental distribution account. Mr. Day wrote, "Broker to transfer shortage for rental distribution." In the "Corrective Action" section of the form, Mr. Day wrote, "see above" and "use correct reconciliation sheet."

15. The Audit Form also included items which required the investigator to indicate what, if any, action was taken in a case. The investigator was to respond "yes" or "no" to each of the following: (1) Was a citation issued; (2) Was a notice of noncompliance issued; and (3) Was a complaint docketed. On the Audit Form, Mr. Day indicated that no citation or notice of noncompliance was issued to Respondents but that a complaint was docketed.

16. Respondent Koutroubis and Mr. Day signed the Audit Form on January 14, 1998.

17. After Respondent Koutroubis signed the Audit Form and wrote a check for the amount of the shortage, she mistakenly believed that no further action would be taken with regard to the cited violations. Respondent Koutroubis' belief was based on the fact that no citation or notice of noncompliance was issued and on her understanding of Mr. Day's comments concerning how to resolve the shortage in the escrow account.

18. Neither Mr. Day nor any other Department employee told Respondent Koutroubis or Mr. Ricci that if a check were written to cover the shortage in the escrow account, that the Department would take no further action.

19. Mr. Day believed that the likely reason for the shortage in the disbursement account was that proceeds were disbursed prior to checks clearing.

20. After the subject audit of Respondents' 1997 records, Respondent Koutroubis began using a new form to prepare Prestige International Realty's monthly reconciliation statements.

21. As of the date of the hearing, there is no indication that there have been shortages or overages in the Prestige's escrow accounts since the January 1998 audit.

CONCLUSIONS OF LAW

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

23. The Department is statutorily empowered to suspend, revoke, or otherwise discipline the real estate license of any licensee in Florida found guilty of any act enumerated in Section 475.25, Florida Statutes.

24. The Department has the burden of proof in this proceeding and to prevail, must show by clear and convincing evidence that Respondent committed the acts alleged in the Administrative Complaint and the reasonableness of any penalty to be imposed. Department of Banking and Finance v. Osborne Stern, 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

25. In Evans Packing Company v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116, n. 5 (Fla. 1st DCA 1989), the court explained:

[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the evidence must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact the firm belief of [sic] conviction, without hesitancy, as to the truth of the allegations sought to be established.

Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

26. The Administrative Complaint against Respondent contains four counts. Count I alleges that Respondent Koutroubis is guilty of failure to maintain trust funds in the real estate brokerage bank account until disbursement was properly authorized in violation of Section 475.25(1)(k), Florida Statutes. Count II alleges that Respondent Koutroubis is guilty of fraud, misrepresentation, concealment, false promises, false pretenses, dishonest dealing by trick, scheme or device, culpable negligence, or breach of trust in a business transaction in violation of Section 475.25(1)(b), Florida Statutes.

27. Counts III and IV allege that Respondent Prestige International Realty is guilty of the same conduct charged against Respondent Koutroubis in Counts I and II of the Administrative Complaint.

28. With regard to Counts I and III, Rule 61J2-14.012, Florida Administrative Code, provides in part:

(2) At least 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 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)

29. The Department has met its burden as to Counts I and III of the Administrative Complaint. The clear and convincing evidence established that Respondents' trust liability and bank balances for the period audited did not agree. Moreover, the evidence established that Respondents' reconciliation forms for that time period failed to include a description or explanation for the differences. While the undisputed evidence shows that Respondent Koutroubis took corrective action to resolve the shortage, once she became aware of the problem, that action does not absolve her from being penalized for failing to comply with Section 475.25(1)(k), Florida Statutes, and Rule 61J2-14.012(2 and (3), Florida Administrative Code.

30. Counts II and IV of the Administrative Complaint allege that the Respondents are:

Guilty of fraud, misrepresentation, 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.

31. In this case, there are no factual allegations of conduct by Respondents that would give rise to the charges. More significantly, there is no evidence that Respondent Koutroubis, as a broker or officer of Prestige International Realty, engaged in any conduct that constitutes "fraud, misrepresentation, concealment, false promises, false pretenses, dishonest dealing by trick, scheme, or device, culpable negligence or breach of trust in a business transaction." In the absence of such

evidence, the Department has failed to meet its burden or proving by clear and convincing evidence the allegations contained in Counts II and IV of the Administrative Complaint.

32. The discipline that may be imposed against a real estate licensee are: revocation, suspension for a period not exceeding ten years, imposition of an administrative fine not to exceed \$1,000 for each count or separate offense, a reprimand, probation, and any or all of the foregoing. Section 475.25(1), Florida Statutes, and Rule 61J2-24.001(3), Florida Administrative Code.

33. According to Rule 61J2-24.001(3), Florida Administrative Code, the recommended penalty for a violation of Section 475.25(1)(k), Florida Statutes, is a minimum of a 90-day suspension of license and \$1,000.00 fine up to a maximum of revocation of license.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is:

RECOMMENDED that a final order be entered finding Respondents guilty of violating Section 475.25(1)(k), Florida Statutes; imposing an administrative fine of \$1,000.00 on Respondent Koutroubis; issuing a reprimand to Respondent Prestige International Realty; and dismissing Counts II and IV of the Administrative Complaint.

DONE AND ENTERED this 9th day of February, 2000, in
Tallahassee, Leon County, Florida.

CAROLYN S. HOLIFIELD
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 9th day of February, 2000.

COPIES FURNISHED:

Ghunise Coaxum, Esquire
Department of Business and
Professional Regulation
Division of Real Estate
400 West Robinson Street, Suite N-308
Orlando, Florida 32801

Stephen F. Ricci, Qualified Representative
Prestige International Realty Corporation
1111 North Westshore Boulevard
Tampa, Florida 33607

Barbara D. Auger, General Counsel
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-0792

Herbert S. Fecker, Division Director
Florida Real Estate Commission
400 West Robinson Street
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 should be filed with the agency that will issue the final order in this case.