

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) Case No. 99-3075
)
LARRY L. MORRIS AND INVESTMENT)
MARKETING, INC.,)
)
Respondents.)
_____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its designated Administrative Law Judge, Jeff B. Clark, held a formal hearing in the above-styled case on November 9, 2000, in Shalimar, Florida.

APPEARANCES

For Petitioner: Tonya Davis, Esquire
Nancy P. Campiglia, Esquire
Department of Business and
Professional Regulation
400 West Robinson Street
Hurston Building, Suite N308
Orlando, Florida 32801-1772

For Respondents: Steven W. Johnson, Esquire
1801 East Colonial Drive
Suite 101
Orlando, Florida 32803

STATEMENT OF THE ISSUES

1. Whether the real estate license of Respondent, Larry L. Morris, should be disciplined for:

a. Advertising property or services in a manner which is fraudulent, false, deceptive, or misleading in form or content in violation of Subsection 475.25(1)(c), Florida Statutes (1998);

b. Failure to prepare required written monthly escrow statement-reconciliations in violation of Rule 61J2-14.012(2) and (3), Florida Administrative Code, and, therefore, in violation of Subsection 475.25(1)(e), Florida Statutes (1998);

c. Using a trade name without proper registration in violation of Rule 61J2-10.034, Florida Administrative Code, and, therefore, in violation of Subsection 475.25(1)(e), Florida Statutes (1998); and

d. Depositing or intermingling personal funds with funds being held in escrow or trust or on condition in violation of Rule 61J2-14.008(1)(c), Florida Administrative Code, and, therefore, in violation of Subsection 475.25(1)(e), Florida Statutes (1998);

2. Whether the real estate license of Respondent, Investment Marketing, Inc., a Florida Corporation, should be disciplined for:

a. Failure to prepare required written monthly escrow statement-reconciliations in violation of Rule 61J2-14.012(2) and (3), Florida Administrative Code, and, therefore, in violation of Subsection 475.25(1)(e), Florida Statutes (1998); and

b. Depositing or intermingling personal funds with funds being held in escrow or trust or on condition in violation of Rule 61J2-14.008(1)(c), Florida Administrative Code, and, therefore, in violation of Subsection 475.25(1)(e), Florida Statutes (1998).

PRELIMINARY STATEMENT

On May 20, 1999, Petitioner, Department of Business and Professional Regulation, Division of Real Estate, filed an Administrative Complaint against Respondents, Larry L. Morris, and Investment Marketing, Inc., a Florida Corporation. A request for formal hearing was received by the Division of Administrative Hearings on July 19, 1999.

The case was set for final hearing on September 17, 1999. An Order granting Respondent's motion to continue was entered on September 9, 1999, placing the case in abeyance at the suggestion of the parties that they were negotiating a settlement.

On November 12, 1999, the Administrative Law Judge was advised that the parties were unable to settle, and the case was rescheduled for final hearing on March 8, 2000.

On February 23, 2000, a Joint Motion to Hold Case in Abeyance was filed again suggesting that the parties were "negotiating a stipulated settlement." The case was again placed in abeyance by Order dated February 25, 2000.

On May 23, 2000, Petitioner filed a Status Report indicating that a settlement had been negotiated by the parties and advising that the settlement would be forwarded to the Real Estate Commission.

In an August 1, 2000, Status Report, Petitioner advised that the "parties were unable to reach an agreement." The case was rescheduled for final hearing on November 9, 2000.

Petitioner presented three witnesses and offered five exhibits (Petitioner's Exhibits 1, 3, 5, 6 and 7) which were admitted into evidence. Respondents presented two witnesses and offered three exhibits which were admitted into evidence.

Petitioner's Exhibit No. 5, a composite of 16 pages of records of the Division of Real Estate pertaining to Case Nos. 94-80988 and 94-81264, Department of Business and Professional Regulation, Division of Real Estate v. Larry L. Morris and Investment Marketing, Inc., was admitted into evidence as a result of Respondent, Larry L. Morris, having volunteered on

direct examination that he had a previous problem with his escrow accounts.

The Transcript of the hearing was filed with the Division of Administrative Hearings on January 8, 2001. The parties jointly moved to extend the time to file proposed recommended orders until February 9, 2001. The Motion was granted. Both parties filed Proposed Recommended Orders which were received on February 9, 2001.

FINDINGS OF FACT

Upon consideration of oral and documentary evidence received at the hearing, the following relevant findings of fact are made:

1. Petitioner, Department of Business and Professional Regulation, Division of Real Estate, is the State of Florida agency which licenses and regulates real estate professionals pursuant to Section 20.165, Florida Statutes (1998), and Chapters 120, 455, and 475, Florida Statutes (1998), and the rules in the Florida Administrative Code promulgated pursuant thereto.

2. Respondent, Larry L. Morris (hereinafter "Morris"), is now, and was at all times material hereto, a licensed real estate broker in the State of Florida holding License No. 0061891. Respondent, Investment Marketing, Inc., a Florida Corporation (hereinafter "Investment Marketing"), is now, and

was at all times material hereto, a licensed real estate broker holding License No. 0233721. At all times material hereto, Morris was an officer of Investment Marketing and its qualifying broker.

4. Morris has agreed by stipulation that he is a real estate broker and subject to the jurisdiction of Petitioner during the period of the acts alleged in the Administrative Complaint filed in this case.

5. In 1989, a company that Morris had an interest in, Sunset Harbour Condominium Development Company, purchased 57 condominium units in the 72-unit Sunset Harbour Condominium (hereinafter "Condos"). Subsequent to the initial purchase of 57 units, Sunset Harbour Condominium Development Company acquired 10 additional units which were in foreclosure.

6. Sunset Harbor Condominium Development Company subsequently sold all units it owned in Condos. Morris continues to own one unit in Condos.

7. Respondents managed Condos and were sales and rental agents for Condos pursuant to a verbal agreement with the Sunset Harbour Condominium Association.

8. When Condos was acquired, Morris either personally or through an entity in which he had ownership, acquired a tract of land contiguous to Condos on which Sunset Harbour Villas (hereinafter "Villas") was developed by Morris in 1987-1989.

9. Respondents were rental and sales agents for Villas.

10. Condos had the following amenities which are relevant to this case: a swimming pool, a gazebo, and a 200-foot fishing pier. Villas has the following amenities which are relevant to this case: a swimming pool and a clubhouse. Morris testified that he hoped to "integrate the amenities between the two condominium properties." According to Morris, "the Board of Directors has the right to do that [a cross-use of amenities] on a year-to-year basis."

13. Morris had brochures printed in 1997 for Villas which advertised the following amenities: Two swimming pools; Clubhouse; Gazebo; and, a 200-foot pier.

14. Morris testified that when he realized that there would be no integration or cross-use of the amenities of Condos and Villas which made the brochure inaccurate, he redacted, using a "magic marker," the inappropriate amenities from the brochure.

15. In 1997 or 1998, during the construction start-up of Villas, David Woodard obtained an unredacted copy of the brochure at Morris' office. Woodard did not see any redacted brochures.

16. In January 1999, Benjamin Clanton, a Division of Real Estate Investigator, obtained an unredacted copy of the brochure

from Morris' office. He also saw redacted brochures in the office.

17. Gene Daughtry, an employee of Investment Marketing, testified that [at some non-specified date] he redacted about 2500 out of 3000 - 4000 brochures and that he never gave a prospective buyer a brochure which had not been redacted.

18. On January 27, 1999, Mr. Clanton performed an audit on Respondents' security account (escrow/trust account). Morris made the requisite information available to him although the escrow liability lists had to be reconstructed. Mr. Clanton discovered that the monthly reconciliations had been done improperly.

19. The trust liability account balance was \$3,400.31; the reconciled bank balance was \$4,320.31. There was \$920.50 in excess funds in the escrow account.

20. On February 10, 1999, Morris wrote Mr. Clanton a letter in which he stated that the excess funds "came from monies that were paid to Investment Marketing for utility bills, etc., that were paid for owners to keep their utilities from being disrupted, and Investment Marketing was never reimbursed. The other overage amounts came from unpaid rental commissions."

21. Morris acknowledged that the monthly escrow reconciliations were not done exactly right and testified that, "I'm guilty."

22. On April 26, 1994, Florida Department of Business and Professional Regulation, Division of Real Estate, filed an Administrative Complaint against Larry L. Morris and Investment Marketing, Inc., which alleged that escrow account irregularities had been discovered during a February 4, 1994, audit (Case Nos. 94-80988, 94-81264).

23. On July 14, 1994, Florida Department of Business and Professional Regulation, Division of Real Estate, and Larry L. Morris and Investment Marketing, Inc., entered into a stipulation which stated inter alia:

5. Respondents neither admit nor deny the allegations contained in the Administrative Complaint, nor that if true, they support a finding of a violation of the Real Estate License Law.
6. Respondents shall not in the future violate Chapters [sic] 455, Florida Statutes, or the Real Estate License Law, or Rules promulgated pursuant thereto.
7. Respondent Larry L. Morris shall be fined \$3,000. The fine shall be made payable to the Department of Business and Professional Regulation, Division of Real Estate, within thirty (30) days from the date of filing of the Final Order, or the Respondent's licenses, registrations, certificates, and permits shall be suspended until such fine is paid. This suspension period shall not exceed ten years.
8. Respondent Larry L. Morris shall provide original evidence of having satisfactorily completed a 30-hour broker management post-licensure education course within one year. These education hours are in addition to the hours required to maintain your real estate license. Should these education hours not be completed within the required one-year period all Respondent's licenses, registrations,

certificates, and permits shall be suspended until satisfactory evidence that such education hours are successfully completed and that the original grade report from the real estate school has been received by the Florida Division of Real Estate.

9. Respondents Larry L. Morris and Investment Marketing, Inc., shall be reprimanded.

* * *

12. The action reflected in the Final Order shall be published in the FREC News and Report as follows:

Destin: Larry L. Morris; broker:
Reprimanded; fined \$3,000; 30 hr. bk.
mgmt. course within 1 yr.: Investment
Marketing, Inc.: Reprimanded: failed to
maintain sufficient funds in escrow
account; failed to properly prepare the
required written monthly escrow
statement-reconciliations.

24. On December 3, 1998, the following advertisement appeared in the Pensacola News-Journal classified advertising section:

NAVARRE BEACH

Waterfront and Waterview Condos for Sale and Lease. Sale prices starting at \$68,900. Long and short term rentals also available. Pool, fishing pier, gazebo, and clubhouse
Sunset Villas Development Co. 800-939-1887

25. Morris testified that he believed the name Sunset Villas Development Company was registered with the Florida Real Estate Commission.

26. Morris testified that the errors made in the December 3, 1998, ad were made by the Pensacola News-Journal.

The newspaper failed to include "Investment Marketing, Inc.", but included Investment Marketing's broker's phone number. Morris maintains that this ad is for both Villas and Condos.

27. Subsequent to the January 27, 1999, audit, Morris made changes in his bookkeeping procedures. Mr. Clanton conducted a later audit which revealed appropriate escrow account management.

CONCLUSIONS OF LAW

28. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this cause pursuant to Subsection 120.57(1) and Section 455.225, Florida Statutes.

29. License revocations and discipline procedures are penal in nature. Petitioner must demonstrate the truthfulness of the allegations in the Administrative Complaint dated May 20, 1999, by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

30. The "clear and convincing" standard requires:

[T]hat the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony 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 a firm belief or 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).

31. Petitioner must set forth the charges against Respondent with specificity, carrying the burden of proving each charge, and in the final order set forth explicit findings of fact and conclusions of law addressing each specific charge.

Davis v. Department of Professional Regulation, 457 So. 2d 1074 (Fla. 1st DCA 1984); Lewis v. Department of Professional Regulation, 410 So. 2d 593 (Fla. 2d DCA 1982).

32. Petitioner has alleged that Morris is guilty of having violated the following Florida Statutes and Florida Administrative Code Rules:

a. Count I. Subsection 475.25(1), Florida Statutes (1998):

(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:

* * *

(c) Has advertised property or services in a manner which is fraudulent, false, deceptive, or misleading in form or content.

* * *

(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.

b. Count II. Rule 61J2-14.012(2) and (3), Florida

Administrative Code:

(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.

c. Count IV. Rule 61J2-10.034, Florida Administrative

Code:

An individual broker, partnership or corporation may use a trade name and, if so, it must be disclosed upon the request for license, and be placed upon the registration or license.

d. Count V. Rule 61J2-14.008(1)(c), Florida

Administrative Code:

(1)(a) A "deposit" is a sum of money, or its equivalent, delivered to a real estate licensee, as earnest money, or a payment, or a part payment, in connection with any real estate transaction named or described in s. 475.01(1)(a), Florida Statutes, or for the purpose of obtaining satisfaction, release, or assignment of mortgages, or quit claim or other deeds deemed necessary or desirable in acquiring or perfecting the title to real estate, or assembling interest therein, or such sum delivered in escrow, trust or on condition, in connection with any transaction conducted, or being conducted, by such licensee within the scope of Chapter 475, Florida Statutes.

* * *

(c) "Trust" or "escrow" account means an account in a bank or trust company, title company having trust powers, credit union, or a savings and loan association within the

State of Florida. Only funds described in this rule shall be deposited in trust or escrow accounts. No personal funds of any licensee shall be deposited or intermingled with any funds being held in escrow, trust or on condition except as provided in Rule 61J2-14.010(2), Florida Administrative Code.

33. Petitioner has alleged that Investment Marketing is guilty of having violated Rules 61J2-14.012(2) and (3) and 61J2-14.008(1)(c), Florida Administrative Code. These Rules are set forth hereinabove.

34. Petitioner has proved by clear and convincing evidence that Morris caused brochures to be printed and that he made some of the unredacted brochures available to the public which contained fraudulent, false, deceptive, or misleading advertising about Villas property.

35. While the information contained in the December 3, 1998, Pensacola News-Journal classified advertisement is clearly misleading, there is no evidence to refute Morris' testimony that it was the newspaper's error to fail to include Investment Marketing in the advertisement. Had Investment Marketing been included, as it was rental and sales agent for both Condos and Villas, the advertisement would have been acceptable.

36. Petitioner has proved by clear and convincing evidence that Morris and Investment Marketing failed to prepare written monthly escrow statement reconciliations as required by Rule

61J2-14.012(2) and (3), Florida Administrative Code. Respondent Morris acknowledged this in his testimony.

37. Petitioner has proved by clear and convincing evidence that Morris and Investment Marketing deposited personal funds with funds being held in escrow, trust or on condition as defined in Rule 61J2-14.008(1)(c), Florida Administrative Code. Morris' undated letter to Fred Clanton (Respondent's Exhibit 3) acknowledged that "unpaid commissions" were retained in the escrow account.

38. Petitioner has not proved that Morris used a trade name without proper registration in violation of Rule 61J2.10.034, Florida Administrative Code.

39. Chapter 61J2-24, Florida Administrative Code, provides guidelines for determining penalties when a real estate licensee is found guilty of violations of Chapters 455 or 425, Florida Statutes. The discipline urged by counsel for Petitioner is within appropriate guidelines and, therefore, is recommended.

RECOMMENDATION

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

RECOMMENDED that Petitioner enter a final order finding Morris guilty of violating Subsection 475.25(1)(c), Florida Statutes (1998); Rule 61J2-14.012(2) and (3), Florida Administrative Code, and, therefore, Subsection 475.25(1)(e),

Florida Statutes (1998); Rule 61J2-14.008(1)(c), Florida Administrative Code (1998); and, therefore, Subsection 475.25(1)(e), Florida Statutes (1998); finding that Morris did not violate Rule 61J2-10.034, Florida Administrative Code, and, therefore, Subsection 475.25(1)(e), Florida Statutes (1998); dismissing Count IV of the Administrative Complaint; finding Investment Marketing guilty of violating Rule 61J2-14.012(2) and (3), Florida Administrative Code, and, therefore, Subsection 475.25(1)(e), Florida Statutes (1998), and Rule 61J2-14.008(1)(c), Florida Administrative Code, and, therefore, Subsection 475.25(1)(e), Florida Statutes (1998); imposing a penalty of \$1,000 per count, resulting in \$3000.00 for Morris and \$2,000.00 for Investment Marketing; suspending Morris' license for one year; and reprimanding Investment Marketing.

DONE AND ENTERED this 21st day of February, 2001, in
Tallahassee, Leon County, Florida.

JEFF B. CLARK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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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.