

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF FLORIDA LAND SALES,)
CONDOMINIUMS, AND MOBILE HOMES,)
)
Petitioner,)
)
vs.) Case No. 00-0598
)
JOHN SCALES,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on October 16, 2000, by video teleconference with connecting sites in Fort Lauderdale and Tallahassee, Florida, before Errol H. Powell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Janis Sue Richardson, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 60
Tallahassee, Florida 32399-2202

For Respondent: Tracy J. Sumner, Esquire
1307 Leewood Drive
Tallahassee, Florida 32312

STATEMENT OF THE ISSUE

Whether Respondent committed the offenses set forth in the Notice to Show Cause and, if so, what action should be taken.

PRELIMINARY STATEMENT

On December 22, 1999, the Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes (Petitioner), filed a Notice to Show Cause against John Scales (Respondent). Petitioner charged Respondent with violating Subsection 326.002(1), Florida Statutes, by failing to maintain a consumer's funds in his escrow account until disbursement of the funds, in violation of Subsection 326.005(1), Florida Statutes. Respondent filed a response to the Notice to Show Cause and requested a hearing. On February 3, 2000, this matter was referred to the Division of Administrative Hearings.

Subsequently, Petitioner filed a motion to admit into evidence the facts contained in its Pre-Hearing Statement. A telephone conference was held and certain facts and documents were agreed-upon for admission into evidence, but the parties were unable to agree upon facts relating to the role that one witness played in the alleged violation. That limited factual issue was reserved for an evidentiary hearing. By Order dated October 17, 2000, the following facts, contained in Petitioner's Pre-Hearing Statement, were admitted into evidence: facts

numbered (1); (2); (3); (5); (6); (7), except for the word "Dettman"; (8); (9); (10); (11); (13); (14); (16); (18); and (21). Additionally, the said Order admitted into evidence Respondent's Admissions and the deposition testimony of Warren Scott.

At the hearing on the limited factual issue, Petitioner was granted leave to amend the Notice to Show Cause to reflect that the date of the escrow deposit was April 5, 1999. Petitioner presented the testimony of two witnesses and entered 34 exhibits (Petitioner's Exhibits numbered 1-9, 10a-10q, 12, 13, 15a-15c, 16, and 17) into evidence. Petitioner's Exhibit numbered 14 was withdrawn. Respondent testified in his own behalf, presented the testimony of one witness, and entered two exhibits (Respondent's Exhibits numbered 1-2) into evidence. Respondent was permitted to late-file one exhibit (Respondent's Exhibit numbered 4). Judicial recognition was taken of Chapter 326, Florida Statutes; Rule 61B-60, Florida Administrative Code; and the Final Order in Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes vs. Lorraine A. Woods, Docket No. YS97173 (June 17, 1998) and the Amended Final Order in Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes vs. Lorraine A. Woods, Docket No. YS97173 (September 30, 1999).

Petitioner was permitted to object to Respondent's Exhibit numbered 3 subsequent to the filing of the late-filed Exhibit. Respondent objected to the said Exhibit, but it was admitted over Respondent's objections by Order dated November 28, 2000.

A transcript of the hearing was ordered. At the request of the parties, the time for filing post-hearing submissions was set for more than ten days following the filing of the transcript, or the ruling on Petitioner's objections to Respondent's Exhibit numbered 3, whichever occurred last. The Transcript, consisting of one volume, was filed on November 7, 2000. The ruling on Petitioner's objections was issued on November 28, 2000. The parties timely filed their post-hearing submissions, which were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is the state agency charged with regulating yacht and ship brokers and salespersons pursuant to Chapter 326, Florida Statutes.

2. At all times material hereto, Respondent was a licensed yacht and ship broker salesman. He has been licensed since 1990. In December 1990, Respondent was issued license number 1322, as a yacht and ship broker salesman for Seafarer Brokerage, Inc. (Seafarer). In October 1998, he renewed his license, which had an expiration date of October 28, 2000.

3. On July 31, 1997, Lorraine Woods, the President of Seafarer, wrote to Peter Butler, section head of the yacht and ship section of the Department of Business and Professional Regulation, notifying him that Respondent was the broker of record for Seafarer. Ms. Woods' license had been suspended, and Respondent knew that her license had been suspended prior to his becoming broker of record for Seafarer.

4. As the broker of record, Respondent knew that he was solely responsible for safeguarding the money of all clients in the brokerage's escrow account.

5. Respondent did not know the details involving the suspension of Ms. Woods' license. He was not aware that Ms. Woods had abused the control of Seafarer's escrow account for her own benefit by taking client funds from the escrow account to pay for Seafarer's operating expenses.

6. Mr. Butler was very concerned with the abuse of Seafarer's escrow account committed by Ms. Woods. He demanded assurance from Respondent that Ms. Woods would not have access to the escrow account, and Respondent provided that assurance.

7. On August 4, 1997, Respondent wrote to Mr. Butler confirming that he (Respondent) was the broker of record for Seafarer. In his written communication, Respondent confirmed certain details of the escrow account of Seafarer, including that he was broker of record and that the account was located at First

Union National Bank of Florida, with the address and account number listed. Moreover, Respondent indicated that, as of July 30, 1997, he became the sole signatory on the account.

8. Respondent personally provided the signatory card, showing that he was the sole signatory on the account, to the bank. Even though the bank did not have a record of such a signatory card, the undersigned is persuaded that Respondent's testimony is credible and that he provided the signatory card to the bank.

9. Even though Respondent was the broker of record for Seafarer, Respondent looked upon Ms. Woods as the employer and himself as the employee, resulting in an employer-employee relationship. Seafarer consisted of two persons, Respondent and Ms. Woods. If Respondent was unavailable for a situation in which a check had to be written and executed, he would prepare a blank check with his signature on it and give it to Ms. Woods. She continued to maintain the business records. Ms. Woods maintained all the operating and escrow records, checks, and bank statements in a locked drawer for which she had the only key; Respondent did not have free and unobstructed access to these documents even though he was Seafarer's broker of record. Respondent and Ms. Woods continued this procedure for over a year without incident.

10. On April 2, 1999, Warren Scott made an offer on a 1974 CAL2-46, a 46-foot yacht, with Seafarer. He placed a \$6,000.00 deposit on the yacht. Mr. Scott's dealings, regarding the yacht, were with Ms. Woods. He had dealt with Seafarer and Ms. Woods on a prior occasion, had made a deposit, and had his deposit refunded. As a result, Mr. Scott felt comfortable dealing with Seafarer and Ms. Woods even though he had not purchased a yacht from Seafarer.

11. On April 5, 1999, Mr. Scott's check was deposited in Seafarer's escrow account.

12. On April 5, 1999, check numbered 1144, made payable to cash for \$4,305.00, bearing Respondent's signature was written. The check bore the notation at the bottom left corner at the "FOR" space: "CAL2-46 (illegible) Enterprises." This check cleared Seafarer's escrow account on April 7, 1999, leaving a balance of \$2,512.34.

13. Respondent had signed the check and left it for Ms. Woods to fill-in the details. The check was signed by Respondent in March 1999 for a closing that was taking place at the end of March, but the check was not used at the closing in March. Ms. Woods had written the check to pay the rent for Seafarer. Even though Respondent had signed the check, the undersigned is persuaded that he did not know that Ms. Woods

was going to use the check for a purpose other than for what it was written.

14. On April 27, 1999, Respondent signed a check for \$100.00, payable to Complete Yacht Service for engine repair to the CAL2-46. This check cleared Seafarer's escrow account on April 30, 1999, leaving a balance of \$5,796.36.

15. After a sea trial and survey, Mr. Scott wrote to Ms. Woods on April 30, 1999, indicating that he had decided not to purchase the 1974 CAL2-46 pursuant to their arrangement of April 2, 1999.

16. On May 3, 1999, Mr. Scott again wrote to Ms. Woods that his offer to purchase the 1974 CAL2-46 for \$55,000.00 in the conditional acceptance of vessel agreement, dated April 29, 1999, was expiring on May 3, 1999, at 9:00 p.m.

17. Mr. Scott went to Seafarer on May 4, 1999, to obtain a refund of his deposit from Ms. Woods. Respondent informed him that Ms. Woods was out and that they would have to wait for her return, which was going to be in about an hour.

18. Mr. Scott was unable to wait. He left Fort Lauderdale, returning to Nevada, with the understanding that his deposit, less \$100.00 for the engine survey, would be returned to him. Mr. Scott expected the monies within a week to ten days.

19. On May 5, 1999, a deposit of \$4,700.00 was made to Seafarer's escrow account, leaving a balance of \$9,136.36.

20. On May 5, 1999, Seafarer's escrow account contained sufficient monies to give Mr. Scott a full refund of his deposit, less the \$100.00.

21. Respondent left for a vacation to the United Kingdom on May 17, 1999, with his return on June 15, 1999. Prior to his leaving, Respondent signed two blank checks, numbered 1153 and 1154, from Seafarer's escrow account. The checks were written for an upcoming business transaction during his absence, regarding a closing and Respondent's commission on the closing.

22. On May 18, 1999, Seafarer's escrow account balance fell to \$5,192.21, after three checks cleared the account. Two of the three checks, signed by Respondent, were payable to Seafarer in the amount of \$1,360.00 for "comm.-37'Irwin."

23. During May 1999, checks totaling \$6,900.00, which were signed by Respondent, cleared Seafarer's escrow account.

24. Mr. Scott made several telephone calls to Seafarer regarding the return of his deposit. Each time Mr. Scott spoke with Ms. Woods and he was not provided with a satisfactory response from her.

25. On June 16, 1999, Mr. Scott received a check, check numbered 1153, for \$5,900.00 from Seafarer. He also received a telephone call that same day from Ms. Woods requesting him not to deposit the check until the end of the month; Mr. Scott agreed.

26. Respondent was not aware that check numbered 1153 was going to be used to refund Mr. Scott's deposit. Respondent was unaware that the check was used for a purpose other than for what it was intended.

27. On June 17, 1999, check numbered 1154, made payable to Seafarer for \$1,000.00 for "petty cash" cleared Seafarer's escrow account. The check was used by Ms. Woods to pay Seafarer's telephone and utility bills.

28. Respondent was unaware that check numbered 1154 was going to be used for a purpose other than for what it was written.

29. When Respondent returned from his vacation, he was contacted by Mr. Scott who advised Respondent of the problem with the return of his refund. Respondent checked the bank statements for Seafarer's escrow account and discovered that Ms. Woods had not used the checks for their intended purpose and that she had used funds from the escrow account for improper purposes.

30. On June 25, 1999, Mr. Scott deposited the check that he received from Seafarer.

31. The check, payable to Mr. Scott, was posted to Seafarer's escrow account on June 29, 1999, leaving a negative balance of \$2,667.22.

32. For 67 days, between April 5, 1999, when Mr. Scott's deposit of \$6,000.00 was deposited in Seafarer's escrow account,

and June 29, 1999, the date Mr. Scott's refund of \$5,900.00 cleared, Seafarer's escrow account did not have sufficient funds to pay the refund. The period between May 5, 1999, and May 17, 1999, was the only time period, during the 67-day period, that Seafarer's escrow account had sufficient funds to pay the refund.

33. Mr. Scott indicates that his refund was received in his account in July 1999. Respondent remained with Seafarer long enough to ensure that Mr. Scott received his refund.

34. On July 8, 1999, Respondent notified Mr. Butler that he was no longer the broker for Seafarer.

35. Respondent has no prior disciplinary action.

CONCLUSIONS OF LAW

36. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes.

37. License revocation proceedings are penal in nature. The burden of proof is on the Petitioner to establish by clear and convincing evidence the truthfulness of the allegations in the Notice to Show Cause. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

38. A licensee is charged with knowing the practice act that governs his/her license. Wallen v. Florida Department of Professional Regulation, Division of Real Estate, 568 So. 2d 975 (Fla. 3d DCA 1990).

39. Section 326.002, Florida Statutes (1997), provides in pertinent part:

As used in ss. 326.001-326.006, the term:

(1) "Broker" means a person who, for or in expectation of compensation: sells, offers, or negotiates to sell; buys, offers, or negotiates to buy; solicits or obtains listings of; or negotiates the purchase, sale, or exchange of, yachts for other persons.

40. Regarding escrow deposits, Section 326.005, Florida Statutes (1997), provides in pertinent part:

(1) A broker shall place any funds received pursuant to a transaction into a trust account in a savings and loan association, bank, trust company, or other financial institution located in this state having a net worth in excess of \$5 million until he or she disburses such funds. A separate record shall be maintained of all such moneys received and the disposition thereof.

41. Rule 61B-60.006, Florida Administrative Code, provides in pertinent part:

(2) A broker holding the license of a salesman shall make all trust account deposits and withdrawals of monies involved in a transaction brokered by the salesman. Any salesman who receives any deposit shall immediately deliver the same to the broker under whom he is licensed as a salesman.

(3) Within 3 working days of receipt of funds pursuant to a purchase contract, all funds received by a broker or salesman in connection with the sale, exchange, or purchase of a yacht shall be deposited in the broker's trust account and shall remain in the account until the funds are disbursed pursuant to the provisions of the contract or controlling statute. . . No personal or operating funds shall be deposited or intermingled with any funds held in trust, and monies deposited into the account shall not be used to pay operating expenses.

(4) A broker shall maintain books and records of receipts, deposits and withdrawals of trust account funds in accordance with generally accepted accounting principles.

42. Petitioner demonstrated that Respondent violated Subsections 326.002(1) and 326.005(1), Florida Statutes (1997). As broker for Seafarer, Respondent was responsible for the actions of all persons in the operation of the brokerage and for customers' funds. He was responsible for safeguarding customers' funds deposited in Seafarer's escrow account and for appropriately disbursing the funds. The arrangement between Respondent and Ms. Woods prevented Respondent from carrying out his duties as a broker. For all practical purposes, Ms. Woods continued to maintain her control over the brokerage.

43. Moreover, Respondent failed to ensure that Mr. Scott's deposit was safe and secure. Mr. Scott's refund should have been returned to him when he requested it. However, the refund could not be made to Mr. Scott because insufficient funds were in the

escrow account due to the funds being used to pay the operating expenses of Seafarer. The responsibility was Respondent's to prevent escrow monies from being used for operating expenses. Respondent failed to carry-out his responsibility.

44. As to penalty, a civil penalty may be imposed not to exceed \$10,000.00. Section 326.006, Florida Statutes (1997). Additionally, Respondent's license may be suspended or revoked. Section 326.006, Florida Statutes (1997), and Rule 61B-60.008, Florida Administrative Code.

45. Petitioner suggests revocation of Respondent's license and imposition of a \$5,000.00 civil penalty. Revocation of Respondent's license is too severe a penalty under the circumstances of the instant case. Respondent has been licensed for ten years. He has no prior disciplinary action against him. Even though the arrangement that Respondent had with Ms. Woods was improper, Ms. Woods had given him no reason to believe that she would use the blank checks for purposes other than that for what they were intended. Respondent was not aware of the details of the suspension of Ms. Woods license, which was using escrow funds for Seafarer's operating expenses.

RECOMMENDATION

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

RECOMMENDED that the Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes, enter a final order:

1. Sustaining the Notice to Show Cause and finding that John Scales violated Subsections 326.002(1) and 326.005(1), Florida Statutes (1997).

2. Suspending Respondent's license for three years.

3. Imposing a civil penalty of \$5,000.00.

DONE AND ENTERED this 14th day of February, 2001, in Tallahassee, Leon County, Florida.

ERROL H. POWELL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 14th day of February, 2001.

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.