

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. 00-1415
)
GIOVANNA GALLOTTINI,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on November 15, 2000, in Fort Lauderdale, Florida, before Errol H. Powell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Scott K. Edmonds, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 60
Tallahassee, Florida 32399-2202

For Respondent: Giovanna T. Gallottini, pro se
Yachting Consultants, Inc.
1050 Marina Drive
Hollywood, Florida 33019

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 January 26, 2000, the Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes (Petitioner), filed a Notice to Show Cause against Giovanna Gallottini (Respondent). Petitioner charged Respondent with violating Rule 61B-60.008(3)(a), Florida Administrative Code, through her failure to exercise due professional care in the performance of brokerage services in holding up a closing by not providing a financial institution with a sufficient power of attorney as requested, threatening to hold up a closing due to a dispute regarding the amount of a commission, and demanding payment of the disputed commission prior to closing. Respondent filed a response to the Notice to Show Cause and requested a hearing. On March 31, 2000, this matter was referred to the Division of Administrative Hearings.

At final hearing, Petitioner presented the testimony of eight witnesses and entered 11 exhibits (Petitioner's Exhibits numbered 1-11) into evidence. Respondent testified in her own behalf and entered two exhibits (Respondent's Exhibits numbered 1-2) into evidence.

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. The Transcript, consisting of one volume, was filed on

November 21, 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 broker.¹ She is the yacht broker for Yachting Consultants, Inc. in Fort Lauderdale, Florida.

3. In April 1999, Respondent was the listing broker of record regarding the sale of a 43-foot Pilgrim yacht. The selling broker was Mark Lipkus, a licensed yacht broker.

4. John Pribik, a licensed salesperson, was Respondent's representative in the sale of the Pilgrim yacht. Mr. Pribik was under the supervision and control of Respondent and Respondent was responsible for his actions.

5. Respondent had a buyer for the Pilgrim yacht, and the closing for the sale of the yacht was scheduled for April 13, 1999. The buyer was financing the purchase of the yacht.

6. In a sale situation, a buyer and a seller have different responsibilities. The seller is responsible for providing all of the documents needed for a sale. The buyer is responsible for providing the funds for a sale. In the sale of the Pilgrim

yacht, the responsibilities of the Seller and the Buyer did not change.

7. There is a commission from the sale of a yacht, which is paid by the seller and, in accordance with standard industry practice, paid at closing. By standard industry practice, the commission split is 70/30, but can differ upon agreement.

8. Mr. Lipkus received a down payment of \$15,000.00 from the Buyer and placed the down payment in his escrow account. Mr. Lipkus was of the mistaken belief that the commission was payable by the Buyer, not the Seller.

9. No co-broker agreement was entered into between Respondent or Mr. Pribik and Mr. Lipkus regarding commission. There was no discussion regarding the split of the commission between them.

10. On a prior sale involving Mr. Pribik and Mr. Lipkus, the commission split was 60/40. Mr. Pribik and Respondent assumed the commission split of the sale of the Pilgrim yacht would again be 60/40. Considering the prior sale, it was not unreasonable for Respondent and Mr. Pribik to assume a 60/40 split of the commission.

11. Mr. Lipkus assumed the commission split would be 70/30.

12. A power of attorney had been prepared by the Seller who was unavailable for closing due to being in a remote area in the Philippine Islands. Mr. Pribik provided the power of attorney to

the documenting agent who reviewed the power of attorney and found it to be satisfactory.

13. The mortgage broker received a copy of the power of attorney prior to closing and forward a copy to the lending institution. The lending institution notified the mortgage broker at some point before closing that the power of attorney was unacceptable. In turn, the mortgage broker contacted the documenting agent regarding the unacceptability of the power of attorney and informed the documenting agent that a new power of attorney was required before closing could take place.

14. Mr. Pribik was notified by the mortgage broker that a new power of attorney was required. The responsibility to obtain the new power of attorney was the responsibility of the listing broker, who was Respondent via Mr. Pribik.

15. As far as Mr. Pribik was concerned, with the time remaining before closing² and with the Seller being in the Philippine Islands, he believed that it was virtually impossible to obtain a new power of attorney by the time of closing. The mortgage broker, taking the position that he should do whatever he could to effectuate a closing, encouraged Mr. Pribik to attempt to contact the Seller. Complying, Mr. Pribik was able to make telephonic contact with the Seller and Mr. Pribik and the mortgage broker spoke with the Seller, who agreed to provide a new power of attorney. Based on the verbal assurance by the

Seller to provide the new power of attorney, the lending institution agreed to proceed with the closing, which was re-scheduled for April 14, 1999. A new power of attorney was faxed to the Seller, and the Seller executed it and faxed it back.

16. According to industry standard, all commissions are paid at closing when a seller receives the funds. Also, according to industry standard, closing is not delayed until a commission is paid.

17. Mr. Lipkus mistakenly believed that the commission was paid by a buyer, coming out of a buyer's deposit. As a result, he expected to take the commission out of the Buyer's down payment, which was held in Mr. Lipkus' escrow account. After obtaining his commission, Mr. Lipkus was going to forward the remaining monies.

18. On April 13, 1999, the original date for the closing, the closing could not take place because the financing from the lending institution was not available, based upon the absence of a new power of attorney. Also, Mr. Lipkus had not made arrangements for the deposit monies to be at closing or forwarded a settlement statement to closing, which were both needed for the closing. Respondent contacted Mr. Lipkus by fax regarding the commission monies and the settlement statement, demanding both items in order for closing to take place. The evidence is not clear and convincing as to whether Respondent demanded the monies

held by Mr. Lipkus prior to closing or whether Respondent was threatening to delay the closing unless she had the monies prior to closing. The evidence suggests that Respondent was demanding the monies to be in place at closing.

19. Additionally, on the original closing date, closing was to take place at the office of the mortgage broker. Mr. Pribik, the Buyer, and the mortgage broker were present for the closing. Mr. Lipkus did not intend to attend, and did not attend, the closing. Since the commission monies were not available at closing, Mr. Pribik telephoned Mr. Lipkus and demanded that the commission monies be available and, told him that if not made available, the closing could not take place. In Mr. Pribik's opinion, the monies were needed for closing. The evidence is not clear and convincing as to whether Mr. Pribik demanded the monies held by Mr. Lipkus prior to closing or whether Mr. Pribik was threatening to delay the closing if he did not have the monies prior to closing. The evidence suggests that Mr. Pribik was demanding the monies to be in place at closing.

20. Furthermore, for the first time, Mr. Pribik and Mr. Lipkus, during the telephone conversation, became aware of their disagreement as to the proper commission split, whether 60/40 or 70/30. Believing that Mr. Pribik would prevent a timely closing, Mr. Lipkus agreed to Mr. Pribik's split of 60/40.

21. Closing occurred on April 14, 1999. The necessary documents and finances were present.

22. At the final hearing, Respondent expressed with sincerity that, if she did anything wrong, she wanted to know exactly what it was, so that she would not engage in the same conduct again. Furthermore, Respondent expressed the frustration that, prior to hearing, no one had explicitly told her what she had done wrong and that, at hearing, she continued to be unsure what she had done wrong because she had not been explicitly told what she had done wrong.

23. Respondent has no prior disciplinary action.

CONCLUSIONS OF LAW

24. 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.

25. 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 Administrative Complaint and the amendment thereto.

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).

26. Respondent is charged with violating Rule 61B-60.008, Florida Administrative Code, by failing to provide the lending institution with a sufficient power of attorney as requested, threatening to hold up the closing due to a dispute over the amount of the commission, and demanding payment of the commission prior to closing. Rule 61B-60.008, Florida Administrative Code, provides in pertinent part:

(3) Standards of Conduct:

(a) A licensee . . . shall exercise due professional care in the performance of brokerage services

(b) A broker shall be deemed responsible by the Division for the actions of all salesmen who perform brokerage functions under his supervision and control.

27. Section 326.006, Florida Statutes, provides in pertinent part:

(2) The division has the power to enforce and ensure compliance with the provisions of this chapter and rules adopted under this chapter, relating to the sale and ownership of yachts and ships. In performing its duties, the division has the following powers and duties:

* * *

(d) Notwithstanding any remedies available to a yacht or ship purchaser, if the division has reasonable cause to believe that a violation of any provision of this chapter or rule adopted under this chapter has occurred

* * *

4. The division may impose a civil penalty against a broker or salesperson . . . for any violation of this chapter or a rule adopted under this chapter. A penalty may be imposed for each day of continuing violation, but in no event may the penalty for any offense exceed \$10,000. . . .

28. Petitioner failed to demonstrate that Respondent failed to exercise due professional care in the performance of brokerage services relating to the closing. The evidence was not clear and convincing that Respondent held up the closing by not providing the financial institution with a sufficient power of attorney as requested, by threatening to hold up the closing due to a dispute over the amount of the commission, or by demanding payment of the commission prior to the closing.

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. Finding that Giovanna Gallottini did not violate Rule 61B-60.008(3)(a), Florida Administrative Code.
2. Not sustaining the Notice to Show Cause.

DONE AND ENTERED this 6th 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
Division of Administrative Hearings
this 6th day of February, 2001.

ENDNOTES

^{1/} Petitioner did not submit any documentary evidence to demonstrate that Respondent was a licensed yacht broker. However, through the testimony of the witnesses and the evidence presented, an inference is drawn that Respondent was a licensed yacht broker.

^{2/} From the evidence presented, this Administrative Law Judge was not able to ascertain the time period, days or hours, from the time that Mr. Pribik was notified of the need for a new power of attorney to the time of the closing.

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.