

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND	)	
PROFESSIONAL REGULATION,	)	
DIVISION OF REAL ESTATE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 00-1617
	)	
LEE H. DAVIS,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case before Lawrence P. Stevenson, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, via teleconference at sites in Orlando and Tallahassee, Florida, on February 5, 2001.

APPEARANCES

For Petitioner: Sunia Y. Marsh, Esquire  
Department of Business and  
Professional Regulation  
Division of Real Estate  
400 West Robinson Street  
Suite N-308A  
Orlando, Florida 32801-1772

For Respondent: No appearance

### STATEMENT OF THE ISSUE

The issue in this case is whether Respondent, Lee H. Davis, committed the offenses alleged in an Administrative Complaint issued against him on August 16, 1999.

### PRELIMINARY STATEMENT

On August 16, 1999, Petitioner, the Department of Business and Professional Regulation, Division of Real Estate, issued a four-count Administrative Complaint (the "Complaint") against Respondent, Lee H. Davis. Count I of the Complaint alleges that Respondent is guilty of failure to account for or deliver funds, in violation of Subsection 475.25(1)(d)1, Florida Statutes. Count II of the Complaint alleges that Respondent is guilty of misrepresentation, concealment, dishonest dealing, culpable negligence, or breach of trust in any business transaction, in violation of Subsection 475.25(1)(b), Florida Statutes. Count III of the Complaint alleges that Respondent is guilty of failure to maintain trust funds in the real estate brokerage escrow account or other proper depository until disbursement was properly authorized, in violation of Subsection 475.25(1)(k), Florida Statutes. Count IV of the Complaint alleges that Respondent is guilty of having collected money in connection with a real estate brokerage transaction not in the name of his employer and without his employer's express consent, and is guilty of

commencing or maintaining an action for a commission or compensation against a person other than his registered employer, in violation of Subsection 475.42(1)(d), Florida Statutes, and therefore in violation of Subsection 475.25(1)(e), Florida Statutes.

Respondent disputed the allegations of fact in the Administrative Complaint by an Election of Rights dated February 29, 2000.

Copies of the Administrative Complaint and the Election of Rights were filed with the Division of Administrative Hearings on April 17, 2000, by Petitioner with a request that the matter be assigned to an Administrative Law Judge. The matter was assigned to the undersigned and scheduled for hearing on July 25, 2000. On June 16, 2000, Petitioner's motion to take deposition by telephone and motion to use deposition as evidence at formal hearing were granted. On July 12, 2000, Petitioner's motion to place the case in abeyance was granted, pending settlement negotiations. On November 1, 2000, Petitioner filed a status report, stating that the parties had been unable to reach a settlement and requesting that the matter be set for hearing. On November 7, 2000, the undersigned issued an order setting the matter for hearing on January 30, 2001. Two additional continuances were

granted, with the hearing ultimately being held on February 5, 2001.

The formal hearing of this case was conducted via telephonic conference. The undersigned was located in Tallahassee. Petitioner and the court reporter were located at the offices of the Division of Real Estate in Orlando. Respondent failed to appear or participate in the formal hearing.

Petitioner presented the deposition testimony of Robert Trindle, Brian Piper, and John Brouillette. Petitioner's Exhibits 1 through 10 were accepted into evidence.

On February 5, 2001, an Order to Show Cause was issued, informing Respondent that the formal hearing had taken place in his absence and providing Respondent a period of ten days in which to show cause why the record in the proceeding should not be closed. Respondent did not respond to the Order to Show Cause.

A Transcript of the hearing was filed on February 20, 2001. Pursuant to Petitioner's request, proposed orders were due 15 days after filing of the Transcript. Petitioner timely filed a Proposed Recommended Order on March 7, 2001.

## FINDINGS OF FACT

1. Petitioner, the Department of Business and Professional Regulation, Division of Real Estate (hereinafter referred to as the "Division"), is an agency of the State of Florida. The Division is charged with the responsibility for, among other things, regulating the practice of persons holding real estate brokers' and real estate salespersons' licenses in Florida. Section 20.165, and Chapters 455 and 475, Florida Statutes.

2. Respondent, Lee H. Davis, is and was at all times relevant to this matter licensed as a real estate broker in Florida, issued License Number 0186063. The last license issued was as an involuntary inactive broker, c/o 815 New Waterford Drive, No. 204, Naples, Florida 34104.

3. On or about August 24, 1995, Respondent executed a form 400.5 and submitted it to the Division to register as a salesperson with Sentry Realty and Property Management, Inc. ("Sentry"). At all times relevant to these proceedings, Respondent was registered with the Division as employed by Sentry.

4. On or about September 7, 1995, Respondent facilitated a contract for sale and purchase (the "contract") between Robert Trindle as buyer and John Petracelli as seller/builder for property described as Hallandale Park, Plat Book 12, Page

37, Block 37, Lots 6,7,8, a/k/a approximately 2801 North East 214 Street, North Miami Beach, Florida. Mr. Trindle testified that he intended to purchase a townhouse to be built by Mr. Petracelli as part of a project to include 40 to 50 townhouses.

5. The contract provided that a \$3,900 deposit was to be held by "Lee H. Davis Escrow Agent." Mr. Trindle gave Respondent two checks totaling \$3,900, as the earnest money deposit on the purchase price of \$130,000. The first check, dated October 9, 1995, was for \$1,000. The second check, dated November 3, 1995, was for \$2,900. The checks were made out to "Lee H. Davis-- Escrow." Also noted on the checks was "Davena Group Inc.," which Mr. Trindle understood to be Respondent's real estate company. Each check was negotiated by Respondent within a week of its receipt.

6. At the time of this transaction, Respondent's registered broker was John Brouillette of Sentry. Respondent did not place the escrow deposit with Mr. Brouillette, who testified that he knew nothing of the transaction at the time it occurred and never saw the contract.

7. Respondent represented to Mr. Trindle that he would maintain the escrow deposit as broker during this transaction. Mr. Trindle did not give Respondent permission to transfer the escrow deposit to the builder/seller, Mr. Petracelli.

8. Correspondence from Respondent indicated that he did turn the escrow deposit over to Mr. Petracelli, without informing Mr. Trindle. Mr. Petracelli never built the promised townhouses. Rather, he left the country, absconding with Mr. Trindle's escrow deposit along with monies provided by other purchasers and/or investors in the project.

9. Mr. Trindle attempted to contact Respondent regarding the status of his escrow deposit, but was unable to reach him prior to the filing of his complaint with the Division. As of the date of the hearing, the earnest money deposit had not been returned to Mr. Trindle.

#### CONCLUSIONS OF LAW

10. The Division of Administrative Hearings has jurisdiction of the parties to and the subject matter of this proceeding. Section 120.57, Florida Statutes. The parties were duly noticed for the administrative hearing.

11. The burden of proof in this proceeding was on the Division, the party asserting the affirmative of the issue: that Respondent committed violations of Subsection 475.25(1), Florida Statutes. See Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977). The Division was required

to meet its burden by clear and convincing evidence. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

12. A real estate licensee is charged with knowledge of Chapter 475, Florida Statutes. Wallen v. Florida Department of Professional Regulation, Division of Real Estate, 568 So. 2d 975 (Fla. 3d DCA 1990).

13. Section 475.25, Florida Statutes, authorizes the Florida Real Estate Commission to take disciplinary action against the license of any real estate broker or real estate salesperson if the licensee commits certain specified acts. Of the specified acts of Subsection 475.25(1), Florida Statutes, Respondent was charged with violating the following:

(b) Has been guilty of fraud, misrepresentation, concealment, false promises, false pretenses, dishonest dealing by trick, scheme, or device, culpable negligence, or breach of trust in any business transaction in this state or any other state, nation, or territory; has violated a duty imposed upon her or him by law or by the terms of a listing contract, written, oral, express, or implied, in a real estate transaction. . . .

\* \* \*

(d)1. Has failed to account or deliver to any person . . . at the time which has been agreed upon or is required by law or, in the absence of a fixed time, upon demand of the person entitled to such accounting and delivery, any personal property such as money, fund, deposit, check, draft, abstract of title, mortgage, conveyance, lease, or



other document or thing of value, including a share of a real estate commission. . . .

\* \* \*

(k) Has failed, if a broker, to immediately place, upon receipt, any money, fund, deposit, check, or draft entrusted to her or him by any person dealing with her or him as a broker in escrow with a title company, banking institution, credit union, or savings and loan association located and doing business in this state, or to deposit such funds in a trust or escrow account maintained by her or him with some bank, credit union, or savings and loan association located and doing business in this state, wherein the funds shall be kept until disbursement thereof is properly authorized. . . .

14. Respondent is also charged with violating Subsection 475.42(1)(d), Florida Statutes, which provides that no salesperson shall collect any money in connection with a real estate brokerage transaction except in the name of the employer and with the express consent of the employer. This violation is punishable through Subsection 475.25(1)(e), Florida Statutes, which provides discipline for violations of any provision of Chapter 475.

15. The evidence established that Respondent registered with the Division as employed by Sentry, as of August 24, 1995. If Respondent thereafter did business as an employee or principal of "Davena Group Inc.," he did so without properly filing a form 400.5 with the Division.

16. Respondent facilitated the contract at issue while registered as an employee of Sentry. The evidence established that Respondent facilitated the contract without the knowledge and consent of Mr. Brouillette, his registered broker, in violation of Subsection 475.42(1)(d), Florida Statutes.

17. The evidence established that Respondent received an earnest money deposit of \$3,900 from Mr. Trindle, and that Respondent represented to Mr. Trindle that the money would be held in escrow. Respondent in fact turned the money over to Mr. Petracelli, who absconded with it. Respondent's actions constitute misrepresentation, concealment, dishonest dealing, culpable negligence and breach of trust, in violation of Subsection 475.25(1)(b), Florida Statutes.

18. The evidence established that Respondent collected the escrow deposit not in the name of Mr. Brouillette, his registered broker, and without the express consent of Mr. Brouillette, in violation of Subsection 475.42(1)(d), Florida Statutes.

19. The evidence established that Respondent failed to maintain the deposit in escrow until Mr. Trindle authorized disbursement, in violation of Subsection 475.25(1)(k), Florida Statutes.

20. The evidence established that Respondent took no effective steps to account to Mr. Trindle as to the status of

the escrow funds, and that Respondent failed to deliver the funds to Mr. Trindle upon demand, in violation of Subsection 475.25(1)(d)1, Florida Statutes.

21. Subsection 475.25(1), Florida Statutes, provides a range of penalties that the Florida Real Estate Commission may impose upon a real estate licensee, including revocation; suspension for a period not to exceed ten years; administrative fines not to exceed \$1,000 for each count or separate offense; reprimand; probation; or any combination of the foregoing. Rule 61J2-24.001(3), Florida Administrative Code, sets forth ranges of suggested discipline and has been considered in this case.

22. Disciplinary statutes are penal in nature and must be strictly interpreted against the authorization of discipline and in favor of the person sought to be penalized. Munch v. Department of Business and Professional Regulation, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992); Fleischman v. Department of Business and Professional Regulation, 441 So. 2d 1121, 1123 (Fla. 3d DCA 1983).

23. The Division has shown by clear and convincing evidence that Respondent committed the violations set forth in the Complaint. The Division submitted evidence sufficient to establish Respondent's culpability and shift the burden to Respondent to dispute that evidence or, at least, to offer

evidence in mitigation of the facts established by the Division. Respondent declined to appear at the hearing or otherwise contest the case presented by the Division.

RECOMMENDATION

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

RECOMMENDED that a final order be entered by Petitioner finding that Respondent has violated Subsections 475.25(1)(b), 475.25(1)(d)1, 475.25(1)(e), 475.25(1)(k), and 475.42(1)(d), Florida Statutes, as alleged in the Administrative Complaint issued against Respondent, and that Respondent's real estate license be revoked.

DONE AND ENTERED this 13th day of March, 2001, in Tallahassee, Leon County, Florida.

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LAWRENCE P. STEVENSON  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 13th day of March, 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.