

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. 00-2941
)
JUSTO LAMAR,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case in Miami and Tallahassee, Florida via videoteleconferencing, on October 10 and October 30, 2000, before Florence Snyder Rivas, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Scott K. Edmonds, Esquire
Department of Business and
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Tallahassee, Florida 32399-2202

For Respondent: Richard L. Lapidus, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent, a Florida-licensed yacht salesman, should be disciplined for violation of Rule 61B-60.006(2), Florida Administrative Code, as alleged in the Administrative Complaint dated May 10, 2000.

PRELIMINARY STATEMENT

By Administrative Complaint dated May 10, 2000, the Department of Business and Professional Regulation (DBPR) charged that Respondent, a licensed yacht salesman, "failed to immediately deliver the \$150,000 deposit, pursuant to the Purchase Agreement dated December 4, 1998, in connection with the purchase of the 'Caliente' 72' Knight & Carver Yacht, to Dwight Tracy, the Broker under whom he was licensed, in violation of Rule 61B-60.006(2) Florida Administrative Code."

Respondent timely demanded a formal hearing on the charge. The hearing was held on October 10 and 30, 2000, via video teleconference.

Respondent objected to proceeding with hearing on October 10, 2000. Respondent advised, and Petitioner did not seriously dispute, that the parties had reached a stipulation of facts, executed by Respondent's counsel, which would have obviated the need for a hearing.

Based upon that understanding, Respondent's counsel advised Respondent that the hearing would be canceled, and counsel came to work dressed for an informal day at his own office.

Instead, Respondent's counsel learned, upon arriving at work, that the hearing had not been canceled and rushed to the hearing site, still dressed informally.

At this late hour, Respondent's counsel was unable to secure his client's attendance.

Respondent's counsel reasonably relied upon counsel for the Petitioner, who had assured that the scheduled October 10 hearing would not go forward. Petitioner's counsel was overruled by his superiors, who reversed the professional commitment counsel had made to Respondent and refused to approve the stipulation. This, the Petitioner was empowered to do.

The Division of Administrative Hearings (DOAH) is not bound by informal agreements by the parties, and cases are not settled until the DOAH is so advised, in writing.

Therefore, the parties were directed to proceed with the presentation of the Petitioner's evidence and informed that, if appropriate, additional hearing time would be scheduled at which the Respondent would be permitted to present his case.

The Petitioner rested on October 10, 2000, and the case was continued to October 30, 2000, in order to provide Respondent a fair opportunity to present his defense.

At the beginning of the October 30, 2000, hearing, Petitioner moved for leave to re-open its case to amend its unilateral prehearing statement.

Petitioner decided, based upon the testimony adduced at the October 10 proceedings, to seek an enhanced penalty against Respondent's license. Petitioner wished to present testimony in support of an enhanced penalty. Respondent objected. The testimony was received without prejudice. 1/

At the conclusion of Petitioner's case, and again at the close of the Respondent's case, and from time to time throughout the final hearing, Respondent moved to dismiss the Administrative Complaint for failure to state a claim upon which the relief sought could be granted, for due process violations relating to the charges themselves, as well as the proposed enhanced penalty, and for failure of proof on the charge filed. Each such motion was reserved upon. 2/

At the hearing, Petitioner presented the testimony of Craig Cadwalader, President of Ardell Brokers; Yvonne Tawfik-Mestre, an investigator with DBPR, and Peter Butler, Sr., a senior Management Analyst with DBPR. Petitioner also introduced twelve exhibits.

Respondent testified in his own behalf and introduced seventeen exhibits. 3/

A Transcript of the proceedings was filed December 5, 2000. The parties jointly sought and were granted enlargements of time for the submission of proposed recommended orders, through February 21, 2001. The Proposed Recommended Orders have been carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times pertinent to the issues herein, DBPR, through its Division of Florida Land Sales, Condominiums and Mobile Homes (the Division) was the state agency in Florida responsible for the licensing and discipline of yacht salespersons and brokers in this state and the regulation of the yacht-brokering profession.

2. Respondent, Justo Lamar (Lamar), has been licensed as a yacht salesperson since November 1976.

3. Prior to this action, Lamar has never been the subject of disciplinary action arising out of the practice of his profession.

4. This action was precipitated by a yacht owner, Juan A. Galan (Galan), who unsuccessfully attempted to sell his yacht to a client of Lamar's.

5. In July 1998, Galan listed his yacht, the Caliente, for sale through Ardell Yacht and Ship Brokers (Ardell).

6. The listing resulted in negotiations for the purchase of the Caliente by one Larry Griggs (Griggs), a prospective customer represented by Lamar.

7. At all times relevant to this case, Lamar was acting as a sales agent for Allied Marine and its broker, Dwight Tracy (Tracy). As set forth in more detail below, the negotiations between Galan and Griggs took place over a three-month period from October 1998 through December 1998 with no meeting of the minds.

8. On July 12, 1999, some seven months after negotiations between Griggs and Galan terminated, Galan lodged a complaint with DBPR. Although the complaint was ostensibly directed against salesman Lamar and broker Tracy, each and every allegation in the complaint was directed to the broker's conduct, not Lamar's.

9. Galan, who did not testify at final hearing, alleged in his complaint that "Broker presented a contract representing that deposit had been received/deposited (upon acceptance). In fact, broker never deposited check and we wasted our time and money on survey/sea trial as buyer was not (at that time or any time later) financially capable of buying boat @ \$1.75 million."

10. Galan provided some, but by no means all, of the documents which revealed the details of the prolonged and ultimately unsuccessful negotiations between Galan and Griggs.

11. In the narrative portion of his complaint, Galan asserted that he lost money on sea trials and implied, without actually stating, that the Caliente had been taken off the market during the pendency of negotiations with Griggs.

12. For reasons which remain unclear, the Division did not focus its investigation on Tracy, who was the obvious target of Galan's complaint. Instead, it targeted Lamar, who was an obvious add-on target of Galan's ire.

13. The exhibits reveal a complex series of offers and counteroffers and jockeying for negotiating advantage, not just between Galan and Griggs as prospective Seller and Buyer of the Caliente, but also between Lamar and the two brokers, all three of whom stood to profit if the transaction were consummated.

14. Negotiations for the Caliente began in late October 1998. On October 30, 1998, Lamar's client Griggs, through a corporation he controlled, issued a \$150,000 check for "Deposit, 72' (sic) Caliente Sportfisherman." This check accompanied a Brokerage Purchase and Sale Agreement dated October 29, 1998, offering to purchase the Caliente for \$1,500,000.

15. That same day, Galan's representatives faxed Lamar to advise that Griggs' offer was insufficient.

16. Lamar forthwith provided the check to his broker, Tracy.

17. Negotiations between Galan and Griggs continued in November. Galan chose to by-pass his own Broker and negotiate directly with Lamar over lunch on November 18, 1998. Lamar wrote Galan's demands on the back of a restaurant placemat. The primary sticking point was Galan's insistence on a "bottom line" of \$1,665,000 to him, after all commissions and other expenses, if any, were paid.

18. Griggs nevertheless persevered in his effort to buy the Caliente for \$1,500,000. On November 24, 2000, Griggs executed another Brokerage Purchase and Sale Agreement in which he offered an entity called Majua, Inc., of which Galan was President, the opportunity to sell the Caliente to Griggs for \$1,500,000.

19. Galan signed the November 24 agreement, but added an addendum which materially changed the terms. The addendum unilaterally purported to raise the sales prices to Galan's previously stated "bottom line" of \$1,665,000.

20. Thanksgiving passed, and negotiations wore on.

21. On December 4, 1998, Griggs executed a third Brokerage Purchase and Sale Agreement, raising his offer to \$1,755,000. The new offer expressly stipulated that Griggs' \$150,000 earnest money check could be deposited when and if all parties executed this new proposed agreement. Like the October 29 and

November 24 brokerage purchase and sale agreements, the December 4 document never ripened into a contract.

22. The December 4 document was a clear and unembarrassed reminder from Griggs that an earnest money check had been written by Griggs, but was not on deposit, and was not going to be on deposit until such time as Galan had signed off on the contract as written by Griggs. Galan nevertheless permitted a sea trial of the Caliente in furtherance of negotiations, now in their fifth week.

23. Also as part of the negotiating process, Galan permitted some, but not all, of the inspections requested by Griggs.

24. Expenses for the sea trial and inspections were borne entirely by Griggs.

25. By Christmas Eve, relations between the parties had deteriorated to the point where Lamar retrieved the check from the Allied Marine corporate files and returned it to Griggs.

26. At no time did negotiations with Lamar's client Griggs preclude or interfere with efforts by Galan to negotiate with and sell the Caliente to any other prospective purchaser.

CONCLUSIONS OF LAW

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

28. Pursuant to Chapter 326, Florida Statutes, DBPR is charged with the task of licensing, regulating, and disciplining Florida yacht and ship salesmen and brokers.

29. Pursuant to Section 326.006(2)(d)(4), Florida Statutes, the Division is authorized to impose a civil penalty against a broker or salesperson for a violation of a Rule properly adopted under Section 326, to a maximum of \$10,000 per offense.

30. Section 326.006(2)(d) provides in relevant part:

(d) Notwithstanding any remedies available to a yacht and shop 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 the division may institute enforcement proceedings in its own name against any broker or salesperson . . . as follows:

The division may impose a civil penalty against a broker or salesperson or any of his or her assignees or agents . . . for any violation of this chapter or a rule adopted under this chapter.

31. Petitioner has the burden of proving by clear and convincing evidence the allegations against Respondent. Section 120.57(1)(h), Florida Statutes; Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Department of Banking and Finance v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996).

32. Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116, fn. 5 (Fla. 1st DCA

1989), provides the following guidance regarding the clear and convincing evidence standard:

* * *

[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 the 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 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).

33. The Administrative Complaint alleges that Lamar is guilty of having violated Rule 61B-60.006(2), Florida Administrative Code, which provides, in pertinent part, as follows:

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.

34. The evidence established that salesman Lamar delivered a proffered deposit to his broker, Tracy, thus complying with the portion of the Rule directed to Lamar. It is Tracy upon whom the Rule imposes the duty to deposit "monies involved in a transaction brokered by the salesman." Lamar cannot be guilty

of violating the portion of the Rule which is not directed to him.

35. All of the testimony of persons with personal knowledge suggests that Lamar's actions were entirely consistent with Rule 61B-60.006(2), Florida Administrative Code. Lamar immediately delivered Griggs' \$150,000 check to Tracy several weeks before the State asserts Lamar was obliged to do so. Although there is no direct evidence in the record to explain why Tracy did not feel obliged to deposit same into his trust account, the conclusion is inescapable that the deposit was not made because there was never even a preliminary good faith belief by Tracy that negotiations would ripen into a contract. All of the competent, persuasive evidence suggests that no contract existed on December 4, 1998, nor at any other time, between Griggs and Galan.

36. Rule 61B-60.006 was recently construed in Woods v. Department of Business and Professional Regulation, Division of Florida Land Sales, 738 So. 2d 520 (Fla. 4th DCA 1999). Woods involved a broker charged with violating Rule 61-B60.006(3) by failing to properly deposit a check received pursuant to a purchase agreement. The Court held that failure to prove the existence of a valid contract was fatal to the case against Woods.

37. Lamar is charged under Subsection 2 of the same Rule construed in Woods. While Subsection 2 of the Rule only requires that any "deposit" received by a salesperson be provided immediately to the broker holding the salesperson's license, the Woods case supports the conclusion that a valid contract is required before a salesperson can be said to have received a "deposit." Thus, because there was no valid contract in this case the "check" received by Lamar was not a "deposit" which he was required to deliver to Tracy. But this point need not be decided, since, as noted above, Lamar did deliver the check to Tracy.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that DBPR enter a final order dismissing the Administrative Complaint against Respondent.

DONE AND ENTERED this 1st day of March, 2001, in
Tallahassee, Leon County, Florida.

FLORENCE SNYDER RIVAS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of March, 2001.

ENDNOTES

1/ The recommendation reached in this case moots Petitioner's motion.

2/ The recommendation reached in this case moots each of these motions.

3/ For reasons which were not clarified in the record, the parties elected to file unilateral prehearing statements. Respondent's exhibits were plainly described in unilateral filings dated October 5, 2000, and October 16, 2000, both of which reflect service upon Department counsel. In addition, at the final hearing Respondent's counsel produced a cover letter indicating that copies of the exhibits themselves were in fact informally furnished to the Department. On October 30, 2000, for the first time, Petitioner's counsel claimed he had not received the exhibits and therefore objected to their use at trial. The objection was overruled. The hearing record, taken as a whole, amply demonstrated that Petitioner was neither surprised nor prejudiced in any way by the Respondent's exhibits.

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.