

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
DIVISION OF REAL ESTATE, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 03-0359PL  
 )  
JONATHAN M. DOUGHERTY, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Orlando, Florida, on June 12, 2003.

APPEARANCES

For Petitioner: Christopher J. DeCosta  
Senior Attorney  
Division of Real Estate  
Department of Business and  
Professional Regulation  
400 West Robinson Street  
Suite N-801  
Orlando, Florida 32801

For Respondent: Jonathan M. Dougherty, pro se  
127 West Fairbanks Avenue  
Number 439  
Winter Park, Florida 32789

STATEMENT OF THE ISSUES

The issues are whether Respondent is guilty of interfering with or intimidating any person who is, or is expected to be, a

witness in any investigation or proceeding relative to a violation of Chapter 475, Florida Statutes, in violation of Section 475.42(1)(i), Florida Statutes.

PRELIMINARY STATEMENT

By Administrative Complaint dated December 19, 2002, Petitioner alleged that, at all material times, Respondent was a licensed Florida real estate broker, whose last license was as an involuntary inactive broker at 127 West Fairbanks Avenue, Suite 439, Winter Park. The Administrative Complaint alleges that, on March 2, 2002, Respondent facilitated a contract for purchase and sale between Anna Marie Nealey, as seller, and Paul Branic, as buyer, of property in Oviedo. The Administrative Complaint alleges that Respondent collected \$3150 from the buyer as an earnest money deposit, but failed to forward the deposit to the seller. The Administrative Complaint alleges that, after the seller filed a complaint against Respondent with Petitioner, he induced the seller to sign a document in which she agreed not to pursue her claim in return for payment of \$3550. A few days later, the Administrative Complaint alleges, Respondent learned of the disciplinary complaint that the seller had already filed against him and sent her a letter, threatening civil and criminal actions if she did not rescind her complaint.

At the start of the hearing, Petitioner dismissed Counts I and II of the Administrative Complaint, which had alleged

violations pertaining to Respondent's acts and omissions at the time of the underlying transaction. Count III, which is the sole remaining count, alleges that Respondent is guilty of interfering with, or intimidating, any person who is, or is expected to be, a witness in any investigation or proceeding relative to a violation of Chapter 475, Florida Statutes, in violation of Section 475.42(1)(i), Florida Statutes.

At the hearing, Petitioner called one witness and offered into evidence six exhibits: Petitioner Exhibits 4-6 and 9-11. Respondent called no witnesses and offered into evidence five exhibits: Respondent Exhibits 1-5. All exhibits were admitted.

The court reporter filed the transcript on July 16, 2003. The parties filed their proposed recommended orders by August 4, 2003.

#### FINDINGS OF FACT

1. Respondent was actively licensed as a Florida real estate salesperson through March 31, 2002, and was so licensed during the events described below.

2. In 2001, Anna Marie Nealey and her husband, Edward Nealey, were selling their home in Oviedo. On January 20, 2001, Respondent submitted a contract of purchase and sale on behalf of the buyer, Paul Branich. The parties agreed to a closing on March 2, 2001.

3. The record does not describe in much detail the nature of this real estate transaction. The exhibits do not include even the contract. The only witness was Ms. Nealey, who claims only a limited understanding of the transaction.

4. Ms. Nealey's complaint centers on Respondent's handling of an earnest money deposit, but no competent evidence supports findings of any kind concerning such a deposit or how it was handled.

5. In her complaint letter to Petitioner, Ms. Nealey describes her dissatisfaction with a closing statement that her friend and real estate agent received on April 11, although it seems that the statement was prepared by an independent closing agent, not Respondent. Ms. Nealey asserts that, two days after receiving the closing statement, she and her real estate agent met with the closing agent, who stated that \$3150 had been paid the sellers outside closing.

6. Ms. Nealey's complaint letter adds that she and her husband left the closing without any money, although she does not preclude the possibility of a credit for the \$3150 by way of a note or other credit on the closing statement. When Ms. Nealey finally spoke with Respondent, he said that he had done everything that he was supposed to have done. Ms. Nealey's complaint states: "I didn't like the manner in which he talked to me about this situation; it led me to believe there was more

than what was being told." Later, Ms. Nealey's letter asserts: "I have a gut feeling that [Respondent] is trying to hide some things, and won't be completely honest with me. . . . I just want to know if there is a copy of a cashier's check or money order receipt given to the mortgage company with our names on it and where my money is at this time."

7. By letter dated May 18, 2001, one of Petitioner's investigators acknowledge the receipt of Ms. Nealey's "recent complaint." However, the complaint letter itself is undated.

8. Also on May 18, 2001, Mr. and Ms. Nealey entered into an agreement with Respondent. Respondent agreed to pay the Nealeys \$3550 upon the delivery of a duly assigned note, originally from Mr. Branic to the Nealeys; a signed covenant against further action; and a signed statement to the Florida Department of Banking to the effect that the dispute involving Respondent has been settled. The covenant provides that the Nealeys will not file a legal action or disciplinary complaint against Respondent or the mortgage company, and the \$3550 settles all pending disputes to the full satisfaction of the Nealeys, who retract any allegations that they had already made against Respondent or the mortgage company.

9. Prior to the signing of the Agreement and other settlement documents, the Nealeys had filed a complaint with the Florida Department of Banking and Finance against a mortgage

company involved in the transaction. Respondent was aware of this complaint when he and the Nealeys signed the Agreement and the Nealeys signed the other settlement documents. However, when signing the Agreement, Respondent was unaware that the Nealeys had also filed a complaint against him with Petitioner.

10. After signing the Agreement, Ms. Nealey informed Respondent that she had also filed a complaint against him with Petitioner. Respondent became angered and refused to complete the settlement transaction, although he called the Nealeys the next morning and indicated he would purchase the mortgage the following day, which he did.

11. A few days later, when Respondent received formal notice of the Nealeys' complaint from Petitioner on May 23, 2001, he wrote them a letter accusing them of defrauding him out of \$3550 and identifying their action as a basis for a civil proceeding in fraud and misrepresentation and for criminal action. The letter warns that, if the Nealeys did not take corrective action immediately, Respondent would file a civil action and refer the matter to the State Attorney's Office. The letter adds that the Nealeys' original claims were baseless, but time-consuming and damaging to business reputations.

12. The Nealeys' satisfaction with the \$3550 that they obtained for the Branich second mortgage sufficed for the Florida Department of Banking and Finance to close the case against the

mortgage company. However, Petitioner continued to prosecute this case, which originally involved claims arising out of the underlying transaction and a claim arising out of the post-closing dealings between Respondent and the Nealeys, but now only involves a claim arising out of the post-closing dealings between Respondent and the Nealeys.

13. As already noted, the record does not permit more than a rough reconstruction of the real estate transaction that has engendered this disciplinary case. However, Ms. Nealey supplied more detail during her testimony than she supplied in her complaint letter. She conceded during her testimony that she and her husband had agreed to hold a second purchase-money mortgage and note from Mr. Branich. Ms. Nealey testified that her problems with the transaction only surfaced when Mr. Branich failed to make payments on this mortgage and another that he had given to Ms. Nealey's real estate agent. This failure caused Ms. Nealey to file her complaints against the mortgage company, and Respondent.

14. Based on this record, there is no evidence of any fraud or misdealing by Respondent in the underlying real estate transaction. It appears that the Nealeys, and perhaps Ms. Nealey's real estate agent, took notes from Mr. Branich, and Mr. Branich did not make the payments for very long. It appears that, even though she lacked evidence of misdealing, Ms. Nealey

reported suspicions and concerns to Petitioner, and it appears that Petitioner initially found cause to prosecute Respondent for his acts and omissions in connection with the underlying transaction, as well as his post-closing acts and omissions.

15. It is unclear if Petitioner's theory of the remaining case relies in part on Respondent's acts and omissions in connection with the Agreement and other settlement documents. If so, this theory would fail because Respondent did not then know that Petitioner had filed a complaint against him with Petitioner. Absent Respondent's knowledge that Petitioner had commenced a prosecution, he could not have been capable of interfering with a witness against him.

16. The evidence clearly fails to establish any such knowledge on the part of Respondent at the time of the execution of the Agreement and payment of the \$3550 for the Branic second mortgage. At the time, Respondent thought only that he was resolving a complaint filed against a mortgage company, not him, with the Florida Department of Banking and Finance. If he had already known of the complaint already filed with Petitioner, he would not have angrily lost his temper, refused to close, and then regained his composure the next day and close promptly on the settlement. When given the opportunity, Ms. Nealey could not supply any other reason for Respondent's otherwise-inexplicable behavior.



17. By the time of the May 23 letter, Respondent, who had been aware of the complaint with Petitioner for several days, surmised either that the Nealeys had not performed their end of the bargain or that, if they had, Petitioner would not drop the disciplinary case.

18. The threat of civil action is unremarkable because, on the facts of this record, it was justified. The threat of a criminal complaint to gain civil advantage raises a distinct issue, but, more important to this case, is whether Respondent was interfering with, or intimidating, a witness in an investigation or prosecution against him.

19. A close examination of the record reveals Respondent's exasperation with a complainant's willingness to use the power of the disciplinary process to insulate herself from the consequences of her bad business judgment and impose these consequences unfairly upon Respondent. Although not obligated to do so, Respondent voluntarily bought the Branick second mortgage and reasonably thought that he was thus purchasing the satisfaction and acquiescence of the Nealeys.

20. When Petitioner failed to dismiss the subject case (until the start of this hearing), Respondent threatened Ms. Nealey with severe consequences if she did not then stop complaining about him. In essence, as her complaints were groundless, the threat demanded only that Ms. Nealey stop her

prevarications and start to tell the truth--i.e., by admitting that she and her husband had made a bad business decision in taking the Branic second mortgage and Respondent had relieved them of the mortgage, although he had not legally been required to do so. The May 23 letter represents an attempt by Respondent to coerce Ms. Nealey to tell the truth. Such an effort serves, rather than impedes, Petitioner's investigation by allowing it to gather facts on which it may make an informed determination whether Respondent violated any disciplinary laws. Evidently, when apprised of those facts, Petitioner determined that Respondent had not violated any such laws in the underlying transaction, nor did he in his post-closing dealings with the Nealeys.

#### CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction over the subject matter. Section 120.57(1), Florida Statutes. (All references to Sections are to Florida Statutes.)

22. Section 475.42(1)(i) provides:

No person shall obstruct or hinder in any manner the enforcement of this chapter or the performance of any lawful duty by any person acting under the authority of this chapter or interfere with, intimidate, or offer any bribe to any member of the commission or any of its employees or any person who is, or is expected to be, a

witness in any investigation or proceeding relating to a violation of this chapter.

23. Petitioner must prove the material allegations by clear and convincing evidence. *Department of Banking and Finance v. Osborne Stern and Company, Inc.*, 670 So. 2d 932 (Fla. 1996) and *Ferris v. Turlington*, 510 So. 2d 292 (Fla. 1987).

24. For the reasons set forth above, Petitioner has failed to prove that Respondent interfered with or intimidated Ms. Nealey. He rightly demanded only that she tell the truth.

RECOMMENDATION

It is

RECOMMENDED that the Florida Real Estate Commission enter a final order dismissing the Administrative Complaint.

DONE AND ENTERED this 27th day of August, 2003, in Tallahassee, Leon County, Florida.



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ROBERT E. MEALE  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 27th day of August, 2003.

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 must be filed with the agency that will issue the final order in this case.