

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 03-4208  
 )  
NOEL T. WINTER, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly-designated Administrative Law Judge, Carolyn S. Holifield, conducted a formal hearing in this case on March 1, 2004, by videoconference between Orlando and Tallahassee, Florida.

APPEARANCES

For Petitioner: Alpheus C. Parsons, Esquire  
Department of Business and  
Professional Regulation  
Hurston Building, North Tower  
400 West Robinson Street, Suite N801  
Orlando, Florida 32801

For Respondent: Noel T. Winter, pro se  
1751 Rose Garden Lane  
Orlando, Florida 32825

STATEMENT OF THE ISSUES

Whether Respondent committed the violations alleged in the Administrative Complaint dated February 4, 2002; and if so, what penalty should be imposed.

PRELIMINARY STATEMENT

In a two-count Administrative Complaint dated February 4, 2002, the Department of Business and Professional Regulation (Department), charged Noel T. Winter (Respondent) with violating Subsections 475.227(1)(q) and 475.42(1)(a) and Section 455.228, Florida Statutes (2000).<sup>1</sup> Specifically, in Count I of the Administrative Complaint, the Department charged Respondent with having violated a lawful order of the Department in violation of Subsection 475.227(1)(q), Florida Statutes. In Count II, Respondent is charged with having operated as a broker or salesperson without being the holder of a valid and current license as a broker or salesperson, in violation of Subsection 475.42(1)(a) and Section 455.228, Florida Statutes.

During this proceeding, the Department dismissed Count I after discovering that the Final Order, which was the basis of that charge, had been superceded by an Amended Final Order. Thus, Count II is the only allegation that remains at issue.

The Administrative Complaint includes the following factual allegations to support the charge in Count II:

6. On or about May 16, 2000, the Department of Business and Professional Regulation entered a final order that, in pertinent part, ordered Respondent to "immediately cease and desist from offering any real property for sale, rent, or lease until such time as Respondent has purchased, closed on, and in good faith acquired title to such real property."

7. On or about November 1, 2000, Respondent and Marie Saintil executed a Contract for Sale and Purchase for real property located at 1818 Verona Street, Kissimmee, Florida. Respondent was listed as seller. . . .

8. Respondent did not own the property.

9. The Contract states "subject to seller closing on prior transaction to purchase."

10. Ms. Saintil tendered to Respondent \$1,500.00 as a deposit towards purchase of the property.

11. Respondent was listed as the escrow agent.

12. On or about December 5, 2000, Respondent and Eladio and Marim [sic] Rodriguez executed a Contract for Sale and Purchase for real property located at 1818 Verona Street, Kissimmee, Florida. Respondent was listed as the buyer.

13. On or about December 18, 2000, Respondent and Marie Saintil executed a second Contract for Sale and Purchase for real property located at 1818 Verona Street, Kissimmee, Florida.

Respondent timely challenged the allegations and requested a formal hearing. The Department forwarded the matter to the Division of Administrative Hearings for assignment of an

Administrative Law Judge. Pursuant to notice, the final hearing was held on March 1, 2004.

At hearing, the Department presented the testimony of Patrick Forsyth, a real estate broker and salesperson, and Robert Baird, a former investigator with the Department. The Department had six exhibits received into evidence. Respondent testified on his own behalf and had three exhibits received into evidence. The record was left open until March 15, 2004, to give Respondent additional time to attempt to locate Ms. Saintil, so that he could present her testimony. However, on March 11, 2004, Respondent filed a notice advising the undersigned that he would not be presenting additional witnesses or documentary evidence.

On March 8, 2004, the Department filed a Notice of Supplemental Exhibit and requested that it be allowed to offer as a late-filed exhibit a document which had not been presented at the final hearing. That request is denied, and the document marked by the Department as Exhibit numbered 8 has not been considered in preparation of this Recommended Order.

A Transcript of the proceeding was filed on March 22, 2004. The Department filed a Proposed Recommended Order on March 30, 2004. Respondent's Motion for Dismissal and Suggested Proposed Order was filed on March 11, 2004, and Respondent's Response to

Proposed Recommended Order was filed on April 14, 2004.

Respondent's Motion for Dismissal is addressed below.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. Petitioner, the Department of Professional Regulation, is the state government licensing and regulatory agency charged with the responsibility and duty to prosecute administrative complaints pursuant to the laws of the State of Florida, in particular Section 20.165 and Chapter 475, Florida Statutes (2003), and the rules promulgated thereto.

2. At all times relevant to this proceeding, Respondent, Noel T. Winter, was not registered as a real estate broker or salesperson in the State of Florida in accordance with Chapter 475, Florida Statutes.

3. On May 5, 2000, Respondent and the Department entered into a Stipulation in FDBPR Case Nos. 97-80646 and 97-80496. Subsequently, the Department issued an Amended Final Order in FDBPR Case Nos. 97-80646 and 97-80496, which adopted and incorporated that Stipulation. Both the Stipulation and the Amended Final Order provide that Respondent will immediately cease and desist from offering any real property for sale, rent, or lease until such time as Respondent has "purchased, closed

on, or in good faith believed that Respondent would acquire title to such property prior to closing."

4. On or about November 1, 2000, Respondent and Marie Saintil executed a Contract for Sale and Purchase (Saintil Contract), which provided for the purchase of real property located at 1818 Verona Street, Kissimmee, Florida (Verona Street property). The Saintil Contract listed Respondent as the seller and Ms. Saintil as the buyer. Respondent was also listed as the escrow agent. The closing date for the Saintil Contract was set for November 30, 2000.

5. The Saintil Contract indicates that Ms. Saintil paid Respondent a deposit of \$1,500.00. However, Ms. Saintil did not pay the \$1,500.00 for approximately three weeks after she executed the contract.

6. On November 1, 2000, at the time he signed the Saintil Contract, Respondent did not own the Verona Street property.

7. The Saintil Contract that was executed by Respondent and Ms. Saintil had a hand-written notation which indicated that the sale of the Verona Street property was "subject to seller closing on prior transaction to purchase."

8. On November 1, 2000, Respondent had no prior contract to purchase the Verona Street property.

9. Respondent, Eladio Rodriguez, and his daughter, Marin Perez (also Marin Rodriguez), executed a Contract for Sale and

Purchase (Rodriquez Contract) for the Verona Street property. On this contract, Respondent was listed as the buyer, and Mr. Rodriquez and Ms. Perez were listed as the sellers of the property.

10. Respondent signed the Rodriquez Contract on November 21, 2000, and paid a deposit of \$500.00 to secure the contract. Mr. Rodriquez and Ms. Perez signed the Rodriquez Contract on December 5, 2000.

11. The Rodriquez Contract set the closing date for December 30, 2000.

12. On or about December 18, 2000, Respondent and Ms. Saintil executed a second Contract for Sale and Purchase (Second Saintil Contract) for the Verona Street property.

13. Part III of the Saintil Contract provides that "the Seller does not own title to the subject property," but that "he will be able to deliver title at the time a simultaneous closing occurs." That contract also provides that the "Seller [Respondent] discloses he is holding or is expected to hold an executed contract between the current titleholder and himself to purchase the property that is the subject of this contract" and that the contract "is subject to Seller closing on the prior contract with the current titleholder."

14. The Rodriguez Contract negotiated between Respondent and Mr. Rodriguez and Ms. Perez was never completed. The reason the transaction failed was because financing was never obtained.

15. The transaction between Respondent and Ms. Saintil was never completed because financing was never obtained.

16. If the Saintil and Rodriguez transactions had closed, Respondent expected to make as much as \$4,000.00 to \$5,000.00.

17. Respondent spent \$895.00 of the \$1,500.00 deposit paid to him by Ms. Saintil in connection with the Saintil Contract. These funds were spent for an appraisal, a processing fee, credit reports, long-distance phone calls to a mortgage company, and postage for mailing two loan packages.

18. Respondent has never returned the remaining \$605.00 of the deposit to Ms. Saintil, because he does not know where she is residing or working.

#### CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction of the parties to and the subject matter of this proceeding pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes (2003).

20. In its Administrative Complaint, the Department seeks to impose penalties against Respondent that include issuance of a cease and desist order and/or imposition of an administrative fine. Therefore, the Department has the burden of proving by



clear and convincing evidence that Respondent committed the violations alleged in the Administrative Complaint. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996).

21. Clear and convincing evidence is that which is credible, precise, explicit, and lacking in 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. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

22. As noted above, during the course of this proceeding, the Department dismissed Count I of the Administrative Complaint. Therefore, the only allegation to be addressed is the one contained in Count II.

23. In Count II of the Administrative Complaint, Respondent is charged with having operated as a broker or salesperson without being the holder of a valid and current license as a broker or salesperson. It is alleged that this conduct is a violation of Subsection 475.42(1)(a) and Section 455.228, Florida Statutes.

24. Subsection 475.42(1)(a), Florida Statutes, provides as follows:

(1) VIOLATIONS.--

(a) No person shall operate as a broker or salesperson without being the holder of a valid and current active license therefor.

25. Subsection 475.01(1)(a), Florida Statutes, defines the term "broker" as follows:

(1) As used in this part:

(a) "Broker" means a person who, for another, and for a compensation or valuable consideration directly or indirectly paid or promised, expressly or impliedly, or with an intent to collect or receive a compensation or valuable consideration therefor, appraises, auctions, sells, exchanges, buys, rents, or offers, attempts or agrees to appraise, auction, or negotiate the sale, exchange, purchase, or rental of business enterprises or business opportunities or any real property or any interest in or concerning the same, including mineral rights or leases, or who advertises or holds out to the public by any oral or printed solicitation or representation that she or he is engaged in the business of appraising, auctioning, buying, selling, exchanging, leasing, or renting business enterprises or business opportunities or real property of others or interests therein, including mineral rights, or who takes any part in the procuring of sellers, purchasers, lessors, or lessees of business enterprises or business opportunities or the real property of another, or leases, or interest therein, including mineral rights, or who directs or assists in the procuring of prospects or in the negotiation or closing of any transaction which does, or is calculated to, result in a sale, exchange, or leasing thereof, and who receives, expects, or is promised any compensation or valuable consideration, directly or indirectly therefor; and all persons who advertise rental property information or lists. A broker renders a professional service and is

a professional within the meaning of s. 95.11(4)(a). Where the term "appraise" or "appraising" appears in the definition of the term "broker," it specifically excludes those appraisal services which must be performed only by a state-licensed or state-certified appraiser, and those appraisal services which may be performed by a registered assistant appraiser as defined in part II. The term "broker" also includes any person who is a general partner, officer, or director of a partnership or corporation which acts as a broker. The term "broker" also includes any person or entity who undertakes to list or sell one or more timeshare periods per year in one or more timeshare plans on behalf of any number of persons, except as provided in ss. 475.011 and 721.20.

26. Subsection 475.01(3), Florida Statutes, defines "operate" as follows:

(3) Wherever the word "operate" or "operating" as a broker, broker-salesperson, or salesperson appears in this chapter; in any order, rule, or regulation of the commission; in any pleading, indictment, or information under this chapter; in any court action or proceeding; or in any order or judgment of a court, it shall be deemed to mean the commission of one or more acts described in this chapter as constituting or defining a broker, broker-salesperson, or salesperson, not including, however, any of the exceptions stated therein. A single such act is sufficient to bring a person within the meaning of this chapter, and each act, if prohibited herein, constitutes a separate offense.

27. Based on the findings of fact herein, the Department has proved by clear and convincing evidence that Respondent

operated as a real estate broker with respect to the Saintil Contract for the Verona Street property.

28. The clear and convincing evidence established that on November 1, 2000, when he offered to sell the Verona Street property to Ms. Saintil, Respondent had not purchased or closed on that property. Moreover, when he made the offer to sell the Verona Street property to Ms. Saintil, Respondent did not have a contract to purchase that property.

29. The evidence established that Respondent received compensation from Ms. Saintil and intended to receive additional compensation for this transaction. First, Respondent accepted \$1,500.00 from Ms. Saintil in connection with the Saintil Contract. Of this amount, Respondent used approximately \$900.00 for costs and preparation of paperwork for the transaction. Moreover, Respondent testified that he expected to make as much as \$4,000.00 to \$5,000.00 at the closing of the Saintil and Rodriquez transactions.

30. Subsection 475.011(2), Florida Statutes, which exempts certain individuals and entities from Chapter 475, Florida Statutes, provides, in relevant part:

Exemptions.--This part does not apply to:

\* \* \*

2) Any individual, corporation, partnership, trust, joint venture, or other entity which sells, exchanges, or leases its

own real property; however, this exemption shall not be available if and to the extent that an agent, employee, or independent contractor paid a commission or other compensation strictly on a transactional basis is employed to make sales, exchanges, or leases to or with customers in the ordinary course of an owner's business of selling, exchanging, or leasing real property to the public; . . . .

31. According to Subsection 475.011(2), Florida Statutes, quoted above, an individual who is not a licensed real estate broker or salesperson may sell property, if he owns that property. However, that exception does not apply in this case because the clear and convincing evidence established that Respondent did not own the property he was offering to sell.

32. Respondent argues that the Department should be estopped from bringing this action, because his conduct is consistent with the language in the Amended Final Order and Stipulation in paragraph 3 above. That language states that Respondent should "cease and desist from offering any real property for sale, rent, or lease, until such time as Respondent has purchased, closed on, or in good faith believed he would acquire title to such property prior to closing." Respondent's argument is unpersuasive. Here, the evidence established that when he entered into the Saintil Contract, Respondent did not own the real property or have a contract to purchase that property. Moreover, the Saintil Contract established a closing

date prior to Respondent's purchasing or having a contract to purchase the Verona Street property.

33. Subsection 455.228(1), Florida Statutes, authorizes the Department to impose penalties for the unlicensed practice of professions which are licensed and regulated by the Department. Those penalties include the issuance of cease and desist orders and the imposition of administrative penalties not to exceed \$5,000.00 per incident.

34. The Department seeks to impose a penalty of \$5,000.00 against Respondent for the violation of Subsection 475.042(1)(a), Florida Statutes, as alleged in Count II of the Administrative Complaint. That administrative penalty, which is the maximum penalty, is appropriate in this case.

#### RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby:

RECOMMENDED that the Department of Business and Professional Regulation enter a final order:

1. Denying Respondent's motion for dismissal;
2. Sustaining the allegation in Count II of the Administrative Complaint; and
3. Imposing an administrative penalty of \$5,000.00 against Noel T. Winter.

DONE AND ENTERED this 30th day of April, 2004, in  
Tallahassee, Leon County, Florida.

*Carolyn S. Holifield*

---

CAROLYN S. HOLIFIELD  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675 SUNCOM 278-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 30th day of April, 2004.

ENDNOTE

1/ All references are to Florida Statutes (2000), unless  
otherwise indicated.

COPIES FURNISHED:

Alpheus C. Parsons, Esquire  
Department of Business and  
Professional Regulation  
Hurston Building, North Tower  
400 West Robinson Street, Suite N801  
Orlando, Florida 32801

Noel T. Winter  
1751 Rose Garden Lane  
Orlando, Florida 32825

John Washington, Hearing Officer  
Office of General Counsel  
Department of Business and  
Professional Regulation  
Northwood Centre  
1940 North Monroe Street  
Tallahassee, Florida 32399

Leon Biegalski, General Counsel  
Department of Business and  
Professional Regulation  
Northwood Centre  
1940 North Monroe Street  
Tallahassee, Florida 32399-2202

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.