STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF REAL ESTATE,	)	
Petitioner,	)	
vs.	)	Case No. 04-1444
NICHOLAS ANTHONY MUSASHE AND THE JANDER GROUP, INC.,	)	
Respondents.	)	

RECOMMENDED ORDER

Pursuant to notice, this case came on for formal hearing before Daniel M. Kilbride, Administrative Law Judge of the Division of Administrative Hearings, on July 2, 2004, by video teleconference with sites in Orlando and Tallahassee, Florida.

APPEARANCES

For Petitioner: Jason W. Holtz, Esquire
Department of Business and Professional Regulation
400 West Robinson Street
Suite 801, North Tower
Orlando, Florida 32801

For Respondent: William M. Furlow, Esquire
Akerman Senterfitt
106 East College Avenue, Suite 1200
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STATEMENT OF THE ISSUES

Whether Respondent, Nicholas Anthony Musashe (Respondent Musashe), is guilty of failure to account or deliver funds and failure to follow procedures as required by Subsection 475.25(1)(d)1., Florida Statutes (2003).

Whether Respondent Musashe is guilty of failure to provide written notification to the Florida Real Estate Commission (FREC) within 15 days of the last party's demand as required by Florida Administrative Code Rule 61J2-10.032(1)(a).

Whether Respondent Musashe is guilty of culpable negligence or breach of trust in any business transaction in violation of Subsection 475.25(1)(b), Florida Statutes (2003).

Whether Respondent, The Jander Group, Inc. (Jander Group), is guilty of failure to account or deliver funds and failure to follow procedures, as required by Subsection 475.25(1)(d)1., Florida Statutes (2003).

Whether the Jander Group is guilty of failure to provide written notification to the FREC within 15 days of the last party's demand as required by Florida Administrative Code Rule 61J2-10.032(1)(a).

Whether the Jander Group is guilty of culpable negligence or breach of trust in any business transaction in violation of Subsection 475.25(1)(b), Florida Statutes (2003).

PRELIMINARY STATEMENT

On May 20, 2003, the Department of Business and Professional Regulation, Division of Real Estate, filed a 24-count Amended Administrative Complaint against Respondents, Nicholas Anthony Musashe and The Jander Group, Inc., alleging violations of Subsections 475.25(1)(d), (1)(e), and (1)(b), Florida Statutes (2003), and Florida Administrative Code Rule 61J2-10.032(1)(a) in their handling of three different rental deposit disputes. Respondents raised affirmative defenses and requested a formal hearing. This matter was referred to the Division of Administrative Hearings on April 20, 2004. Following discovery and the filing of a Joint Response to Pre-Hearing Order, a formal hearing was conducted on July 2, 2004, by video teleconference.

Petitioner presented the testimony of one witness, Tiffnye Castro, and 11 exhibits were admitted into evidence. Respondents presented the testimony of James R. Mitchell, Esquire, and Respondent Musashe; and one exhibit was admitted into evidence. The parties agreed that the time for filing proposed recommended orders was ten days from the filing of the transcript. The Transcript was filed on July 23, 2004. Each of the parties timely filed Proposed Recommended Orders on July 30, 2004, which have been carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is the state licensing and regulatory agency charged with the responsibility and duty to investigate administrative complaints pursuant to Section 20.165 and Chapters 455 and 475, Florida Statutes (2003), and the rules promulgated thereunder.

2. Respondent Musashe is, and has been at all times material, a licensed real estate broker, having been issued license no. 265400 and license no. 3010224. He is the owner of the Jander Group, which is also a licensed real estate broker, and its business address is located at 1440 Howell Branch Road, Winter Park, Florida 32789. At all times material hereto, Respondent Musashe was licensed and operating as the qualifying broker for the Jander Group. The Jander Group manages rental property exclusively and is not involved in the sale of real estate.

3. Respondent Musashe has been managing rental properties in Florida since 1990. He, through his company, the Jander Group, manages about 500 properties. He enters into contracts with property owners to provide property management services. He meets with the property owners to advise them on improvements to accommodate rentals. He advertises vacant properties; interviews prospective residents; shows properties; takes applications; screens applicants; and, upon ascertaining that

the applicant meets the minimum standards, enters into lease agreements with tenants. He also performs the day-to-day functions of collecting rent, accounting, paying bills, accounting to the owner, and paying the owner the rental proceeds. He keeps a percentage of the rent for his services.

4. From time to time, in the property management business, a dispute develops between a tenant and a property owner. This can involve a deposit by a prospective tenant or a security deposit pursuant to a lease. In the early 1990's, the Legislature amended Chapter 83, Florida Statutes (2003), the "Florida Residential Landlord and Tenant Act" (Landlord-Tenant Act). Among other changes, it relieved licensed real estate brokers from the requirements of reporting escrow disputes and instituting settlement procedures as outlined in Subsection 475.25(1)(d), Florida Statutes (2003), when there were deposit disputes between residential landlords and tenants. Thereafter, and until late 2001, the FREC's position on rental property deposit disputes was that such disputes were addressed by the Landlord-Tenant Act and not subject to the provisions of Chapter 475, Florida Statutes (2003). This applied to disputes over security deposits, as well as disputes over deposits by prospective tenants.

5. In late 2001, without notice to brokers and associates or rulemaking, the FREC changed its legal interpretation of

Subsections 475.25(1)(d) and 83.49(3)(d), Florida Statutes (2003), with respect to disputes over pre-lease deposits on rental property. In this case and at least one other case, administrative complaints were filed against brokers who, faced with a dispute between a prospective tenant and a property owner, failed to give the FREC notice of the dispute and requested one of the settlement procedures set forth in Subsection 475.25(1)(d), Florida Statutes (2003).

6. In the early to mid-1990s, in his business of managing rental properties, when confronted with disputes between prospective tenants and property owners, Respondent Musashe routinely sent notice to the FREC and requested an escrow disbursement order (EDO) to assist in determining how to settle the dispute in accordance with Subsection 475.25(1)(d), Florida Statutes (2003). The FREC responded that disputes involving rental properties were to be resolved in accordance with the Landlord-Tenant Act and did not issue an EDO.

7. James Mitchell was the legal advisor to the FREC for several years while in the Attorney General's (AG) office in the 1990s; and since that time, is the author of continuing education materials which are approved by the FREC. In his materials, he instructs real estate brokers that disputes involving any type of rental deposits should be handled pursuant to the Landlord-Tenant Act, and not in accordance with the

notice and settlement procedures set forth in Subsection 475.25(1)(d), Florida Statutes (2003). Mitchell is not familiar with the particular facts or documents at issue in this case. He did not give an opinion as to whether or not the facts of the present case created a landlord and tenant relationship between Respondents and Tiffnye Castro.

8. During his tenure with the AG's office, Mitchell applied Chapter 83, Florida Statutes (2003), to escrow dispute issues in a manner consistent with the statutes' definition of "tenant" and "rental agreement."

9. Section 83.49, Florida Statutes (2003), applies "whenever money is deposited or advanced by a tenant on a rental agreement or as advanced rent for other than the next immediate rental period." Chapter 83, Florida Statutes (2003), defines, "tenant" as "any person entitled to occupy a dwelling under a rental agreement."

10. On May 10, 2002, Castro signed a rental application with the Jander Group to rent a duplex at 12034 Waldenwoods in Orlando. She gave the Jander Group a check for $25.00 as an application fee and $585.00 as a holding deposit.

11. According to the terms of the application, the holding deposit was to be held by the broker while the application was being processed. If the prospective tenant was deemed qualified, she would receive a lease. During the time that the

broker was checking on the tenant's qualifications, the property would be taken off of the rental market. If the tenant did not meet the qualifications for renting the property, the holding deposit would be returned to her. If the prospective tenant qualified, but changed her mind and decided not to rent the property, the property owner was entitled to keep the holding deposit as liquidated damages for holding the property off the rental market.

12. Subsequent to filling out the application, Castro was approved as a tenant. In a dispute over the amount of rent to be charged for the unit, Castro decided not to rent the property and sent a demand letter to Respondent seeking the return of her deposit. On June 20, 2002, the Jander Group sent Castro a letter, in conformance with Subsection 83.49(3), Florida Statutes (2003), giving her notice of its intent to keep her deposit. Respondents accounted for the deposit to both parties in the transaction; and subsequently, delivered the deposit to the property owner.

13. Castro never signed a lease or possessed keys, and she never had the right to occupy the property in question.

14. Respondent predicated the handling of the escrow deposit on the assumption that he had a landlord and tenant relationship with Castro.

15. Respondents never petitioned the FREC for a declaratory statement regarding a dispute over a deposit by a non-tenant on a lease application, rather than a rental agreement.

16. Respondent Musashe elected not to follow Subsection 475.25(1)(d)1., Florida Statutes (2003), requirements for five reasons: his opinion that the issue was contractual; his own reading of the law; his experience with professional education; advice of private counsel; and the statements of law issued by the AG's office regarding EDOs.

17. There is no evidence that Respondent Musashe was ever specifically advised by a state agency that the landlord and tenant procedure in Section 83.49, Florida Statutes (2003), was applicable to earnest money deposits made by a non-tenant as part of an application that did not create a lease obligation.

18. Petitioners presented no evidence relative to paragraphs 15 through 22 and 25 through 32 of the Amended Administrative Complaint.

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the subject matter and parties in this proceeding pursuant to Sections 120.569 and 120.60 and Subsection 120.57(1), Florida Statutes (2003).

20. Petitioner is charged with the regulation of licensed real estate brokers pursuant to Chapter 475, Florida Statutes (2003), and is authorized to discipline those licensed thereunder who violate the law.

21. License disciplinary proceedings are penal in nature, State ex. rel. Vining v. Florida Real Estate Commission, 281 So. 2d 487 (Fla. 1973), and must be construed strictly in favor of the one against whom the penalty would be imposed. Munch v. Department of Profession Regulation, Division of Real Estate, 592 So. 2d 1136 (Fla. 1st DCA 1992); Fleischmann v. Department of Professional Regulation, 441 So. 2d 1121 (Fla. 3d DCA 1983). The standard of proof required in this matter is that relevant and material findings of fact must be supported by clear and convincing evidence of record. Department of Banking and Finance v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996). Petitioner has the burden of proving by clear and convincing evidence each of the allegations in the Administrative Complaint. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

22. Subsections 475.25(1)(b) and (d), Florida Statutes (2003), as it pertains to the alleged facts in this matter, reads in pertinent part:

> (1) The commission may deny an application for licensure, registration, or permit, or renewal thereof; may place a licensee, registrant, or permittee on probation; may suspend a license,

registration, or permit for a period not exceeding 10 years; may revoke a license, registration, or permit; may impose an administrative fine not to exceed $1,000 for each count or separate offense; and may issue a reprimand, . . . if it finds that the licensee: . . . .

* * *

(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 . . . .

* * *

(d)1. Has failed to account or deliver to any person, including a licensee under this chapter, 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 if a civil judgment relating to the practice of the licensee's profession has been obtained against the licensee and said judgment has not been satisfied in accordance with the terms of the judgment within a reasonable time, or any secret or illegal profit, or any divisible share or portion thereof, which has come into the licensee's hands and which is not the licensee's property or which the licensee is not in law or equity entitled to retain under the circumstances. However, if the licensee, in good faith, entertains doubt as to what person is entitled to the accounting and delivery of the escrowed property, or if conflicting demands have been made upon the licensee for the escrowed property, which property she or

he still maintains in her or his escrow or trust account, the licensee shall promptly notify the commission of such doubts or conflicting demands and shall promptly:

a. Request that the commission issue an escrow disbursement order determining who is entitled to the escrowed property;

b. With the consent of all parties, submit the matter to arbitration;

c. By interpleader or otherwise, seek adjudication of the matter by a court; or

d. With the written consent of all parties, submit the matter to mediation. The department may conduct mediation or may contract with public or private entities for mediation services. However, the mediation process must be successfully completed within 90 days following the last demand or the licensee shall promptly employ one of the other escape procedures contained in this section. Payment for mediation will be as agreed to in writing by the parties. The department may adopt rules to implement this section.

If the licensee promptly employs one of the escape procedures contained herein and abides by the order or judgment resulting therefrom, no administrative complaint may be filed against the licensee for failure to account for, deliver, or maintain the escrowed property. Under certain circumstances, which the commission shall set forth by rule, a licensee may disburse property from the licensee's escrow account without notifying the commission or employing one of the procedures listed in sub-subparagraphs a.-d. If the buyer of a residential condominium unit delivers to a licensee written notice of the buyer's intent to cancel the contract for sale and purchase, as authorized by s. 718.503, or if the buyer of real property in good faith

> fails to satisfy the terms in the financing clause of a contract for sale and purchase, the licensee may return the escrowed property to the purchaser without notifying the commission or initiating any of the procedures listed in sub-subparagraphs a.-d.
>
> 2. Has failed to deposit money in an escrow account when the licensee is the purchaser of real estate under a contract where the contract requires the purchaser to place deposit money in an escrow account to be applied to the purchase price if the sale is consummated. . . .

23. Chapter 83, Florida Statutes (2003), the Landlord-Tenant Act, sets forth a procedure for handling deposits in landlord-tenant transactions. It requires a landlord to write a letter to the tenant in a form set forth in the statute, advising them of any claims against the deposit. Subsection 83.49(3)(d), Florida Statutes (2003), further specifically provides:

> (d) Compliance with this section by an individual or business entity authorized to conduct business in this state, including Florida-licensed real estate brokers and sales associates, shall constitute compliance with all other relevant Florida Statutes pertaining to security deposits held pursuant to a rental agreement or other landlord-tenant relationship. Enforcement personnel shall look solely to this section to determine compliance. This section prevails over any conflicting provisions in chapter 475 and in other sections of the Florida Statutes, and shall operate to permit licensed real estate brokers to disburse security deposits and deposit money without having to comply with the notice and

settlement procedures contained in s. 475.25(1)(d).

24. The language of Section 83.49, Florida Statutes (2003), is not the model of clarity with regard to whether it applies to pre-lease deposits. It is clear that its provisions preempt any other contrary rental agreement or other landlord-tenant relationship. Further, the FREC's earlier interpretation would indicate that this section does apply to pre-rental deposits.

25. However, Petitioner now argues that since a lease was never signed, there was no landlord and tenant relationship; and thus, this provision of the Landlord-Tenant Act would not apply. Certainly, the FREC is entitled to change its interpretation of the statute that it administers.

26. A party who seeks an exemption to a statute bears the burden of proving those facts that would bring him within the defined exception. Armstrong v. Ormond in the Pines, 734 So. 2d 596, 599 (Fla. 1st DCA 1999). Respondents take the position that since the application clearly evidences the parties' intent to create a landlord and tenant relationship, the fact that the lease was not executed does not change the nature of the transaction in question. It was the first step in creating a landlord and tenant relationship.

27. In addition, Respondent seeks to invoke estoppel against a government entity and relies on Council Brothers v. City of Tallahassee, 634 So. 2d 264 (Fla. 1st DCA 1994), wherein the First District Court of Appeal held:

> The elements which must be present for application of estoppel are: "(1) a representation as to a material fact that is contrary to a later-asserted position; (2) reliance on that representation; and (3) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon . . ." As a general rule, estoppel will not apply to mistaken statements of the law, . . . but may be applied to erroneous representations of fact . . . Equitable estoppel will apply against a governmental entity "only in rare instances and under exceptional circumstances . . ." In proper circumstances, the doctrine "may be invoked against a municipality as if it were an individual . . ." The reasonable expectation of every citizen "that he will be dealt with fairly by his government," can form the basis for application of equitable estoppel against a government entity . . . One seeking to invoke the doctrine of estoppel against the government first must establish the usual elements of estoppel, and then must demonstrate the existence of affirmative conduct by the government which goes beyond mere negligence, must show that the governmental conduct will cause serious injustice, and must show that the application of estoppel will not unduly harm the public interest . . . .

Id. at 266 (citations omitted). The court applied the principle of estoppel to the appellee because its official told the appellant, a building contractor, that it was exempt from system

charges on future construction and the appellant detrimentally relied upon that representation. Id. at 267. Later, the appellee changed its position and sought to impose the charges. Id. The court determined that the elements of estoppel were met, and the appellee was estopped from imposing the charges. Id.

28. Respondents also rely on Lamar Advertising v. Department of Transportation, 559 So. 2d 240 (Fla. 1st DCA 1990). In this case, the appellee notified appellant that its sign permit, issued three years earlier, would be revoked because the sign violated Subsection 479.11(4), Florida Statutes (2003), prohibiting signs within 100 feet of a public park. Id. at 241. The evidence showed that the appellee's method of measuring had changed between 1985 and 1988. Id. at 243. The court found that the fact scenario of the case brought:

> [I]s within the purview of the principle of [equitable estoppel] law enunciated in Tri-State Systems, Inc. v. Department of Transportation, 500 So. 2d 182 (Fla. 1st DCA 1986), and cases cited therein. That is, "[a]lthough DOT may revoke a permit for the reasons stated in the statute, it may not do so because DOT's interpretation of that statute has subsequently changed." 500 So. 2d at 183.

Id.

29. In the cases above, the government was estopped, as to the appellant, from changing its interpretation or application

of a statute. See Council Brothers, 634 So. 2d at 265 (where the record indicated confusion both in the construction industry generally and in various departments of the appellee, as to the applicability under Section 235.26, Florida Statutes (2003), of systems charges to projects having an educational purpose). Additionally, as in the cases above, each of the elements of estoppel is present.

30. The FREC, by earlier taking the position that brokers need not comply with the notice and settlement provisions of Subsection 467.25(1)(d), Florida Statutes (2003), made a material statement of fact that is contrary to its current position. Respondent Musashe, in reliance on this statement of fact, did not follow the provisions in Section 475.25, Florida Statutes (2003). He instead complied with the Landlord-Tenant Act related to deposits. Clearly, it would be unjust to penalize Respondent Musashe for conduct when he had been told by the FREC that such conduct was proper. Finally, because the FREC seeks to penalize Respondent Musashe for prior conduct, application of estoppel in this case will not cause public harm.

31. The Amended Administrative Complaint sets forth descriptions of three separate, but similar, rental deposit transactions involving three different prospective tenants. Each one of those factual scenarios is followed by four statutory charges against the Jander Group. The four charges,

which are repeated six times (three for each Respondent), are as follows:

A. Failing to account and deliver funds in violation of Subsection 475.25(1)(d)1., Florida Statutes (2003).

B. Failure to provide written notification to the FREC within 15 business days of the party's last demand in violation of Florida Administrative Code Rule 61J2-10.32(1)(a) and, therefore, in violation of Subsection 475.25(1)(e), Florida Statutes (2003).

C. Failure to institute use of the settlement procedures as set forth in Subsection 475.25(1)(d)1., Florida Statutes (2003), within 30 business days after the last demand in violation of Florida Administrative Code Rule 61J2-10.032(1)(a) and, therefore, in violation of Subsection 475.25(1)(e), Florida Statutes (2003).

D. Fraud, misrepresentation, concealment, false pretenses, and dishonest dealings by trick, scheme or devise, culpable negligence, or breach of trust in any business transaction in violation of Subsection 475.25(1)(b), Florida Statutes (2003).

32. For the reasons set forth above, Respondents cannot be disciplined for failing to notify the FREC of the rental deposit

disputes or for failing to institute one of the settlement procedures, as charged in the Amended Administrative Complaint in Counts 2, 3, 6, 7, 10, 11, and 14. Respondents complied with the provisions of the Landlord-Tenant Act, which specifically preempt compliance with the notice and settlement procedures set forth in Subsection 475.25(1)(d), Florida Statutes (2003). Further, the FREC is estopped from taking action for conduct, which it earlier condoned.

33. With respect to Counts 1, 5, 9, and 13 (failure to account and deliver), Respondents likewise cannot be found guilty. The evidence failed to show any failure to account or deliver funds, and there was no allegation in the factual recitation of the Amended Administrative Complaint that either of Respondents failed to properly account or deliver funds. A "failure to account" violation requires an allegation and proof that the person making the demand was, in fact, entitled to deliver funds. Golub v. Department of Professional Regulation, 450 So. 2d 229 (Fla. 5th DCA 1984). There was no such allegation, nor proof offered. And further, in order to find that a real estate broker has violated this statute, an intentional act must be proven before a violation can be found. Munch v. Department of Professional Regulation, Division of Real Estate, 592 So. 2d 1136 (Fla. 1st DCA 1992). The evidence does

not establish by clear and convincing evidence that Respondents committed an intentional act in violation of the statutes.

34. With respect to the remaining counts, Counts 9 through 24, all charging Respondents with fraud, misrepresentation, concealment, false promises, false pretenses, and dishonest dealings by trick, scheme or device, culpable negligence, or breach of trust in any business transaction, the allegations, as well as the proof, cannot support a finding of such violations. There were no factual allegations in the Amended Administrative Complaint alleging such misconduct, and the evidence submitted at hearing did not show any such violations.

RECOMMENDATION

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

RECOMMENDED that the Department of Business and Professional Regulation, Division of Real Estate, enter a final order dismissing the Amended Administrative Complaint filed against Respondents Nicholas Anthony Musashe and The Jander Group, Inc.

DONE AND ENTERED this 11th day of August, 2004, in Tallahassee, Leon County, Florida.

DANIEL M. KILBRIDE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of August, 2004.

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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.