

STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION
FLORIDA REAL ESTATE COMMISSION

DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION,
DIVISION OF REAL ESTATE

Petitioner,

vs.

NICHOLAS ANTHONY MUSASHE AND
THE JANDER GROUP, INC.,

Respondents.

Final Order No. BPR-2005-00081 Date: **1-7-05**
FILED

Department of Business and Professional Regulation
AGENCY CLERK

Sarah Wachman, Agency Clerk

By: Sarah Wachman

DOAH Case No. 04-1444
DBPR Case No. 2002006341;
2002007304; 2002014398;
2002014399; 2002011376;
2002011377

FINAL ORDER

THIS CAUSE came on to be heard before the Florida Real Estate Commission (FREC or Commission) at a regularly scheduled meeting held in Orlando, Florida, on October 19, 2004. At that meeting, the FREC reviewed the Recommended Order entered by ALJ Daniel M. Kilbride on July 2, 2004. The FREC has addressed the Exceptions to that Order filed by the Petitioner as well as the Responses thereto filed by the Respondents.¹

¹The FREC has reviewed the entire record and heard arguments of counsel.

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 Respondents: William M. Furlow, Esquire
Akerman Senterfitt
106 East College Avenue, Suite 1200
Tallahassee, Florida 32301

RULINGS ON THE EXCEPTIONS

The Commission REJECTS Exceptions # 1-3. Resolution of issues of disputed material fact are left to the Administrative Law Judge and the ALJ's findings must be sustained if supported by competent substantial evidence. In the instant case, while the Commission may have come to different conclusions if it were the trier of fact, it must defer to the findings of the ALJ since they are based upon sufficient record evidence. Thus, the Commission is bound by the ALJ's findings of fact and the ALJ's determination (COL #s 27-30, 32) based upon those facts that sufficient evidence existed to work an estoppel upon the Department and the Commission. Such a determination precludes the finding a violation even though, as set forth below, it appears that Respondents did not comply with the provisions of Section 475.25(1)(d), Florida Statutes, when they otherwise should have done so.

The Commission ACCEPTS Exception #4 and therefore rejects the first sentence of COL # 24 and the first two sentences of COL # 29.

Initially, as a prerequisite to this finding, the Commission determines that it has substantive jurisdiction over the provisions of Section 83.49, Florida Statutes. This finding is necessary under the provisions of Section 120.57(1)(l), Florida Statutes, in order for the

Commission to consider Petitioner's Exception to the ALJ's Conclusions of Law, G.E.L. Corp. v. Department of Environmental Protection, 875 So.2d 1257(Fla. 5th DCA 2004).

The Commission possesses substantive jurisdiction due to the fact that Section 83.49(3)(d), Florida Statutes, provides that compliance with that Section permits a licensee to act in a manner that would otherwise not be permitted under Chapter 475 and specifically to disburse funds without having to comply with the notice and settlement provisions of Section 475.25(1)(d), Florida Statutes. Thus, at least to the extent necessary to determine whether the provisions of Section 83.49, Florida Statutes, apply to a particular fact situation and have been complied with, the Commission possesses substantive jurisdiction over that Section. This is so insofar as the Commission must determine if those provisions apply and are complied since only under those circumstances is a licensee not subject to the provisions of Chapter 475 and Section 475.25(1)(d), Florida Statutes.

Here, for the reasons set forth in Exception #4, the Commission determines that under these facts Respondents were responsible for complying with the provisions of Section 475.25(1)(d), Florida Statutes, insofar as the alternative procedure set out in Section 83.49, Florida Statutes, does not apply to deposits that are made by a person who is not entitled to occupy the property as part of an application that is not a rental agreement. However, insofar as the ALJ found that previous actions of the Commission and Department induced Respondents reliance upon a policy to the contrary, no discipline can be imposed upon Respondents' licenses.

With the exception of the foregoing, the Findings of Fact, Conclusions of Law, and Recommended Disposition of the ALJ are ACCEPTED by the Commission and those findings, conclusions, and disposition are adopted as the decision of the Commission.

WHEREFORE, it is hereby ORDERED and ADJUDGED that the charges against Respondents are hereby DISMISSED.

DONE and ORDERED this 19 day of October, 2004, by the Florida

Division of Real Estate.



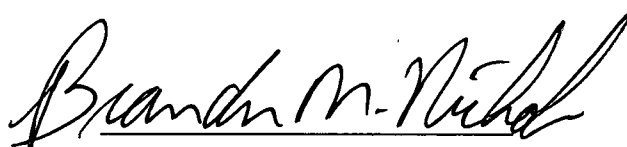
JUANA WATKINS
ACTING EXECUTIVE DIRECTOR

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES, REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been provided by U.S. Mail to William M. Furlow, Esquire, Akerman Senterfitt, 106 East College Avenue, Suite 1200, Tallahassee, FL 32301 and Jason W. Holtz, Senior Attorney, Department of Business and Professional Regulation, Division of Real Estate, 400 West Robinson Street, Suite 801, North Tower, Orlando, Florida 32801-1757, on this 7th day of January, 2004⁵.



Brandon M. Nichol