

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HILDA BELL AND SHARMIC REALTY)
PROPERTIES, INC.,)
)
 Petitioners,)
)
vs.) Case No. 05-4200F
)
DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
 Respondent.)
_____)

FINAL ORDER

Pursuant to notice, a formal hearing was held in this case on April 21 and November 6, 2006, by video teleconference with connecting sites in Miami, Lauderdale Lakes, and Tallahassee, Florida, before Errol H. Powell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: George G. Lewis, Esquire
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950 South Pine Island Road, Suite 150
Plantation, Florida 33324

For Respondent: James P. Harwood, Esquire
Department of Business and
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STATEMENT OF THE ISSUE

The issue for determination is whether Petitioner should be awarded attorney's fees and costs, pursuant to Section 57.111, Florida Statutes (2005), and, if so, in what amount.

PRELIMINARY STATEMENT

On November 18, 2005, a Motion for Entry of Final Order and For Attorney's Fees and Costs, hereinafter Motion, was filed on behalf of Hilda Bell and Sharmic Realty Properties, Inc., hereinafter Ms. Bell and Sharmic Realty, by their counsel, Imani Shele, Esquire, together with an affidavit of fees and costs by Attorney Shele and a detailed account of costs incurred and of fee for legal services rendered. The Motion was filed pursuant to Section 57.111, Florida Statutes (2005), and requested \$30,961.35 in attorney's fees and \$617.07 in costs, totaling \$31,578.42. The Department of Business and Professional Regulation, Division of Real Estate, hereinafter, Division of Real Estate, filed a motion for extension of time in which to respond, which was granted. The Division of Real Estate filed a response, among other things, admitting that Ms. Bell and Sharmic Realty were the prevailing parties and that the Division of Real Estate was not a nominal party; denying that Sharmic Realty was a small business entity; stating that the actions of the Division of Real Estate were substantially justified, that an essential witness was not available for the final hearing,

and that, therefore, an award of attorney's fees and costs would be unjust; and requesting an evidentiary hearing.¹ Subsequently, Ms. Bell and Sharmic Realty filed a correction of costs incurred.

The final hearing in this matter was scheduled for April 21, 2006. At the hearing, Attorney Shele failed to appear. Ms. Bell, who appeared at the hearing, had no knowledge of Attorney Shele's whereabouts and, even though Ms. Bell had attempted to contact Attorney Shele prior to the hearing, had had no contact with her. The Division of Real Estate also had had no contact with Attorney Shele, even though it had attempted to contact her. The undersigned continued the hearing and, by order, provided an opportunity for Attorney Shele to explain the circumstances surrounding her non-appearance at the final hearing. Attorney Shele failed to respond. However, a notice of appearance was filed by George G. Lewis, Esquire, George G. Lewis, P.A., on behalf of Ms. Bell and Sharmic Realty, and Attorney Lewis requested that he be permitted to represent Ms. Bell and Sharmic Realty in these proceedings; his request was granted by the undersigned.

The final hearing was re-scheduled for August 24, 2006. The Division of Real Estate requested a continuance, which was granted. After receiving suggested dates from the parties, the final hearing was re-scheduled for November 6, 2006.

At hearing, neither party called any witnesses to testify, instead relying upon the exhibits entered into evidence.

Ms. Bell and Sharmic Realty entered 16 exhibits (Petitioner's Exhibits marked A through P) into evidence; and the Division of Real Estate entered two exhibits (Respondent's Exhibits numbered 1 and 2, which have been re-marked A and B) into evidence.²

Further, both parties chose to make argument at hearing, which included referencing their respective exhibits.

A transcript of the hearing was ordered. At the request of the parties, the time for filing post-hearing submissions was set for more than ten days following the filing of the transcript. The Transcript, consisting of one volume, was filed on November 16, 2006. Both parties timely filed post-hearing submissions, which were considered in the preparation of this Final Order.

FINDINGS OF FACT

1. By Final Order filed November 18, 2005, in Department of Business and Professional Regulation, Division of Real Estate vs. Hilda Bell and Sharmic Realty Properties, Inc., Case Nos. 2001-80091 and 2001-80092, DOAH Case No. 04-4470, the Florida Real Estate Commission, hereinafter Commission, approved and adopted the recommended findings of fact and conclusions of law issued by the undersigned as its own and ordered that the ruling of the undersigned was accepted as the ruling of the Commission.³

By Recommended Order issued August 9, 2005, the undersigned recommended to the Commission that a final order be entered finding that Ms. Bell and Sharmic Realty did not commit the violations alleged in the Administrative Complaint and dismissing the Administrative Complaint.⁴ Hence, the ruling of the Commission was the dismissal of the Administrative Complaint filed against Ms. Bell and Sharmic Realty.

2. No dispute exists that the Division of Real Estate was the state agency that initiated the administrative action against Ms. Bell and Sharmic Realty conducted in a Chapter 120, Florida Statutes, proceeding.

3. The administrative action against Ms. Bell and Sharmic Realty was initiated by the Division of Real Estate for alleged violations of Section 475.25, Florida Statutes (2000).⁵

4. No dispute exists that the Division of Real Estate was not a nominal party in the administrative action.

5. No dispute exists that Ms. Bell and Sharmic Realty were prevailing parties in the administrative action.

6. Sharmic Realty is incorporated in the State of Florida.

7. Ms. Bell is the sole officer and director of Sharmic Realty.

8. The domicile of Ms. Bell is the State of Florida.

9. The principal office of Sharmic Realty is in the State of Florida, being located in Lauderhill, Florida.

10. At the initiation of the administrative action, the evidence demonstrates that Sharmic Realty employed three agents, which included Ms. Bell.

11. However, the evidence was insufficient to demonstrate the total number of employees of Sharmic Realty at the time of the initiation of the administrative action.

12. No evidence was presented to demonstrate the net worth of Sharmic Realty at the time of the initiation of the administrative action.

13. The attorney, who represented Ms. Bell and Sharmic Realty in the administrative action, filed an affidavit of attorney's fees and costs incurred, with an itemized account of such attorney's fees and costs. The attorney's fees incurred total \$30,961.53, and the costs incurred total \$617.07.

14. At no time did the Division of Real Estate contest or dispute the attorney's fees or costs incurred by Ms. Bell and Sharmic Realty or the reasonableness thereof.

15. Prior to filing an administrative complaint against Ms. Bell and Sharmic Realty, an investigation was performed by the Division of Real Estate, which was reduced to writing.⁶ Among other things, the investigative file contained the following: (a) documents from the file of Sharmic Realty, showing deposit monies paid by the Buyer of realty for whom Sharmic Realty was the agent; (b) copies of letters, provided by

the Complainants, from the agent of the Sellers of the realty to Sharmic Realty making a demand for the deposit monies on the ground that the Buyer failed to comply with the terms of the contract for the sell of the realty; (c) a letter from the Complainants that indicated that the Seller's agent provided the letters in (b) above to them; (d) a summary statement from the investigator that Ms. Bell admitted to him, during his interview of her, that she had not notified the Division of Real Estate of conflicting demands on the deposit monies and a good faith doubt as to who should receive the deposit monies; and (e) a document showing, and a confirmation from Ms. Bell, that Sharmic Realty had returned the Buyer's deposit to him.

16. The investigative file was submitted to a Probable Cause Panel of the Division of Real Estate. The Probable Cause Panel reviewed the "complete file" in the matter involving Ms. Bell and Sharmic Realty and heard from counsel of the Division of Real Estate.⁷ The investigative file supported a commission of the alleged violations by Ms. Bell and Sharmic Realty. The Probable Cause Panel found that probable cause existed to file an administrative complaint against Ms. Bell and Sharmic Realty.

17. The evidence demonstrates and a finding is made that the decision made by the Probable Cause Panel was reasonably based on fact and law and that, therefore, the Division of Real

Estate had a reasonable basis in law and fact to proceed with an administrative action against Ms. Bell and Shamric Realty.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction of these proceedings and the parties thereto pursuant to Section 57.111, Florida Statutes (2006).

19. Section 57.111, Florida Statutes (2005), provides in pertinent part:

(1) This section may be cited as the "Florida Equal Access to Justice Act."

(2) The Legislature finds that certain persons may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense of civil actions and administrative proceedings. Because of the greater resources of the state, the standard for an award of attorney's fees and costs against the state should be different from the standard for an award against a private litigant. The purpose of this section is to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in certain situations an award of attorney's fees and costs against the state.

(3) As used in this section:
* * *

(c) A small business party is a "prevailing small business party" when:

1. A final judgment or order has been entered in favor of the small business party and such judgment or order has not been reversed on appeal or the time for seeking judicial review of the judgment or order has expired;

* * *

(d) The term "small business party" means:

- 1.a. A sole proprietor of an unincorporated business, including a professional practice, whose principal office is in this state, who is domiciled in this state, and whose business or professional practice has, at the time of the action is initiated by a state agency, not more than 25 full-time employees or a net worth of not more than \$2 million, including both personal and business investments; or
- b. A partnership or corporation, including a professional practice, which has its principal office in this state and has at the time the action is initiated by a state agency not more than 25 full-time employees or a net worth of not more than \$2 million; or

2. Either small business party as defined in subparagraph 1., without regard to the number of its employees or its net worth, in any action under s. 72.011 or in any administrative proceeding under that section to contest the legality of any assessment of tax imposed for the sale or use of services as provided in chapter 212, or interest thereon, or penalty therefor.

(e) A proceeding is "substantially justified" if it had a reasonable basis in law and fact at the time it was initiated by a state agency.

(4) (a) Unless otherwise provided by law, an award of attorney's fees and costs shall be made to a prevailing small business party in any adjudicatory proceeding or administrative proceeding pursuant to chapter 120 initiated by a state agency, unless the actions of the agency were substantially justified or special circumstances exist which would make the award unjust.

(b) 1. To apply for an award under this section, the attorney for the prevailing small business party must submit an itemized affidavit to the court which first conducted the adversarial proceeding in the underlying action, or to the Division of Administrative Hearings which shall assign an administrative law judge, in the case of a proceeding pursuant to chapter 120, which affidavit shall reveal the nature and extent of the services rendered by the attorney as well as the costs incurred in preparations, motions, hearings, and appeals in the proceeding.

* * *

(d) The court, or the administrative law judge in the case of a proceeding under chapter 120, shall promptly conduct an evidentiary hearing on the application for an award of attorney's fees and shall issue a judgment, or a final order in the case of an administrative law judge. The final order of an administrative law judge is reviewable in accordance with the provisions of s. 120.68. If the court affirms the award of attorney's fees and costs in whole or in part, it may, in its discretion, award additional attorney's fees and costs for the appeal.

1. No award of attorney's fees and costs shall be made in any case in which the state agency was a nominal party.

2. No award of attorney's fees and costs for an action initiated by a state agency shall exceed \$ 50,000.

20. The pleading filed by the attorney for Ms. Bell and Sharmic Realty complied with the requirements of applying for an award of attorney's fees and costs under Section 57.111, Florida Statutes.⁸ The Division of Real Estate did not contest or

dispute the attorney's fees and costs or the reasonableness thereof.

21. No dispute exists that the Division of Real Estate was the initiating state agency.

22. In the case at hand, as to the burden of proof, Ms. Bell and Sharmic Realty must prove that they fall within the definition of a small business party and are prevailing parties; then the burden shifts to the Division of Real Estate to show that its action in initiating the administrative action was substantially justified. Gentele v. Department of Professional Regulation, Board of Optometry, 513 So. 2d 672 (Fla. 1st DCA 1987); Helmy v. Department of Business and Professional Regulation, 707 So. 2d 366, 368 (Fla. 4th DCA 1998); Albert v. Department of Health, Board of Dentistry, 763 So. 2d 1130 (Fla. 4th DCA 1999), on motion for rehearing, 763 So. 2d 1130 (Fla. 4th DCA 2000).

23. No dispute exists regarding prevailing parties.

24. As to a small business party, the evidence demonstrates that Ms. Bell was the sole owner of Sharmic Realty, that Sharmic Realty was incorporated, and that Sharmic Realty employed three agents, which included Ms. Bell. However, the evidence fails to demonstrate that, at the time of the initiation of the administrative action, Ms. Bell or Sharmic

Realty had no more than 25 full-time employees or a net worth of not more than \$2 million.

25. Even assuming that the requirement of a small business party was met, the Division of Real Estate demonstrates that, at the time it initiated the administrative action, the administrative action was substantially justified. The Probable Cause Panel of the Division of Real Estate decided to proceed with an administrative action against Ms. Bell and Sharmic Realty. In making its decision, the Probable Cause Panel considered, among other things, the investigative file.

26. In the case at hand, the undersigned considered the investigative file reviewed by the Probable Cause Panel. Department of Professional Regulation, Division of Real Estate v. Toledo Realty, Inc., 549 So. 2d 715 (Fla. 1st DCA 1989) (proper for the presiding officer in a Section 57.111, Florida Statutes, proceeding to review the investigative report to determine the issue of substantial justification in initiating the disciplinary complaint). The evidence demonstrates that the Probable Cause Panel's decision to proceed with the administrative action was based on the statements of the witnesses, including Ms. Bell, and the documents contained in the investigative file—all supporting a commission of the alleged violations. Further, an assumption is made that the Probable Cause Panel made a determination that the witnesses

were credible. A finding of fact was made that the Probable Cause Panel's decision to proceed with an administrative complaint was reasonable.

27. In the case at hand, the Division of Real Estate's decision, at the initiation of the administrative action, to proceed with the administrative action against Ms. Bell and Sharmic Realty had a reasonable basis in law and fact and was, therefore, substantially justified. § 57.111(4)(a), Fla. Stat. See Gentele v. Department of Professional Regulation, Board of Optometry, 513 So. 2d 672, 673 (Fla. 1st DCA 1987) (in an action for attorney's fees and costs, pursuant to Section 57.111, Florida Statutes, where the agency's initiation of an administrative action against a licensee was based on a decision by the agency's probable cause panel to prosecute, whose decision essentially turned on the credibility assessment of the witnesses, including the investigator, which was not itself unreasonable, the agency's decision, at the initiation, had a reasonable basis in law and fact and was, therefore, substantially justified).

CONCLUSION

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

ORDERED that the motion for attorney's fees and costs filed by Hilda Bell and Sharmic Realty Properties, Inc. is denied.

DONE AND ORDERED this 22nd day of December, 2006, in
Tallahassee, Leon County, Florida.

Errol H. Powell

ERROL H. POWELL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of December, 2006.

ENDNOTES

^{1/} The Division of Real Estate had filed, prior to its response, a motion to dismiss. Based upon the response filed by the Division of Real Estate, this Administrative Law Judge considered the motion to dismiss withdrawn and, therefore, found it unnecessary to rule upon the motion to dismiss. Furthermore, Respondent did not advance the motion to dismiss at hearing.

^{2/} Both parties pre-filed their exhibits.

^{3/} The Final Order is a part of the record of the case at hand.

^{4/} The Recommended Order is a part of the record of the case at hand.

^{5/} See the Recommended Order.

^{6/} A certified copy of the investigative file was admitted into evidence.

^{7/} A certified copy of the transcript of the Probable Cause Meeting, regarding Ms. Bell and Sharmic Realty, was admitted into evidence.

^{8/} The Division of Real Estate did not challenge the pleading on these grounds.

COPIES FURNISHED:

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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 the original Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.