

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) Case No. 09-0207PL
)
CHRISTINE A. SAXER,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on February 25, 2009, in Clearwater, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Patrick J. Cunningham, Esquire
Department of Business and
Professional Regulation
400 West Robinson Street, Suite N-801
Orlando, Florida 32801

For Respondent: Alfred W. Torrence, Jr., Esquire
Thorton, Torrence, P.A.
6709 Ridge Road, Suite 106
Port Richey, Florida 34668

STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner, a licensed Florida real estate associate, violated provisions of

Subsections 475.278(2) and 475.25(1)(q), Florida Statutes (2007),¹ and, if so, what discipline should be imposed.

PRELIMINARY STATEMENT

On November 18, 2008, Petitioner, Florida Department of Business and Professional Regulation, Division of Real Estate (the Department), issued an Administrative Complaint against Respondent, Christine A. Saxer. The complaint alleges violations of provisions within the statutes and rules governing real estate sales associates.

Saxer timely filed a request for an administrative hearing, which was then forwarded to the Division of Administrative Hearings (DOAH) on January 14, 2009. A final hearing was held at the place and date set forth above. At the final hearing, the Department called two witnesses: David Guerdan, investigation supervisor for the Department; and Christine Ausburn, purchaser of the subject property. The Department offered the following exhibits into evidence, each of which was admitted: (1) The purchase and sales contract; (2) A roof repair estimate; (3) Saxer's real estate licensure history; and (4) The Investigative Report. Saxer testified on her own behalf and also called James A. Staub, a licensed real estate agent. Saxer offered the following exhibits into evidence, each of which was admitted: (1) The building permit for the roof

repair; (3) The property disclosure; and (4) The closing statement.

The parties advised the undersigned that a transcript would be ordered of the final hearing. They were given ten days from the date the transcript was filed at DOAH to submit proposed recommended orders. The Transcript was filed at DOAH on March 4, 2009. Each party submitted a Proposed Recommended Order, and they were given due consideration in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Department is the state agency responsible for, inter alia, licensing and monitoring real estate sales associates within the state. Its headquarters is in Tallahassee, Florida. The Department is charged with the responsibility and duty to prosecute administrative complaints concerning real estate sales associates.

2. Saxer is a licensed real estate sales associate, holding License No. 3110487. Saxer is employed by Century 21 Palm Realty of Pasco, Inc., in New Port Richey, Florida.

3. At all times relevant hereto, Saxer was the listing agent for a property located at 3831 Sail Drive, New Port Richey, Florida (hereinafter referred to as the "Subject Property"). The Subject Property is an approximately 40-year-old house that had not been inhabited for some time. The

owners, Gary and Albert Osborne (referred to herein as the Sellers), had inherited the house, but had never resided in it. The Sellers were Saxer's client in the sale transaction concerning the Subject Property.

4. Leon and Christine Ausburn (the Buyers) entered into a Residential Sale and Purchase Contract (the Contract) to purchase the Subject Property from the Sellers. Saxer negotiated the contract between the Buyers and the Sellers. The Contract was signed by the Buyers on June 8, 2007, and by the Sellers on June 12, 2007. The Contract called for a closing on or before June 29, 2007.

5. On April 27, 2007, when the Sellers listed the Subject Property with Saxer's employer, the Sellers confirmed that they knew of no roof leaks or defects. The Sellers had inherited the property and were not living in it at that time. The Subject Property was not inhabited at any time during the pendency of the Contract.

6. At some time after signing the Contract, the Buyers did an on-site inspection of the Subject Property. They noticed several stains on the ceilings around the house and inquired of their real estate sales agent about the stains. They received assurance from their agent that the property would be inspected to make sure there were no leaks or damages. The Buyers did not

follow up with their agent, nor did they ever see an inspection report indicating his findings.

7. On or about June 14, 2007, the Sellers called Saxer to say there appeared to be a roof leak at the Subject Property. They asked Saxer to take care of having the roof leak repaired. Saxer obtained an estimate from World Class Roofing Services, Inc., for \$725 to repair the roof. Saxer contracted with the roofing company to make the necessary repair.

8. A ten-foot by ten-foot section of the Subject Property's mansard roof was replaced by the roofing contractor.² The leak was in a smaller section, but more of the roof was replaced to insure against further leaks. None of the evidence elicited at final hearing gave any indication of what part of the roof was repaired, i.e., whether it was over the living room, a bedroom, or some other area of the house. The repair estimate describes it as being over the dining room, but no evidence was offered as to where the dining room was in relation to the living room, garage, or other parts of the house.

9. The Contract had a purchase price of one hundred twenty-seven thousand and five hundred dollars (\$127,500). Paragraph 5 of the Contract required the Sellers to pay for any improvements up to 1.5 percent of the purchase price (i.e., up to an amount of \$1,912.50). The Contract also describes the

sale and purchase as an "As Is" sale for wood-destroying organism damages.

10. Inasmuch as the cost of the roof repair was less than the 1.5 percent threshold in the Contract, Saxer did not believe she needed to disclose the repair to the Buyers or Buyers' agent. She did not deem it a "material" defect affecting the value of the Subject Property.

11. The closing was held on June 29, 2007. At the closing, a U.S. Department of Housing and Urban Development closing statement was used to provide the statement of actual settlement costs for the transaction. The Buyers and Sellers were both provided copies of the closing statement and signed an acknowledgement of receipt. The closing statement indicates at Line Item 1314, "Roof repairs paid by seller to World Class Roofing Services, Inc.," and indicates the sum of \$725.

12. Christine Ausburn, one of the Buyers, is a licensed mortgage broker. She testified that she did review the closing statement, but did not notice the line item concerning a roof repair, because she only looked at the Buyers' side of the statement.

13. On that same day, after finalizing the closing, the Buyers went to visit the Subject Property. Upon entering the home, they noticed a puddle of water on the living room floor and a flooded garage. The water had come, it appears, from a

leaking pipe in the ceiling over the garage area. There is no evidence that the water in the garage was caused by or related to the roof repair done pursuant to Saxer's direction.

14. After seeing the water in the garage, the Buyers notified Saxer that they were very upset. Saxer contacted the entity that had performed the roof repair and sent them to the Subject Property. Finding no one home, the roofers left a message and contact information so that they could make any repairs that related to their earlier work which was guaranteed. It is not known whether the Buyers followed up with the roofers or not.

15. The Buyers also determined after closing that the air conditioning system for the Subject Property was not working properly. There is no indication from the record that Saxer or the Sellers were aware of that problem prior to closing.

16. The Buyers had visited the Subject Property prior to closing, but did not have an inspection done to determine potential problems or defects. They had witnessed a number of water stains on the ceilings, but presumed them to be old in nature. The Buyers were told by their own real estate agent that he would "have his people check it out." The Buyers do not know if their agent ever did so, nor did they ever see an inspection report on the Subject Property.

17. The Buyers are completely dissatisfied with the Subject Property due to many reasons. However, there is no indication that Saxer was aware of any material problem extant at the time of closing. Saxer did not consider the minor roof repair a material defect in the Subject Property.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes (2008).

19. Section 475.25, Florida Statutes, is entitled "Discipline" and states:

(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 \$5,000 for each count or separate offense; and may issue a reprimand, and any or all of the foregoing, if it finds that the licensee, registrant, permittee, or applicant:

* * *

(q) Has violated any provision of s. 475.2755 or s. 475.278, including the duties owed under those sections.

20. Section 475.278, Florida Statutes, entitled Authorized brokerage relationships; presumption of transaction brokerage; required disclosures, states:

(1) BROKERAGE RELATIONSHIPS.--

(a) Authorized brokerage relationships.-- A real estate licensee in this state may enter into a brokerage relationship as either a transaction broker or as a single agent with potential buyers and sellers. A real estate licensee may not operate as a disclosed or nondisclosed dual agent. As used in this section, the term "dual agent" means a broker who represents as a fiduciary both the prospective buyer and the prospective seller in a real estate transaction. This part does not prevent a licensee from changing from one brokerage relationship to the other as long as the buyer or the seller, or both, gives consent as required by subparagraph (3)(c)2. before the change and the appropriate disclosure of duties as provided in this part is made to the buyer or seller. This part does not require a customer to enter into a brokerage relationship with any real estate licensee.

(b) Presumption of transaction brokerage.--It shall be presumed that all licensees are operating as transaction brokers unless a single agent or no brokerage relationship is established, in writing, with a customer.

(2) TRANSACTION BROKER RELATIONSHIP.--

(a) Transaction broker-duties of limited representation.--A transaction broker provides a limited form of representation to a buyer, a seller, or both in a real estate transaction but does not represent either in a fiduciary capacity or as a single agent. The duties of the real estate licensee in

this limited form of representation include the following:

1. Dealing honestly and fairly;
2. Accounting for all funds;
3. Using skill, care, and diligence in the transaction;
4. Disclosing all known facts that materially affect the value of residential real property and are not readily observable to the buyer;
5. Presenting all offers and counteroffers in a timely manner, unless a party has previously directed the licensee otherwise in writing;
6. Limited confidentiality, unless waived in writing by a party. This limited confidentiality will prevent disclosure that the seller will accept a price less than the asking or listed price, that the buyer will pay a price greater than the price submitted in a written offer, of the motivation of any party for selling or buying property, that a seller or buyer will agree to financing terms other than those offered, or of any other information requested by a party to remain confidential; and
7. Any additional duties that are mutually agreed to with a party.

21. Saxer had a duty to act honestly and fairly and to disclose all known facts that materially affected the value of the Subject Property. See Johnson v. Davis, 480 So. 2d 625 (Fla. 1985). The caveat to that holding is that disclosure is required when a material defect is hidden or is not obvious.

22. In the present case, there has been no showing that the roof repair was hidden or not obvious to the Buyers. No evidence was presented as to whether the Buyers or their agent looked at the roof (either before or after the roof repair was disclosed in the closing statement). Further, the Buyers did not even establish that the roof repair and the water damage to the Subject Property were related. The roof repair was in one part of the home, the water damage came from a broken pipe in another part of the home. Further still, the Buyers were aware of the ceiling stains indicating prior water damage and were, thus, on notice. The Buyers and/or their real estate agent failed to investigate the situation or to ascertain the extent of the obvious problem.

23. The \$725 roof repair done during the period the Contract was in force and prior to final closing was not indicative of a material defect affecting the value of the property. If the Buyers had alleged and proven that the leaking water pipe (which caused the water damage) was known by Saxer and not disclosed, that may constitute a material defect. However, no such evidence was presented.

24. Petitioner has the burden of proof in this matter. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). The standard of proof for a licensure revocation case is clear and convincing

evidence. Osborne Stern and Co., Inc. v. Department of Banking and Finance, 670 So. 2d 932 (Fla. 1996).

25. Clear and convincing evidence is an intermediate standard of proof which is more than the "preponderance of the evidence" standard used in most civil cases, but less than the "beyond a reasonable doubt" standard used in criminal cases. See State v. Graham, 240 So. 2d 486 (Fla. 2nd DCA 1970). Clear and convincing evidence has been defined as evidence which:

[R]equires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be 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 a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)
(citations omitted).

26. The testimony at final hearing was clear on only one point, that Saxer had the roof repair done and that she did not verbally advise the Buyers or their agent about the repair.

27. Petitioner failed to meet its burden of proving, by clear and convincing evidence, that Saxer failed to disclose a material defect from the Buyers which negatively affected the value of the Subject Property.

RECOMMENDATION

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

RECOMMENDED that a final order be entered by Petitioner, Department of Business and Professional Regulation, Division of Real Estate, dismissing the complaint against Respondent, Christine A. Saxer.

DONE AND ENTERED this 27th day of March, 2009, in Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of March, 2009.

ENDNOTES

^{1/} All further references to the Florida Statutes shall be to the 2007 version.

^{2/} The repair estimate indicates replacement of a ten by ten-foot section of roof. Saxer testified it was a five by five-foot section, but that it was expanded to cover an area more than just where the leak occurred.

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 should be filed with the agency that will issue the Final Order in this case.