

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
DIVISION OF REAL ESTATE, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 09-1219PL  
 )  
NESTOR G. MENDOZA AND DIAMONDS )  
REALTY OF MIAMI BEACH, )  
 )  
Respondents. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on May 8, 2009, at sites in Tallahassee and Miami, Florida.

APPEARANCES

For Petitioner: Patrick J. Cunningham, Esquire  
Department of Business and  
Professional Regulation  
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Orlando, Florida 32801

For Respondents: Nestor G. Mendoza, pro se  
Diamonds Realty of Miami Beach  
12501 Southwest 26th Street  
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STATEMENT OF THE ISSUES

In this disciplinary proceeding, the issues are whether Respondents, who are licensed real estate brokers, failed to

preserve and make available certain records relating to trust accounts and real estate transactions, and/or obstructed or hindered Petitioner's investigators in an official investigation, as alleged by Petitioner in its Administrative Complaint. If Petitioner proves one or more of the alleged violations, then an additional question will arise, namely whether disciplinary penalties should be imposed on Respondents, or either of them.

#### PRELIMINARY STATEMENT

On July 17, 2008, Petitioner Department of Business and Professional Regulation, Division of Real Estate, issued an eight-count Administrative Complaint against Respondents, wherein it was alleged that Respondents had violated various provisions of Chapter 475, Florida Statutes, and Florida Administrative Code Rule 61J2-14.012. Respondents timely requested a formal hearing to contest these allegations, and the matter was referred to the Division of Administrative Hearings on March 5, 2009.

The Administrative Law Judge set the final hearing for May 8, 2009. Both parties appeared at the appointed place and time.

At hearing, Petitioner presented the testimony of one witness: investigator Veronica Hardee. Petitioner also offered

Petitioner's Exhibits 1 through 3, inclusive, and these were admitted into evidence. Respondents offered no evidence.

The final hearing transcript was filed on May 29, 2009. Petitioner submitted a proposed recommended order on June 8, 2009, which was the deadline for filing such papers, as established at the conclusion of the final hearing. Respondents did not file a proposed recommended order.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2008 Florida Statutes.

#### FINDINGS OF FACT

##### The Parties

1. Respondent Nestor G. Mendoza ("Mendoza") is a licensed real estate broker subject to the regulatory jurisdiction of the Florida Real Estate Commission ("Commission").

2. Respondent Diamonds Realty of Miami Beach, Inc. ("Diamonds Realty") is and was at all times material hereto a corporation registered as a Florida real estate broker subject to the regulatory jurisdiction of the Commission.

3. Mendoza is an officer and principal of Diamonds Realty, and at all times relevant to this case he had substantial, if not exclusive, control of the corporation. Indeed, the evidence does *not* establish that Diamonds Realty engaged in any conduct distinct from Mendoza's in connection with the charges at issue. Therefore, Respondents will generally be referred to

collectively as "Mendoza" except when a need to distinguish between them arises.

4. Petitioner Department of Business and Professional Regulation ("Department"), Division of Real Estate, has jurisdiction over disciplinary proceedings for the Commission. At the Commission's direction, the Department is authorized to prosecute administrative complaints against licensees within the Commission's jurisdiction.

5. On January 15, 2008, Veronica Hardee, who was then employed by the Department as an investigator, conducted an audit of Mendoza's records at Mendoza's real estate brokerage office, which was located in Miami Beach. Ms. Hardee was accompanied by her supervisor, Brian Piper.

6. Ms. Hardee knew Mendoza because, in the latter part of 2007, she had investigated a consumer complaint against him, which arose from a transaction that had taken place in the fall of that year. In the course of that investigation, which focused on the period from August 20, 2007 through November 30, 2007, Mendoza had provided Ms. Hardee with business records, including bank statements and documents relating to the brokerage's escrow account. Ms. Hardee's previous investigation had not resulted in charges of wrongdoing being brought against Mendoza.

7. During the audit, Ms. Hardee asked to review some of Mendoza's business records. She testified about this on direct examination as follows:

**Q.** All right. Did you tell [Mendoza] what he would need to bring—or what he could expect from an audit?

**A.** I don't remember, but usually procedure [sic], I would tell them we need to see older escrow accounts, older operating accounts, deposit slips, deposit checks, anything that has to do with their financial matters.

Final Hearing Transcript ("TR.") 40-41 (emphasis added).

8. On cross examination, Ms. Hardee elaborated:

**Q.** (BY MR. MENDOZA) . . . I remember quite well that you did not ask me for the whole year of—for instance, of 2004, you never asked me for whole year, you asked me for a certain month; is that correct?

\* \* \*

THE WITNESS: During the investigation I requested certain documents, yes. You're correct, I asked you for certain months, you had different issues with the Department that I was looking at. . . .

\* \* \*

You didn't provide all the months requested and we came to the audit, you didn't provide—at that time, we asked you to see all of your accounts, it just wasn't for the investigation, we wanted to see your escrow account so you should have had for—I don't remember the—we wanted 1-15-08, we would have done from January of '08 to six months prior, let's just say. I don't remember what dates we gave you at the time.

But then you would have a file with those documents in your escrow reconciliation statement, with all of your checks, all of your deposits with the bank statement attached, you know, organized. But it wasn't so and you said that you wanted to organize it properly and that's why we allowed you to organize it.

So the question, did you provide me documents, yes, you provided me documents in the investigation but not all of the documents requested.

TR. 58-60 (emphasis added).

9. The undersigned attempted to elicit from Ms. Hardee a more detailed description of the materials requested during the audit, giving rise to the following exchange:

THE HEARING OFFICER: Okay. And can you describe for me what it was in particular that you did request on that day in January of 2008? What did you ask [Mendoza] for?

THE WITNESS: Yeah. We asked him for his escrow documents, reconciliation statements, such as the one that you see in [Petitioner's Composite] Exhibit 3. We asked about those months that were missing. We asked him—I don't know if we asked him for six months or one year.

I don't remember the time frame we gave him, but pretty much when we go in to do an audit, we get the last six months, usually the months that are particularly discussed, the checks or the deposits that we're looking into for an investigation.

\* \* \*

So pretty much that's what we asked, all of his escrow operating account that we had for the company, which includes the

reconciliation statement, bank statement, deposit checks, as the statute states here.

THE HEARING OFFICER: Okay. You're standard procedure would have been you say in an audit like this, to have asked for the last six months of records right? So you're nodding your head, that's a yes?

THE WITNESS: Yes. In this case we asked for the months that I was missing and plus I wanted to do a whole—we were going to do a whole audit. I don't remember right now if I asked him for six months or twelve months, I don't remember that part, but usually we ask for all the documents.

THE HEARING OFFICER: And if I could just ask you to clarify do there's no mistake about this, when you say the months that are missing, what months are you referring to?

THE WITNESS: I'm sorry, November of '04 and December of '04.

TR. 73-75 (emphasis added).

10. The Department did not, at the time of the audit, reduce its request for records to writing, which is unfortunate for the Department because, as the above-quoted testimony shows, Ms. Hardee's memory of specifically what Mendoza had been asked to produce was spotty. Although Ms. Hardee did identify two particular months—November and December of 2004—for which contemporaneous records were sought, this detail is practically random (because no context was given to explain the description of these periods, which predated the audit by more than three years, as "missing" months) and, in any event, fails to make the

testimony as a whole explicit or distinctly remembered. The undersigned finds that Ms. Hardee's testimony was insufficiently precise to constitute clear and convincing evidence concerning the particular items that the Department wanted to see.

11. Even if Ms. Hardee's testimony were sufficient on the previous point, however, the proof regarding Mendoza's alleged failure to produce records, which is a separate issue, is less compelling. Ms. Hardee's testimony was that Mendoza made available *some* but not *all* of the documents she and Mr. Piper wanted to see. (Actually, a fairer characterization of Mendoza's relative compliance, accepting Ms. Hardee's testimony as true, would be that he produced *most* of the documents requested, namely six-to-12 or 13 months' worth, failing only to make available documents associated with the last two or three months of 2004.) Mendoza then requested, and was given, additional time to assemble the rest of the materials. For some reason, Mendoza never contacted the Department thereafter to produce the items he could not locate on January 15, 2008, which caused the Department to initiate the instant proceeding.

12. The undersigned largely credits Ms. Hardee's testimony regarding this overview of the events, with the qualification that Mendoza's compliance, while less than 100 percent, was nevertheless substantial. (He might, after all, have produced satisfactorily as much as 13 months' worth of documents,



according to Ms. Hardee's testimony.) Given that Mendoza is alleged to have failed only to produce specific documents relating to the particular period from October through December 2004, the undersigned infers that he produced everything else that the Department wanted to see. The Department did not, however, at the time of the audit (or later), prepare an inventory of the records Mendoza made available (or failed to produce), take copies of the materials Mendoza produced, or otherwise reduce to writing the particulars of his noncompliance (e.g. by sending him a letter, soon after the audit, reminding him of the obligation to produce the materials that were not accessible on January 15, 2008, *and listing or describing those materials*).

13. The absence of a contemporaneous written record of Mendoza's alleged failure to make documents available at the audit is unfortunate for the Department because, on the question of what Mendoza did and did not produce, Ms. Hardee testified as follows:

THE HEARING OFFICER: All right. And when you went back in January of 2008 to see the —Mr. Mendoza at his office and audit his books and records, he produced nothing to you and your supervisor whatsoever on that date in response to the things that you requested to see?

THE WITNESS: He may have provided certain documents but were incomplete. I do not remember which documents he provided.

\* \* \*

I'm not saying he didn't provide me with anything. He didn't provide us with all of the documents we requested.

TR. 71-72 (emphasis added).

14. In sum, the evidence against Mendoza consists of the testimony of Ms. Hardee, who in a nutshell says that, while she cannot clearly remember exactly what the Department asked Mendoza to produce, she knows that she requested documents relating to November and December of 2004, and that, while she cannot remember what documents Mendoza made available, she is sure he did not produce everything associated with the fourth quarter of 2004. Assuming for argument's sake that the Department requested the specific documents Mendoza is charged with failing to produce (which is not entirely clear), and accepting that Mendoza did not produce everything that the Department asked to see, the Department's evidence is still too conclusory to support disciplinary action, in view of Ms. Hardee's testimony that the temporal scope of the Department's request for documents was not limited to the three-month period comprising the fourth quarter of 2004 and indeed might have covered 15 months or more. Because, as found above, Mendoza *did* produce a substantial, albeit indeterminate, amount of documentation, and because there is no clear proof regarding the contents of the records that Mendoza made available, the

undersigned is unable to find, based on clear and convincing evidence as the law requires, that Mendoza failed to produce the documents he has been accused of failing to produce.

#### The Charges

15. In Counts I and V of the Administrative Complaint, the Department alleges that Mendoza and Diamonds Realty are guilty of failing to preserve and make available to the Department all deposit slips and bank statements associated with the broker's trust account(s), in violation of Florida Administrative Code Rule 61J2-14.012(1), which is a disciplinable offense under Section 475.25(1)(e), Florida Statutes.

16. In Counts II and VI, it is alleged that Mendoza and Diamonds Realty failed to prepare written monthly statements comparing the broker's total trust liability to the bank balance(s) in the broker's trust account(s), in violation of Florida Administrative Code Rule 61J2-14.012(2)-(3). This alleged violation is a disciplinable offense under Section 475.25(1)(e), Florida Statutes.

17. In Counts III and VII, the Department accuses Mendoza and Diamonds Realty of having failed to preserve and make available to the Department books, accounts, and records pertaining to the brokerage business, in violation of Section 475.5015, Florida Statutes. This alleged violation constitutes

a disciplinable offense under Section 475.25(1)(e), Florida Statutes.

18. In Counts IV and VIII of its Administrative Complaint, the Department asserts that Respondents obstructed or hindered the enforcement of Chapter 475, Florida Statutes, in violation of Section 475.42(1)(i), Florida Statutes, which is a disciplinable offense under Section 475.25(1)(e), Florida Statutes.

#### Ultimate Factual Determinations

19. As found and explained above, the evidence is insufficient to prove, clearly and convincingly, that Respondents failed to make available the specific records they are alleged to have withheld.

20. At most the evidence establishes that Respondents were unable, on January 15, 2008, to produce an imprecisely identified (and not clearly proved) subset of the universe of documents that the Department's investigators sought to examine during the audit. This is insufficient to prove, much less clearly and convincingly to demonstrate, that Respondents failed to keep or preserve any particular documents.

21. There is no persuasive evidence that Respondents obstructed or hindered the Department's audit. To the contrary, the evidence shows that Mendoza cooperated with the Department's investigators and substantially complied with their demands.

22. Ultimately, therefore, it is found that Respondents are not guilty of the offences charged in Counts I through VIII of the Administrative Complaint.

CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

24. Section 475.25, Florida Statutes, under which Respondents have been charged, sets forth the acts for which the Commission may impose discipline. This statute provides, 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 \$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:

\* \* \*

(e) Has violated any of the provisions of this chapter[, including, as alleged here, Sections 475.42(1)(i) and 475.5015, Florida Statutes,] or any lawful order or rule made or issued under the provisions of this chapter or chapter 455[, including, as alleged here, Florida Administrative Code 61J2-14.012].

25. Section 475.42(1), Florida Statutes, which Respondents are alleged to have violated, committing a disciplinable offense according to Section 475.25(1)(e), Florida Statutes, provides, in pertinent part:

(i) A person may not obstruct or hinder in any manner the enforcement of this chapter or the performance of any lawful duty by any person acting under the authority of this chapter or interfere with, intimidate, or offer any bribe to any member of the commission or any of its employees or any person who is, or is expected to be, a witness in any investigation or proceeding relating to a violation of this chapter.

§ 475.42(1)(i), Fla. Stat.

26. Section 475.5015, Florida Statutes, which Respondents are alleged to have violated, committing a disciplinable offense according to Section 475.25(1)(e), Florida Statutes, provides as follows:

Each broker shall keep and make available to the department such books, accounts, and records as will enable the department to determine whether such broker is in compliance with the provisions of this chapter. Each broker shall preserve at least one legible copy of all books, accounts, and records pertaining to her or his real estate brokerage business for at least 5 years from the date of receipt of any money, fund, deposit, check, or draft entrusted to the broker or, in the event no funds are entrusted to the broker, for at least 5 years from the date of execution by any party of any listing agreement, offer to purchase, rental property management agreement, rental or lease agreement, or any other written or verbal agreement which

engages the services of the broker. If any brokerage record has been the subject of or has served as evidence for litigation, relevant books, accounts, and records must be retained for at least 2 years after the conclusion of the civil action or the conclusion of any appellate proceeding, whichever is later, but in no case less than a total of 5 years as set above [sic]. Disclosure documents required under ss. 475.2755 and 475.278 shall be retained by the real estate licensee in all transactions that result in a written contract to purchase and sell real property.

27. Florida Administrative Code Rule 61J2-14.012, which Respondents are alleged to have violated, committing a disciplinable offense according to Section 475.25(1)(e), Florida Statutes, contains the following requirements:

(1) A broker who receives a deposit as previously defined shall preserve and make available to the BPR, or its authorized representative, all deposit slips and statements of account rendered by the depository in which said deposit is placed, together with all agreements between the parties to the transaction. In addition, the broker shall keep an accurate account of each deposit transaction and each separate bank account wherein such funds have been deposited. All such books and accounts shall be subject to inspection by the DBPR or its authorized representatives at all reasonable times during regular business hours.

(2) Once monthly, a broker shall cause to be made a written statement comparing the broker's total liability with the reconciled bank balance(s) of all trust accounts. The broker's trust liability is defined as the sum total of all deposits received, pending and being held by the broker at any point in time. The minimum information to be

included in the monthly statement-reconciliation shall be the date the reconciliation was undertaken, the date used to reconcile the balances, the name of the bank(s), the name(s) of the account(s), the account number(s), the account balance(s) and date(s), deposits in transit, outstanding checks identified by date and check number, an itemized list of the broker's trust liability, and any other items necessary to reconcile the bank account balance(s) with the balance per the broker's checkbook(s) and other trust account books and records disclosing the date of receipt and the source of the funds. The broker shall review, sign and date the monthly statement-reconciliation.

(3) Whenever the trust liability and the bank balances do not agree, the reconciliation shall contain a description or explanation for the difference(s) and any corrective action taken in reference to shortages or overages of funds in the account(s). Whenever a trust bank account record reflects a service charge or fee for a non-sufficient check being returned or whenever an account has a negative balance, the reconciliation shall disclose the cause(s) of the returned check or negative balance and the corrective action taken.

28. Being penal in nature, the foregoing statutes and rule provisions "must be construed strictly, in favor of the one against whom the penalty would be imposed." Munch v. Department of Professional Regulation, Div. of Real Estate, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992).

29. A proceeding, such as this one, to suspend, revoke, or impose other discipline upon a professional license is penal in nature. State ex rel. Vining v. Florida Real Estate Commission,



281 So. 2d 487, 491 (Fla. 1973). Accordingly, to impose discipline, the Department must prove the charges against Respondents by clear and convincing evidence. Department of Banking & Fin., Div. of Sec. & Investor Protection v. Osborne Stern & Co., 670 So. 2d 932, 933-34 (Fla. 1996)(citing Ferris v. Turlington, 510 So. 2d 292, 294-95 (Fla. 1987)); Nair v. Department of Business & Professional Regulation, Bd. of Medicine, 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

30. Regarding the standard of proof, in Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the court developed a "workable definition of clear and convincing evidence" and found that of necessity such a definition would need to contain "both qualitative and quantitative standards." The court held that:

clear and convincing evidence requires 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 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.

Id. The Florida Supreme Court later adopted the Slomowitz court's description of clear and convincing evidence. See In re Davey, 645 So. 2d 398, 404 (Fla. 1994). The First District

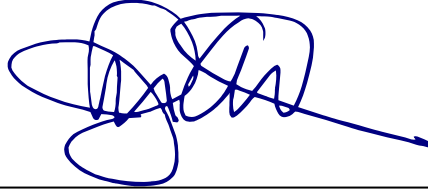
Court of Appeal also has followed the Slomowitz test, adding the interpretive comment that "[a]llthough this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Elec. Corp. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991), rev. denied, 599 So. 2d 1279 (Fla. 1992)(citation omitted).

31. The undersigned has determined, as a matter of ultimate fact, that the Department failed to establish Respondents' guilt by clear and convincing evidence. The undersigned further concludes that the plain language of the particular statutory and rule provisions under which Respondents were charged, being clear and unambiguous, can be applied to the historical events at hand without a simultaneous examination of extrinsic evidence or resort to principles of interpretation. It is therefore unnecessary to make additional legal conclusions with regard to these charges.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Commission enter a final order finding Mendoza and Diamonds Realty not guilty of the offenses charged in the Administrative Complaint.

DONE AND ENTERED this 30th day of June, 2009, in  
Tallahassee, Leon County, Florida.



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JOHN G. VAN LANINGHAM  
Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
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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 must be filed with the agency that will issue the final order in this case.