

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
DIVISION OF REAL ESTATE, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 09-1514  
 )  
NESTOR G. MENDOZA, )  
DIAMONDS REALTY OF MIAMI BEACH, )  
INC., )  
 )  
Respondents. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

This case came before Administrative Law Judge June C. McKinney of the Division of Administrative Hearings for final hearing on July 4, 2009, in Miami, Florida.

APPEARANCES

For Petitioner: Patrick Cunningham, Esquire  
Department of Business and  
Professional Regulation  
400 West Robinson Street, Suite N801  
Hurston Building-North Tower  
Orlando, Florida 32801

For Respondents: Nestor G. Mendoza, pro se  
12501 Southeast 26th Street  
Miami, Florida 33175

STATEMENT OF THE ISSUES

In this disciplinary proceeding, the issues are:

(1) Whether Respondents committed the violations alleged in the

Administrative Complaint issued by the Petitioner; and  
(2) Whether disciplinary penalties should be imposed on Respondents, or either of them, if Petitioner proves one or more of the violations charged in its Administrative Complaint.

PRELIMINARY STATEMENT

On January 17, 2008, the Department of Business and Professional Regulation, Division of Real Estate ("Petitioner"), issued a four-count Administrative Complaint against Nestor G. Mendoza and Diamonds Realty of Miami Beach, Inc. ("Respondents"), wherein it was alleged that Respondents had violated various provisions of Chapter 475, Florida Statutes. Respondents timely requested a formal hearing to contest these allegations, and the matter was referred to the Division of Administrative Hearings on March 20, 2009.

The presiding administrative law judge set the final hearing for June 4, 2009. Both parties appeared at the appointed place and time.

At hearing, Petitioner presented the testimony of two witnesses: Veronica Hardy, Investigator; and Abdul El Hayek, complainant. Petitioner also offered Exhibits numbered 1 through 6<sup>1/</sup> that were admitted into evidence. Mendoza, testified on his own behalf, and Respondents presented the testimony of one other witness, Luigi Gallegos. Respondents offered Exhibits numbered 1 through 6, all of which were received in evidence.

The proceeding was recorded and transcribed. The parties were given until July 21, 2009, to file proposed recommended orders. Only the Petitioner filed a Proposed Recommended Order, which has been considered in the preparation of this Recommended Order.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2004 Florida Statutes.

FINDINGS OF FACT

The Parties:

1. Respondent, Nestor G. Mendoza ("Mendoza"), at all times material to this matter, was a licensed real estate broker subject to the regulatory jurisdiction of the Petitioner. Petitioner issued Mendoza license numbers 156850 and 3190745.

2. Mendoza has been a broker since 1973 and took the license exam which he passed to become a broker. He has been taking continuing education to keep abreast of the law for a broker's license and is familiar with the rules governing brokers.

3. Respondent, Diamonds Realty of Miami Beach, Inc. ("Diamonds"), is and was, at all times material in this matter, a corporation registered as a Florida real estate broker subject to the regulatory jurisdiction of the Petitioner, and having been issued license number 1011331.

4. Mendoza was licensed and operating as a qualifying broker and officer of Diamonds at all times material to this matter.

5. Abdul El Hayek ("Hayek") lived in an apartment building that was going to be converted to condominiums. After speaking with Mr. Gallegos, Mendoza's agent and a realtor for Diamonds, Hayek decided to buy a unit at Bayview apartments. On September 17, 2004, Hayek signed a reservation agreement and gave Gallegos a total deposit of \$15,000. Hayek wrote three separate \$5,000 checks, check numbers 755, 756, and 757, dated September 17, 2004, to Diamonds Realty, as a down payment on the purchase of property located at 7915 East Drive, Unit 3B, North Bay Village, Florida.

6. Per Hayek's reservation agreement, Hayek's \$15,000 down payment was to be deposited in Diamonds' escrow account. The Reservation Agreement stated in pertinent part:

2. Escrow Agreement

The Reservation Deposit will be held in escrow by the Escrow Agent, Diamonds Realty of Miami Beach, Inc. Escrow Account with offices, 960 Arthur Godfrey Road, Suite 212, Miami Beach, Florida 33140. . . .

7. Hayek's \$15,000 deposit was placed in Diamond's operating account not in the escrow account. Hayek never authorized release of the deposit to anyone. Hayek provided his deposit to be held in escrow for the purchase of the unit 3B.

8. The units at Bayview went into receivership and the condominiums were never converted. Hayek never received a refund of the \$15,000 deposit he provided Diamonds.

9. On September 10, 2007, a final judgment was entered against Diamonds for \$15,000, plus interest and costs, for failure to return to Hayek, the buyer, the deposit received by both Respondents for the purchase of the subject property. The civil judgment has not been satisfied. Mendoza admitted at the hearing that the monies went in the operating account, that he had not repaid the \$15,000 deposit, and that Hayek had not received his money back, nor had he obtained a unit at Bayview apartments.

The Charges:

10. In counts I and II, Petitioner charges Respondents with misrepresenting a business transaction in violation of Section 475.25(1)(b), Florida Statutes.

11. In counts III and IV, Petitioner charges Respondents with failing to account or deliver funds in violation of Section 475.25(1)(d)1., Florida Statutes.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the

parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2009).

13. Section 475.25, Florida Statutes, under which Respondents have been charged, sets forth the acts for which the Petitioner 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 \$1,000 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:

\* \* \*

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 in this state or any other state, nation, or territory; has violated a duty imposed upon her or him by law or by the terms of a listing contract, written, oral, express, or implied, in a real estate transaction; has aided, assisted, or conspired with any other person engaged in any such misconduct and in furtherance thereof; or has formed an intent, design, or scheme to engage in any such misconduct and committed an overt act in furtherance of such intent, design, or scheme. It is immaterial to the guilt of the licensee that the victim or intended

victim of the misconduct has sustained no damage or loss; that the damage or loss has been settled and paid after discovery of the misconduct; or that such victim or intended victim was a customer or a person in confidential relation with the licensee or was an identified member of the general public.

\* \* \*

(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.

\* \* \*

14. 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). Being penal in nature, Section 475.25, Florida Statutes, "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).

15. Here, the Division seeks to discipline Respondent's license and/or to impose an administrative fine. Accordingly, the Division has the burden of proving the allegations charged in the Administrative Complaint against the Respondents by clear and convincing evidence. Department of Banking and Finance Division of Securities and Investor Protection v. Osborne Stern and 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, 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

16. Regarding the standard of proof, in Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the Court of Appeal, Fourth District, canvassed the cases to develop 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.

17. A licensee is charged with knowing the practice act that governs his/her license. Wallen v. Florida Department of Professional Regulation, Division of Real Estate, 568 So. 2d 975 (Fla. 3d DCA 1990).

18. There is no dispute (for Mendoza admitted at final hearing) that the \$15,000 deposit was deposited into the operating account not the escrow account. Petitioner asserts in its proposed recommended order that "As a result of Respondent's fraud, misrepresentation, breach of trust and culpable negligence, Mr. El Hayek's deposit was not returned, and was lost." Although each of Petitioner's allegations is a violation under Section 475.25(1)(b), Florida Statutes, the undersigned has to find specific violations of the statute since the 2004 disciplinary guidelines provide varying penalties for each of the aforementioned violations.

19. Petitioner failed to prove fraud<sup>2/</sup> or misrepresentation<sup>3/</sup> in this matter because the record is void of evidence to demonstrate intent, which is required for each of those violations. However, Petitioner met its burden of establishing by clear and convincing evidence Respondents committed a breach of trust and were culpably negligent by not

placing the \$15,000 deposit in the escrow account in violation of Section 475.25(1)(b), Florida Statutes.

20. Petitioner also demonstrated that neither Mendoza nor Diamonds accounted or delivered the money to the complainant upon demand. Mendoza admitted nonpayment of the deposit and the civil judgment supports the proposition that the complainant, Hayak, tried to get his deposit money back from Diamonds, who also failed to account and deliver it to him in violation of Section 425.25(1)(d), Florida Statutes.

Disciplinary Guidelines:

21. Pursuant to Florida Administrative Code Rule 61J2-24.001, the Division has established disciplinary guidelines establishing the range of penalties that will be imposed on licensees guilty of violating Chapter 475. The 2004 guidelines mandate that the Petitioner "impose a penalty from a \$1000 fine to a 1 year suspension" for culpable negligence and breach of trust violations of Section 475.25(1)(b), Florida Statutes. The guidelines further set forth the usual range of punishment for a violation of Section 475.25(1)(d), Florida Statutes, as "an administrative fine of \$1,000 to a 5 year suspension."

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Commission enter a final order that: (a) finds Respondents guilty as charged in counts I, II,

III, and IV of the Administrative Complaint; (b) suspends Respondents' respective real estate licenses for five years; and (c) imposes an administrative fine of \$2,000 against Respondents, jointly and severally.

DONE AND ENTERED this 20th day of August, 2009, in Tallahassee, Leon County, Florida.



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JUNE C. MCKINNEY  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 20th day of August, 2009.

ENDNOTES

<sup>1/</sup> The undersigned received Petitioner's rebuttal Exhibit number 6 into evidence. The Exhibit was a Diamonds Realty card in the name of Luigi Gallegos with the title Realtor-Associate.

<sup>2/</sup> Merriam-Webster's dictionary defines fraud as "intentional perversion of truth in order to induce another to part with something of value or to surrender a legal right" (Emphasis added)

<sup>3/</sup> Merriam-Webster's dictionary defines misrepresentation as "to give a false or misleading representation of usually with an intent to deceive or be unfair." (Emphasis added)

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.