

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) Case No. 09-2995PL
)
GREGORY JOHN OWEN,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly-designated Administrative Law Judge, Jeff B. Clark, held a final administrative hearing in this case on August 6, 2009, in Kissimmee, Florida.

APPEARANCES

For Petitioner: Jennifer Leigh Blakeman, Esquire
Department of Business and
Professional Regulation
400 West Robinson Street, Suite N-801
Orlando, Florida 32801

For Respondent: Daniel Villazon, Esquire
Daniel Villazon, P.A.
1420 Celebration Boulevard, Suite 200
Celebration, Florida 34747

STATEMENT OF THE ISSUES

Whether Respondent, Gregory John Owen, committed the violations alleged in the Administrative Complaint, and, if so, what discipline should be imposed.

PRELIMINARY STATEMENT

On February 17, 2009, Petitioner, Department of Business and Professional Regulation, Division of Real Estate, filed an Administrative Complaint against Respondent, Gregory John Owen, alleging him to be guilty of violating Subsections 475.25(1)(d)1., 475.25(1)(e), 475.25(1)(k), Florida Statutes (2005), and Florida Administrative Code Rule 61J2-14.009. On March 31, 2009, Petitioner received Respondent's Petition for Formal Hearing disputing allegations contained in the Administrative Complaint.

On June 1, 2009, the Division of Administrative Hearings received a request for formal proceedings from Petitioner. On that same day, an Initial Order was forwarded to both parties requesting mutually convenient dates for the final hearing. Based on the response of the parties, on June 9, 2009, the case was scheduled for final hearing on August 6, 2009, in Kissimmee, Florida. On July 7, 2009, Petitioner filed a Motion to Amend Administrative Complaint alleging additional violations of Subsections 475.25(1)(b) and 475.25(1)(k), Florida Statutes (2005). No objection to the Amended Administrative Complaint

was raised, and, on July 17, 2009, an Order was entered allowing the motion to amend.

The case proceeded, as scheduled, on August 6, 2009. Petitioner presented three witnesses: Judy Smith; Roy S. Gonzaque; and David K. Weiker, and offered 15 exhibits, which were received into evidence as Petitioner's Exhibits 1 through 11 and 13 through 16. Respondent testified in his own behalf and offered one exhibit that was received into evidence and marked Respondent's Exhibit 1.

The parties agreed that the proposed recommended orders would be submitted within 21 working days of the filing of the transcript. The Transcript of Proceedings was filed with the Division of Administrative Hearings on September 16, 2009. Both parties timely filed their Proposed Recommended Order.

All statutory references are to Florida Statutes (2005), unless otherwise noted.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing, the following Findings of Facts are made:

1. Petitioner is a state government licensing and regulating agency charged with the responsibility and duty to prosecute Administrative Complaints pursuant to the laws of the State of Florida, in particular, Section 20.165 and

Chapters 120, 455, and 475, Florida Statutes, and the rules promulgated pursuant thereto.

2. Respondent is, and was at all times material hereto, a licensed Florida real estate sales broker, issued License No. 3018133, in accordance with Chapter 475, Florida Statutes.

3. From September 20, 2005, until January 9, 2007, Respondent was a registered member/manager for FCH Realty, LLC (FCH Realty).

4. On October 13, 2005, Respondent filled out a DBPR RE-2050 Form, Request for Change of Status, which, had it been filed with Petitioner, would have changed Respondent's status to "broker/owner employer" for FCH Realty. Form 2050 was never filed, although Respondent thought it had been.

5. At the request of Geoffrey Sinker, the qualifying broker of FCH Realty, Respondent became a signatory on the FCH Realty escrow account.

6. On May 17, 2006, Respondent deposited \$25,000.00 in the FCH Realty escrow account on behalf of Sadiq Ali, as a deposit for real property Ali was purchasing.

7. On May 19, 2006, \$25,000.00 was transferred from the FCH Realty escrow account to the FCH Realty operating account. Bank records indicate that the transfer was made by someone who personally presented himself to a cashier at a branch bank. Respondent denies making this transfer.

8. On May 1, 2006, and May 16, 2006, there were online transfers of \$29,690.00 and \$5,000.00 from the FCH Realty escrow account to the FCH Realty operating account. No evidence was presented regarding who made these online transfers or whether Respondent had online access to the FCH Realty escrow account. There was no evidence presented that Respondent had access to the FCH Realty operating account in May 2005.

9. On May 29, 2006, Respondent deposited a check from Ali in the amount of \$67,580.00 into the FCH Realty operating account.

10. Pursuant to the terms of his contract, Ali's deposit was not required to be held in an escrow account. The contract specifically stated, "Purchaser hereby waives its rights to have deposits placed in escrow, and all deposits which are collected from Purchaser be paid directly to Seller without limitations. Seller may withdraw all or a portion of the deposits to be used for construction and development of the Home, for sales and marketing, or for such other purposes as determined at Seller's sole discretion."

11. Respondent had been directed to place Ali's \$67,580.00 deposit in the FCH Realty operating account.

12. On July 27, 2006, \$32,069.00 was transferred online from the FCH Realty escrow account to the FCH Realty operating account. There were three other online transfers in July from

the FCH Realty escrow account to the FCH Realty operating account in the amounts of \$34,970.00 on July 14, 2006; \$32,069.00 on July 18, 2006; and \$800.00 on July 28, 2006. No evidence was presented that Respondent had online access to the FCH Realty escrow account or that Respondent transferred these funds.

13. On July 28, 2006, Respondent did transfer \$32,890.00 from the FCH Realty operating account to the FCH Realty construction account. The \$32,890.00 was a deposit from a buyer at Millbrook Manor.

14. After transferring the \$32,890.00, Respondent had the bank issue a cashier's check to Platinum Properties for \$32,890.00 as the buyer's deposit on the Millbrook Manor property.

15. Respondent was not responsible for reconciling the FCH Realty escrow account.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the subject of and the parties to this proceeding. §§ 120.57(1) and 455.225(5), Fla. Stat. (2009).

17. The burden of proof in this proceeding is on Petitioner. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349

(Fla. 1st DCA 1977). Petitioner is required to meet its burden by clear and convincing evidence. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

18. Subsection 475.25(1), Florida Statutes, authorizes the Florida Real Estate Commission to take disciplinary action against the license of any real estate sales person if the licensee commits certain specified acts. Listed among the prohibited acts are those alleged to have been committed by Respondent and enumerated in the Amended Administrative Complaint.

19. Count One of the Amended Administrative Complaint alleges a violation of Subsection 475.25(1)(d)1., Florida Statutes, which 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:

(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.

20. No evidence was presented that supports the violation of Subsection 475.25(1)(d)1., Florida Statutes. There is no evidence of a demand being made by any person for an accounting, a return of deposit, or any of the listed improprieties.

21. Count Two of the Amended Administrative Complaint alleges a violation of Florida Administrative Code Rule 61J2-14.010 and, therefore, a violation of Subsection 475.25(1)(e), Florida Statutes. Florida Administrative Code Rule 61J2-14.010 states, in pertinent part, as follows:

(1) Every broker who receives from sales associates, principals, prospects, or other persons interested in any real estate transaction, any deposit, fund, money, check, draft, personal property, or item of value shall immediately place the same in a bank, savings and loan association, trust company, credit union or title company having trust powers, in an insured escrow or trust account. The broker must be a signatory on all escrow accounts.

22. Subsection 475.25(1)(e), Florida Statutes, states, as follows:

Has violated any of the provisions of this chapter or any lawful order or rule made or issued under the provisions of this chapter or chapter 455.

23. The evidence presented indicates that the first \$25,000.00 received from Ali was placed in the FCH Realty escrow account. The Purchase Contract signed by Ali on April 20, 2005, did not require "deposits" received from him to be placed in escrow. The evidence regarding Respondent's status with FCH Realty, other than the fact that he was a "registered member/manager," fails to meet the "clear and convincing" quantum of proof. Count Two has not been proved by "clear and convincing" evidence.

24. Count Three of the Amended Administrative Complaint alleges a violation of Subsection 475.25(1)(k), Florida Statutes, which states:

Has failed, if a broker, to immediately place, upon receipt, any money, fund, deposit, check, or draft entrusted to her or him by any person dealing with her or him as a broker in escrow with a title company, banking institution, credit union, or savings and loan association located and doing business in this state, or to deposit such funds in a trust or escrow account maintained by her or him with some bank, credit union, or savings and loan association located and doing business in this state, wherein the funds shall be kept until disbursement thereof is properly

authorized; or has failed, if a sales associate, to immediately place with her or his registered employer any money, fund, deposit, check, or draft entrusted to her or him by any person dealing with her or him as agent of the registered employer.

25. Count Three has not been proved. Petitioner has failed to present "clear and convincing" evidence that Respondent did not place the funds received into an appropriate bank account maintained by FCH Realty, or that he had a responsibility to do so in light of the contractual relationship that existed between the purchaser and FCH Realty, if there was a relationship. (Petitioner's Exhibit 11 is a Purchase Contract between Ali and Citrus Gardens, LLC.) The evidence is unclear regarding who caused the disbursements from the FCH Realty accounts.

26. Count Four of the Amended Administrative Complaint alleges a violation of Florida Administrative Code Rule 61J2-14.009 and Subsection 475.25(1)(k), Florida Statutes, and, therefore, a violation of Subsection 475.25(1)(e), Florida Statutes. Florida Administrative Code Rule 61J2-14.009 states, as follows:

Every sales associate who receives any deposit, as defined in Rule 61J2-14.008, Florida Administrative Code, shall deliver the same to the broker or employer no later than the end of the next business day following receipt of the item to be deposited. Saturday, Sundays and legal holidays shall not be construed as business

days. Receipt by a sales associate or any other representative of the brokerage firm constitutes receipt by the broker for purposes of paragraph 61J2-14.008(1)(d), Florida Administrative Code.

27. For the reasons stated in paragraphs 23 and 25, Petitioner has failed to prove Count Four by "clear and convincing" evidence.

28. Count Five of the Amended Administrative Complaint alleges a violation of Subsection 475.25(1)(b), Florida Statutes, which states:

(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.

29. The violation of Subsection 475.25(1)(b), Florida Statutes, is based on the factual allegation that Respondent was the sole signatory on the FCH Realty's escrow account and "acting real estate broker" for FCH Realty.

30. Petitioner has not provided "clear and convincing" evidence that Respondent violated Subsection 475.25(1)(b), Florida Statutes, as alleged. While Respondent may have believed that he was the "broker/owner employer," the DBPR RE-2050 Form, Request for Change of Status, was not forwarded to Petitioner. He, in fact, was not the broker. While he was the sole signatory on the escrow account, there is no statutory duty imposed on the "sole signatory."

RECOMMENDATION

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

RECOMMENDED that Petitioner, Department of Business and Professional Regulation, Division of Real Estate, enter a final order finding that Respondent, Gregory John Owen, is not guilty of the allegations of impropriety stated in the Amended Administrative Complaint.

DONE AND ENTERED this 17th day of November, 2009, in
Tallahassee, Leon County, Florida.



JEFF B. CLARK
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of November, 2009.

COPIES FURNISHED:

Thomas W. O'Bryant, Jr., Director
Division of Real Estate
Department of Business and
Professional Regulation
400 West Robinson Street, Suite 802, North
Orlando, Florida 32801

Reginald Dixon, General Counsel
Department of Business and
Professional Regulation
400 West Robinson Street, Suite N-801
Orlando, Florida 32801

Jennifer Leigh Blakeman, Esquire
Department of Business and
Professional Regulation
400 West Robinson Street, Suite N-801
Orlando, Florida 32801

Daniel Villazon, Esquire
Daniel Villazon, P.A.
1420 Celebration Boulevard, Suite 200
Celebration, Florida 34747

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.