

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) Case Nos. 09-3337PL
) 09-3338PL
CRISTAL COLEMAN,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in these cases before Larry J. Sartin, an Administrative Law Judge of the Division of Administrative Hearings, on September 23, 2009, at Key Largo, Florida.

APPEARANCES

For Petitioner: Jennifer Blakeman, Senior Attorney
Department of Business and
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For Respondent: Nicholas W. Mulick, Esquire
Nicholas W. Mulick, P.A.
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STATEMENT OF THE ISSUES

The issues in these cases are whether Respondent, Cristal Coleman, committed the violations alleged in two separate four-

count Administrative Complaints filed with the Petitioner Department of Business and Professional Regulation on April 17, 2009, and, if so, what disciplinary action should be taken against her Florida real estate associate license.

PRELIMINARY STATEMENT

On April 17, 2009, two separate four-count Administrative Complaints, FDBPR Case Nos. 2008048014 and 2009004361, were filed with Petitioner, Department of Business and Professional Regulation, against Respondent, Cristal Coleman, who holds a Florida real estate associate license. It is alleged in the Administrative Complaints that Respondent violated the following provisions of Florida law: Section 475.25(1)(b), Florida Statutes; Section 475.25(1)(d)1., Florida Statutes; Section 455.227(1)(j), Florida Statutes; and Section 475.25(1)(e), Florida Statutes, by violating Section 475.42(1)(b), Florida Statutes.

On or about April 17, 2009, Respondent, through counsel, filed an Answer to Administrative Complaint, Denial of Essential Allegations and Request for Formal Hearing, along with executed Election of Rights forms for each Administrative Complaint.

On June 18, 2009, Petitioner filed the Administrative Complaints, Respondent's responsive pleadings, and a letter for each case requesting that an administrative law judge be assigned to hear the matters. The requests for hearing were

designated DOAH Case Nos. 09-3337PL and 09-3338PL. Both cases were assigned to the undersigned.

On July 7, 2009, a Motion to Consolidate the two cases was filed. That Motion was granted by an Order entered July 7, 2009.

On July 10, 2009, the final hearing of this matter was scheduled for September 23, 2009. The Notice of Hearing was subsequently amended, changing the location of the hearing.

At the final hearing, Petitioner presented the testimony of its investigator, Felix Taver Mizioznickov, and Respondent. Petitioner also had admitted Petitioner's Exhibits 1, 2, 6, 7 (admitted only as to whether an email was sent, not for the truth of what is contained in the email), 8, 9 (pages 1 and 2 only), and 11. Respondent had admitted two exhibits.

The Transcript of the final hearing was filed with the Division of Administrative Hearings on October 2, 2009. Due to the unavailability of the undersigned during the month of October, the parties were given until November 2, 2009, to file proposed recommended orders.

Petitioner filed Petitioner's Proposed Recommended Order timely. Respondent filed Respondent's Proposed Recommended Order on November 3, 2009. It does not appear that Petitioner has been prejudiced in any way by Respondent's late-filing.

Accordingly, both proposed orders have been fully considered in preparing this Recommended Order.

All further references to the Florida Statutes in this Recommended Order are to the 2007 and 2008 editions, unless otherwise noted.

FINDINGS OF FACT

A. The Parties.

1. Petitioner, the Department of Business and Professional Regulation, Division of Real Estate (hereinafter referred to as the "Division"), is an agency of the State of Florida created by Section 20.165, Florida Statutes. The Division is charged with the responsibility for the regulation of the real estate industry in Florida pursuant to Chapters 455 and 475, Florida Statutes.

2. Respondent, Cristal Coleman, was at the times material to this matter, the holder of a Florida real estate associate license, license number 693909, issued by the Division.

3. From January 4, 2005, until March 31, 2008, Ms. Coleman was registered as a sales associate with Cristal Clear Realty (hereinafter referred to the "Realty Company").

B. Cristal Clear Rentals, LLC., and Ms. Coleman's Relationship Thereto.

3. Cristal Clear Rentals, LLC (hereinafter referred to as the "CC Rentals"), is a Florida limited liability company

registered with the office of the Florida Secretary of State, Division of Corporations.

4. CC Rentals business consisted of marketing and renting for compensation transient rental properties.

5. CC Rentals did not engage in the sale of real estate and, therefore, was not registered with the Division as a licensed real estate broker.

6. Ms. Coleman became the sole managing member of CC Rentals as of December 5, 2007. As a managing member, CC Rentals office manager, rental manager, and accountant reported to her on a regular basis.

C. The Richard Bloom and Greg Sousa Rentals.

7. CC Rentals, at the times relevant, was managing two separate properties, one owned by Richard Bloom (hereinafter referred to as the "Bloom Property"), and one owned by Greg Sousa (hereinafter referred to as the "Sousa Property"). The nature of the role of CC Rentals in managing the Bloom Property and the Sousa Property was not proved. Whatever agreements existed as to the management of these properties was not proved. Nor was any evidence presented as to whether any money, in the form of a security deposit, rental fees, or any other form, was received or in the possession of CC Rentals at the times relevant to this matter.

8. On or about May 6, 2008, a form email was sent from Ms. Coleman's email address to clients of CC Rentals notifying clients of the financial demise of CC Rentals (hereinafter referred to as the "Email Notice"). The Email Notice was sent to Mr. Bloom and to Mr. Sousa.

9. In pertinent part, the Notice Email stated:

We regret to advise you that Cristal Clear Rentals, LLC is no longer sufficiently solvent to continue operating. The Company has ceased trading effective May 6, 2008. We have tried to weather a very difficult season where the economic crisis in our country has seriously impacted travel and especially rentals in the Florida Keys this year.

Since the Company has no funds, we need to advise Owners:

- The contract between you and Cristal Clear Rentals, LLC is no longer valid and is terminated.
- There are no funds to pay Owners any rentals collected but not yet paid to Owners through April 2008.
- If there are current reservations we are providing the contact details below to allow you to make direct contact with your pending guests.
- Since there are no funds in Cristal Clear Rentals, LLC, the Company cannot refund any security deposits to the people who made the reservation. This means that any Owner accepting the reservation directly will need to reimburse the guest out of pocket for the amount of the Security Deposit after their stay.

. . . .

10. According the specific information included in Email Notices sent to Mr. Bloom and Mr. Sousa, there were tenants in the Bloom Property and Sousa Property of a term longer than a transient rental. Ms. Coleman was not, however, aware of either rental property or the nature of any agreement with Mr. Bloom and Mr. Sousa for the management of their properties.

CONCLUSIONS OF LAW

A. Jurisdiction.

11. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2009).

B. The Burden and Standard of Proof.

12. The Division seeks to impose penalties against Ms. Coleman pursuant to the Administrative Complaints that include the suspension or revocation of her real estate associate license. Therefore, the Division has the burden of proving the specific allegations of fact that support its charges by clear and convincing evidence. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); and Pou v. Department of Insurance and Treasurer, 707 So. 2d 941 (Fla. 3d DCA 1998).

13. What constitutes "clear and convincing" evidence was described by the court in Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116, n. 5 (Fla. 1st DCA 1989), as follows:

. . . [C]lear 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 evidence 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 the 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).

See also In re Graziano, 696 So. 2d 744 (Fla. 1997); In re Davey, 645 So. 2d 398 (Fla. 1994); and Walker v. Florida Department of Business and Professional Regulation, 705 So. 2d 652 (Fla. 5th DCA 1998)(Sharp, J., dissenting).

C. The Charges of the Administrative Complaints.

14. Section 475.25, Florida Statutes, authorizes the Division to discipline any Florida real estate broker licensee who commits any of a number of offenses defined therein. In this case, the Division has charged Ms. Coleman with having committed, with regard to the Bloom Property and the Sousa Property, four violations: Section 475.25(1)(b), Florida Statutes (Count One of each Administrative Complaint); Section 475.25(1)(d)1., Florida Statutes (Count Two of each

Administrative Complaint); Section 455.227(1)(j), Florida Statutes (Count Three of each Administrative Complaint); and Section 475.25(1)(e), Florida Statutes, by violating Section 475.42(1)(b), Florida Statutes (Count Four of each Administrative Complaint).

15. Section 475.25(1), Florida Statutes, provides the following with regard to the charged offenses:

(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:

. . . .

(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.

. . . .

(e) 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.

16. As to the violation of Section 475.25(1)(e), Florida Statutes, it is alleged that Ms. Coleman violated Section 475.42(1)(b), Florida Statutes, which defines the following "violation": "A person licensed as a sales associate may not

operate as a broker or operate as a sales associate for any person not registered as her or his employer."

17. Finally, Section 455.227(1)(j), Florida Statutes, defines the following ground for disciplinary action: "Aiding, assisting, procuring, employing, or advising any unlicensed person or entity to practice a profession contrary to this chapter, the chapter regulating the profession, or the rules of the department or the board."

D. The Division's Proof.

18. The essential allegations of the Administrative Complaints in support of the alleged statutory violations all turn on two essential facts: the nature of the agreements between Mr. Bloom and Mr. Sousa and CC Rentals; and, whether CC Rentals was in possession of any money which Mr. Bloom or Mr. Sousa were entitled to which not paid to them by CC Rental. Neither of these crucial facts was proved by competent substantial evidence.

19. While the Email Notice establishes that there was some relationship between CC Rental and Mr. Bloom and Mr. Sousa, the nature of the relationship is not proved clearly and convincingly. Additionally, while the Email Notice clearly states that no money owed to Mr. Bloom or Mr. Sousa would be returned to them, the evidence failed to prove that any money was in fact due. The Notice Email was a form notice sent to all

clients of CC Rental and only proved that, if any money was due a client, CC Rental could not pay it.

20. Based upon the foregoing, it is concluded that the Division failed to prove any of the violations alleged in the Administrative Complaints.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered by the Commission:

1. Finding that the Division failed to prove any of the violations alleged in the Administrative Complaints; and
2. Dismissing the Administrative Complaints.

DONE AND ENTERED this 23rd of November, 2009, in Tallahassee, Leon County, Florida.



LARRY J. SARTIN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of November, 2009.

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 these cases.