

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) Case No. 09-4235
)
CLIFFORD ALTEMARE AND ALTEMA)
CONSULTING CO., LLC,)
)
Respondents.)
_____)

RECOMMENDED ORDER

On October 16, 2009, and April 6, 2010, an administrative hearing in this case was held in Clearwater, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Patrick J. Cunningham, Esquire
Department of Business and
Professional Regulation
400 West Robinson Street, Suite N801
Orlando, Florida 32801

For Respondents: Clifford Altemare, pro se
Altema Consulting Co., LLC
1047 Iroquois Street
Clearwater, Florida 33755

STATEMENT OF THE ISSUES

The issues in the case are whether the allegations of the Administrative Complaint are correct, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

By an Administrative Complaint dated October 20, 2008, the Department of Business and Professional Regulation, Division of Real Estate (Petitioner), alleged that Clifford Altemare and Altema Consulting Co., LLC (Respondents), represented a seller in a real estate transaction, failed to properly escrow funds received in connection with the proposed sale, and then failed to return the escrowed funds to the intended buyer when the transaction did not proceed to closing.

The Respondents filed a request for a formal administrative hearing. The Petitioner forwarded the request to the Division of Administrative Hearings, which scheduled the formal hearing.

The case was transferred to the undersigned Administrative Law Judge (ALJ) on October 2, 2009. On the same day, but prior to the transfer of the case, the previously-assigned ALJ granted a motion to withdraw filed by legal counsel for the Respondents. At the commencement of the hearing, the Respondents asserted that substitute legal counsel was being obtained. The Respondents also asserted that no notice had been provided by previous legal counsel of a deposition taken, after the motion

to withdraw was granted, by the Petitioner for use at the hearing and that, accordingly, the Respondents had not attended or been represented at the deposition. The hearing was recessed to permit substituted legal counsel to be obtained, and the Petitioner was directed to reconvene the deposition to permit the Respondents' new counsel to cross-examine the deposed witness.

The Respondents failed to obtain substitute legal counsel, and the deposition was eventually reconvened to permit the Respondents an opportunity to cross-examine the deponent.

Following due notice, the hearing resumed and was completed on April 6, 2010.

At the hearing, the Petitioner presented the testimony of one witness and had Exhibits 1 through 5 (including the deposition testimony of an additional witness) admitted into evidence. The Respondents presented the testimony of one witness (Clifford Altemare) and had Exhibits 1 through 5 admitted into evidence.

The Transcript of the October 16, 2009, hearing was filed on October 27, 2009. The Transcript of the April 6, 2010, hearing was filed on April 9, 2010.

Both parties filed Proposed Recommended Orders that have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times material to this case, Respondent Clifford Altemare (Mr. Altemare) was a licensed real estate broker, holding Florida license BK-3062479.

2. At all times material to this case, Respondent Altema Consulting Co., LLC (ACC), was a licensed real estate brokerage, holding Florida license CQ-1024239. Clifford Altemare was the owner, qualifying broker, and officer for ACC.

3. On August 21, 2006, Mr. Altemare signed an agreement to represent for sale hotel property owned by Sweet Hospitality, LLC. The agreement stated that Mr. Altemare would receive an unidentified commission based on the sales price.

4. On December 12, 2006, Mr. Altemare received an escrow deposit of \$25,000 from Rakesh Rathee, who signed an agreement to purchase the hotel.

5. The \$25,000 deposit was transferred by wire from Rakesh Rathee into a corporate operating account of ACC.

6. Mr. Altemare failed to place the \$25,000 escrow deposit into an ACC escrow account.

7. Apparently, because the seller decided not to sell the property, the proposed sale did not close, and the buyer demanded the return of the \$25,000 deposit.

8. There is no credible evidence that the seller has made any claim upon the deposit.

9. Mr. Altemare has refused to return the \$25,000 deposit to Rakesh Rathee.

10. At the hearing, Mr. Altemare asserted that the deposit has not been returned to the buyer because of uncertainty as to whom the deposit should be refunded. There was no credible evidence offered at the hearing to support the assertion that someone other than Rakesh Rathee should received a refund of the \$25,000 deposit.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2009).

12. The Petitioner is the state agency charged with the regulation of real estate brokers and agencies in the State of Florida. See Ch. 475, Fla. Stat. (2009).

13. The Administrative Complaint filed in this case alleged that: Mr. Altemare was licensed and operating as the qualifying broker and officer of ACC; Mr. Altemare accepted an escrow deposit of \$25,000 from the buyer of the property; the funds were not properly deposited into an ACC escrow account; the sale did not proceed to closing; the buyer demanded return of the deposit; and Mr. Altemare had failed to return the deposit to the buyer.

14. The Petitioner has the burden of proving the allegations set forth in the Administrative Complaint by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). The burden has been met.

15. In relevant part, Section 475.25, Florida Statutes (2006), provides as follows:

(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. However, if the licensee, in good faith, entertains doubt as to what person is entitled to the accounting and delivery of the escrowed property, or if conflicting demands have been made upon the licensee for the escrowed property, which property she or he still maintains in her or his escrow or trust account, the licensee shall promptly notify the commission of such doubts or conflicting demands and shall promptly:

- a. Request that the commission issue an escrow disbursement order determining who is entitled to the escrowed property;
- b. With the consent of all parties, submit the matter to arbitration;
- c. By interpleader or otherwise, seek adjudication of the matter by a court; or
- d. With the written consent of all parties, submit the matter to mediation. The department may conduct mediation or may contract with public or private entities for mediation services. However, the mediation process must be successfully completed within 90 days following the last demand or the licensee shall promptly employ one of the other escape procedures contained in this section. Payment for mediation will be as agreed to in writing by the parties. The department may adopt rules to implement this section.

If the licensee promptly employs one of the escape procedures contained herein and abides by the order or judgment resulting therefrom, no administrative complaint may be filed against the licensee for failure to account for, deliver, or maintain the escrowed property. Under certain circumstances, which the commission shall set forth by rule, a licensee may disburse property from the licensee's escrow account without notifying the commission or employing one of the procedures listed in sub-subparagraphs a.-d. If the buyer of a residential condominium unit delivers to a licensee written notice of the buyer's intent to cancel the contract for sale and purchase, as authorized by s. 718.503, or if the buyer of real property in good faith fails to satisfy the terms in the financing clause of a contract for sale and purchase, the licensee may return the escrowed property to the purchaser without notifying the commission or initiating any of the

procedures listed in sub-subparagraphs a.-
d. . . .

* * *

(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. Florida Administrative Code Rule 61J2-14.010 provides as follows:

61J2-14.010 Real Estate Broker.

(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. If the brokerage entity has more than one broker licensee, then one broker licensee may be designated as the signatory. If the deposit is in securities, intended by the depositor to be converted into cash, the conversion shall be made at the earliest practical time, and the proceeds shall be immediately deposited in said account.

(2) A broker may place and maintain up to \$1,000 of personal or brokerage funds per each sales escrow account. A broker may place and maintain up to \$5,000 of personal or brokerage funds per each property management escrow account. Personal or brokerage funds in any escrow account shall not exceed \$5,000 per account. A broker shall be provided a reasonable amount of time to correct escrow errors if there is no shortage of funds and such errors pose no

significant threat to economically harm the public. For purposes of this subsection, reasonable amount of time shall be defined as 30 days from the date the last reconciliation statement was performed or should have been performed.

17. By failing to properly place the \$25,000 deposit into an escrow account, the Respondents violated Florida Administrative Code Rule 61J2-14.010 and, thereby, violated Subsections 475.25(1)(b) and (e), Florida Statutes (2006).

18. By failing to return, upon demand, the \$25,000 deposit to the prospective purchaser from whom the deposit was received, the Respondents have violated Subsection 475.25(1)(d), Florida Statutes (2006). There is no credible evidence that the Respondents notified the Petitioner, as required by statute, of "doubts or conflicting demands" related to any disputed return of the \$25,000 deposit.

19. Florida Administrative Code Rule 61J2-24.001 sets forth guidelines adopted by the Petitioner relevant to the violations of statute and rule set forth herein and provides the basis for the following recommended penalty. The guidelines do not include return of improperly retained escrow funds within the range of appropriate penalties.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Business and

Professional Regulation, Division of Real Estate, enter a final order, stating that the Respondents violated Subsections 475.25(1)(b), (d), and (e), Florida Statutes (2006), and Florida Administrative Code Rule 61J2-14.010 and imposing a \$15,000 administrative fine and a five-year suspension of licensure.

DONE AND ENTERED this 12th day of May, 2010, in Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of May, 2010.

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.