

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)	
PROFESSIONAL REGULATION,)	
DIVISION OF REAL ESTATE,)	
)	
Petitioner,)	
)	
vs.)	Case No. 10-0389PL
)	
HERIBERTO ALONSO,)	
)	
Respondent.)	
_____)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case before Larry J. Sartin, an Administrative Law Judge of the Division of Administrative Hearings, on April 2, 2010, by video teleconference between Lauderdale Lakes and Tallahassee, Florida.

APPEARANCES

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

For Respondent: Heriberto Alonso, pro se
11336 Southwest 75th Terrace
Miami, Florida 33173

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent, Heriberto Alonso, violated Section 475.25(1)(b), Florida Statutes (2005-

2006), as alleged in a one-count Administrative Complaint filed with the Petitioner, Department of Business and Professional Regulation, and, if so, what disciplinary action should be taken against his Florida real estate associate license.

PRELIMINARY STATEMENT

On March 17, 2009, a one-count Administrative Complaint, issued in FDBPR Case No. 2007038214, was filed with Petitioner, Department of Business and Professional Regulation, against Respondent, Heriberto Alonso, who holds a Florida real estate associate license. It is alleged in the Administrative Complaint that Respondent violated Section 475.25(1)(b), Florida Statutes (2005-2006).

On or about January 26, 2010, Respondent filed an Election of Rights form disputing the material facts of the Administrative Complaint and requesting a formal administrative hearing.

On January 26, 2010, Petitioner filed the Administrative Complaint, Respondent's Election of Rights form, and a letter requesting that an administrative law judge be assigned to hear the matter. The request for hearing was designated DOAH Case No. 10-0389PL and was assigned to the undersigned.

A Notice of Hearing by Video Teleconference was entered February 4, 2010, scheduling the final hearing for April 2, 2010.

At the final hearing, Petitioner presented the testimony of Mark Saracino, Suzanne Lloyd, Yvette Murphy, Esquire, Victor Ulloa, and Doug Dewitt. Petitioner also had admitted Petitioner's Exhibits 1 through 17. Mr. Dewitt, Mr. Saracino, and Ms. Lloyd were also called in rebuttal.

Respondent presented the testimony of Mr. Ulloa and testified on his own behalf.

The Transcript of the final hearing was filed with the Division of Administrative Hearings on May 5, 2010. The same day, a Notice of Filing Transcript was entered informing the parties of the filing of the Transcript. The parties were also informed, consistent with their agreement at hearing and the undersigned's order, that proposed recommended orders were to be filed on or before May 21, 2010.

Petitioner filed Petitioner's Proposed Recommended Order on May 17, 2010. Respondent filed a one-page letter on April 15, 2010, and on May 24, 2010, filed another one-page letter suggesting that Petitioner's post-hearing submittal was filed late. Respondent's suggestion is, based upon a review of the Transcript, incorrect. Accordingly, Petitioner's Proposed Recommend Order and Respondent's first letter have been fully considered in preparing this Recommended Order.

The events at issue in this case took place throughout 2006. Therefore, the 2005 and 2006 editions of Florida Statutes

apply. There being no material difference between those editions, all further references to the Florida Statutes in this Recommended Order are to the 2006 edition, 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, Heriberto Alonso, was at the times material to this matter, the holder of a Florida real estate associate license, license number 3037527, issued by the Division.

3. At the times relevant, Mr. Alonso was an active sales associate with The Keyes Company, 690 Lincoln Road No. 300, Miami Beach, Florida 33139.

B. The "Frow Avenue Property" Listing Agreement.

4. On or about March 9, 2006, Mr. Alonso entered into a listing agreement with Mark Saracino and Suzanne Lloyd, husband and wife, whereby Mr. Alonso agreed to list property they owned

located at 106 Frow Avenue, Coral Gables, Florida (hereinafter referred to as the "Frow Avenue Property").

5. Pursuant to the listing agreement for the Frow Avenue Property, the property was to be listed by Mr. Alonso on the MLS for \$359,000.00.

6. Consistent with the listing agreement for the Frow Avenue Property, the property was listed on the MLS on March 10, 2006, for \$359,000.00.

C. The "Thomas Avenue Property" Listing Agreement.

7. On or about March 14, 2006, Mr. Alonso entered into a listing agreement with Mr. Saracino and Ms. Lloyd, whereby Mr. Alonso agreed to list property they owned located at 3837 Thomas Avenue, Miami, Florida (hereinafter referred to as the "Thomas Avenue Property").

8. Pursuant to the listing agreement for the Thomas Avenue Property, the property was to be listed by Mr. Alonso on the MLS for \$350,000.00.

9. Consistent with the listing agreement for the Thomas Avenue Property, the property was listed on the MLS on March 21, 2006, for \$350,000.00.

D. Sale of the Frow Avenue and Thomas Avenue Properties.

10. In June of 2006, Ms. Lloyd entered into a sale and purchase contract with Reinaldo Gonzalez whereby it was agreed that the Frow Avenue Property would be sold to Mr. Gonzalez for

\$329,000.00. At the same time, Mr. Saracino entered into a sale and purchase contract with Mr. Gonzalez, whereby it was agreed that the Thomas Avenue Property would be sold to Mr. Gonzalez for \$325,000.00.

11. Without the knowledge or permission of Mr. Saracino and/or Ms. Lloyd, on July 26, 2006, Mr. Alonso raised the listing price on each property to \$450,000.00.

12. Mr. Saracino and Ms. Lloyd first learned of the increased listing price when they appeared at the scheduled closing on the properties and were presented with closing documents with a sales price on each property of \$450,000.00. On the advice of counsel, Mr. Saracino and Ms. Lloyd refused to complete the sale of the properties.

13. Mr. Alonso's testimony to the effect that he disclosed the increase in the sales price of the properties prior to the aborted closing is rejected as inconsistent with the credible testimony of Mr. Saracino and Ms. Lloyd.

E. Cost of Investigation.

14. The cost of investigating this matter totaled \$1,551.00.

CONCLUSIONS OF LAW

A. Jurisdiction.

15. 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.

16. The Division seeks to impose penalties against Mr. Alonso, pursuant to the Administrative Complaints, that include the suspension or revocation of his 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).

17. 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 Complaint.

18. Section 475.25, Florida Statutes, authorizes the Division to discipline any Florida real estate licensee who commits any of a number of offenses defined therein. In this case, the Division has charged Mr. Alonso with having violated Section 475.25(1)(b), Florida Statutes, which defines the following offense:

(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. [Emphasis added].

19. In the Administrative Complaint, it has only been alleged that Mr. Alonso violated the portion of Section 475.25(1)(b), Florida Statutes, highlighted in paragraph 17.

20. In Petitioner's Proposed Recommended Order, the charge against Mr. Alonso is further limited; it is argued by Petitioner that the evidence proved that Mr. Alonso is guilty of "misrepresentation, concealment and breach of trust" by raising the listing price of the Frow Avenue and Thomas Avenue Properties.

21. For there to be "misrepresentation, concealment and breach of trust" in violation of Section 475.25(1)(b), Florida Statutes, there must be wrongful intent or scienter. See Munch v. Department of Professional Regulation, 592 So. 2d 1136, 1143-44 (Fla. 1st DCA 1992); and Morris v. Department of Professional Regulation, 474 So. 2d 841, 843 (Fla. 5th DCA 1985).

22. The wrongful intent or scienter required to establish a violation of Section 475.25(1)(b), Florida Statutes, may be proven by circumstantial evidence. See, 705 So. 2d at 654; and Baker v. State, 639 So. 2d 103, 104 (Fla. 5th DCA 1994).

23. In the instant case, the Division established by clear and convincing evidence that Mr. Alonso engaged in "concealment" as alleged in the Administrative Complaint. Mr. Alonso, by his failure to disclose the change in listing price for the properties, concealed pertinent facts from Mr. Saracino and Ms. Lloyd, facts they did not learn of until the aborted closing, and, in so doing, violated Section 475.25(1)(b), Florida Statutes. Respondent acted knowingly, with the intent to deceive, in concealing the increase in the sales price of the Frow Avenue Property from \$329,000.00 to \$450,000.00 and the increase in the sales price of the Thomas Avenue Property from \$325,000.00 to \$450,000. The Division, however, failed to prove that Mr. Alonso made any "misrepresentation" to Mr. Saracino or Ms. Lloyd, or that he committed a "breach of trust."

D. The Appropriate Penalty.

24. The only issue remaining for consideration is the appropriate disciplinary action which should be taken by the Florida Real Estate Commission (hereinafter referred to as the "Commission"), against Mr. Alonzo for the violation proved by the Division. To resolve this issue it is necessary to consult the "disciplinary guidelines" of the Commission set forth in Florida Administrative Code Chapter 61J2-24. Those guidelines effectively place restrictions and limitations on the exercise of the Commission's disciplinary authority. See Parrot Heads,

Inc. v. Department of Business and Professional Regulation, 741 So. 2d 1231, 1233 (Fla. 5th DCA 1999)("An administrative agency is bound by its own rules . . . creat[ing] guidelines for disciplinary penalties."); and § 455.2273(5), Fla. Stat.

25. The penalty guideline for "concealment" committed in violation of Section 475.25(1)(b), Florida Statutes, is a three to five year suspension and a fine of \$1,000.00. Fla. Admin. Code R. 61J2-24.001(3)(c).

26. Florida Administrative Code Rule 61J2-24.001(4) provides for the consideration of certain aggravating and mitigating circumstances.

27. In Petitioner's Proposed Recommended Order, it has been suggested that the recommended penalty should be the revocation of Mr. Alonso's license and the payment of a fine of \$1,000. It is argued in Petitioner's Proposed Recommended Order that revocation is appropriate due to the apparent "fraudulent" nature of the matter, of which the increase in the sales price of the properties was an important step. While it is likely that fraud was involved, considering this possibility is not proper for two reasons: Mr. Alonso was not put on notice that he was being charged with doing anything improper other than changing an agreed listing price without permission or knowledge of the sellers; and the evidence was insufficient to prove that Mr. Alonso was aware of any fraudulent activity.

28. Based upon the foregoing, a suspension of one year, the payment of a fine of \$1,000.00, and payment of the Division's cost of investigation, are adequate penalties.

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 Heriberto Alonso, by his failure to disclose the change in listing price for the properties, did conceal pertinent facts from Mr. Saracino and Ms. Lloyd and, in so doing, violated Section 475.25(1)(b), Florida Statutes; and

2. Suspending his real estate associate's license for a period of one year, requiring the payment of a fine of \$1,000.00, and requiring the payment of the Division's cost of investigation.

DONE AND ENTERED this 8th day of June, 2010, 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 8th day of June, 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 these cases.