

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) Case No. 10-1237PL
)
DENNIS TRAGE,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case on April 29, 2010, in Vero Beach, Florida, before Administrative Law Judge Claude B. Arrington of the Division of Administrative Hearings (DOAH).

APPEARANCES

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

For Respondent: Stephen Fromang, Esquire
1620 26th Avenue
Vero Beach, Florida 32960

STATEMENT OF THE ISSUE

Whether Respondent, a real estate broker, committed the offenses alleged in the Administrative Complaint dated

February 16, 2010, and, if so, the penalties that should be imposed.

PRELIMINARY STATEMENT

On February 16, 2010, Petitioner filed a two-count Administrative Complaint against Respondent alleging certain facts pertaining to an auction of a townhouse conducted by Respondent. Based on those factual allegations, Petitioner charged in Count I that Respondent violated the provisions of Subsection 472.25(1)(b), Florida Statutes,¹ and in Count II that he violated the provisions of Subsection 475.25(1)(d), Florida Statutes.

Thereafter, Petitioner timely denied the allegations of the Administrative Complaint and filed a Request for Administrative Hearing. The matter was referred to DOAH, and this proceeding followed.

At the final hearing, Petitioner presented the testimony of Jonathan Platt, an investigator employed by Petitioner and Aaron Gordon, the high bidder at the subject auction. Petitioner offered five sequentially-numbered exhibits, each of which was admitted into evidence. Respondent testified on his own behalf and presented the additional testimony of Robert Deutsch, a prospective bidder at the subject auction. Respondent offered two sequentially-numbered exhibits, both of which were admitted into evidence.

During the course of the formal hearing, the parties jointly moved to keep the record open for the purpose of taking and subsequently filing the deposition of David Mover, the owner of the subject townhouse. The undersigned granted the motion. The deposition of Mr. Mover was taken May 21, 2010, and filed June 8, 2010.

A one-volume Transcript of the hearing was filed June 21, 2010. The parties filed Proposed Recommended Orders, which have been duly-considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is the state licensing and regulatory 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. At all times relevant to this proceeding, Respondent was licensed in the State of Florida as a real estate broker, having been issued license BK-575099. Respondent is registered as a sole proprietor broker, trading as Atlantic Auction Realty.

3. On February 21, 2008, Respondent, acting through his company, entered into a contract (auction contract) with David Mover to auction a townhouse owned by Mr. Mover located at

8626 S.W. 94th Street, Miami, Florida (the subject property).

4. Mr. Mover had been trying to sell the subject property for approximately two years. In March 2007, Mr. Mover became unable to make the mortgage payments on the subject property. On February 21, 2008, the Circuit Court in and for Dade County, Florida, entered a Final Judgment of Mortgage Foreclosure (Judgment of Foreclosure) against the subject property in favor of Washington Mutual Bank, the holder of the first mortgage. The amount of the judgment was \$245,727.25. The Judgment of Foreclosure ordered that the property be sold at public sale on April 24, 2008.

5. At the time of the auction, there was a second mortgage on the subject property owned by a trust. The approximate amount of the second mortgage was \$120,000.00. The trust was a defendant in the foreclosure proceedings.

6. Prior to the auction conducted by Respondent, the trustee of the trust indicated a possible willingness on the part of the trust to accept less than the balance owed on the second mortgage if the property were sold by private auction, as opposed to the public auction ordered by the Judgment of Foreclosure. However, the subject auction occurred prior to the trustee's making a commitment to take less than the balance owed on the second mortgage.

7. The price listed on the auction contract was

\$350,000.00. The minimum amount Mr. Mover wanted for the townhouse was \$370,000.00, which would have been sufficient to satisfy the Judgment of Foreclosure and the second mortgage. Mr. Mover never agreed to accept less than \$370,000.00 for the subject property.²

8. Mr. Mover understood that the \$350,000.00 figure was a starting point for the auction.³ This was not an absolute auction. Mr. Mover had the right to refuse a bid less than \$350,000.00.

9. The auction contract contained the following provision in paragraph 3:

3. 10% BUYER'S PREMIUM will be added to the Buyer's Bid and be the Auctioneer's total commission.

10. The auction contract provided that the auction would be on March 20, 2008. Respondent prepared a flyer that announced the terms of the auction. Prospective bidders were notified by the flyer that a 10% deposit would be required the day of the sale and that there would be a buyer's premium of 10% of the bid. Prospective bidders were required to have a cashier's check in the amount of \$10,000.00.

11. The "Auction Terms and Conditions" included the following provisions:

1. Bidder Registration. The auction is open to the public and your attendance is

welcomed. To register, you must display a cashier's check in the amount as set forth in each property description. Upon being declared the top bidder, the cashier's check will be applied as a partial deposit, and the deposit must be increased to equal (10%) [sic] of each contract price. Please be advised there are no exceptions. . . .

2. Contract and Deposit. Bids may not be retracted once accepted by the auctioneer. Upon being declared top bidder, the cashier's check will be applied as a partial deposit. . . .

12. The auction was conducted in the driveway of the subject property. Mr. Mover waited in the upper area of the subject property during the auction.

13. Mr. Gordon opened the bidding at the base bid (the bid amount prior to tacking on the buyer's premium) of \$285,000.00, but agreed to up the base bid to \$300,000.00 when Respondent agreed to reduce the buyer's premium to \$10,000.00 from 10% of the base bid amount (\$28,500.00 for a base bid of \$285,000.00 or \$30,000.00 for a base bid of \$300,000.00).

14. Respondent went upstairs and wrote down the amount of the bid and told Mr. Mover that he would reduce the buyer's premium to \$10,000.00 if Mr. Mover would accept that price. Mr. Mover refused to accept that bid. Mr. Mover believed that the auction had failed to sell the property.

15. After talking with Mr. Mover, Respondent concluded the auction by declaring Mr. Gordon, bidding on behalf of himself

and his wife, the winning bidder at the auction. Mr. Gordon's base bid was in the amount of \$300,000.00 plus a buyer's premium in the amount of \$10,000.00, bringing the total bid to \$310,000.00.

16. After being declared the winning bidder, Mr. Gordon gave to the Respondent the \$10,000.00 cashier's check he had brought to the auction. Mr. Gordon signed a document styled "Contract for Sale and Purchase at Auction" (Purchase Contract), which reflected a total selling price of \$310,000.00 (this figure included the buyer's premium) and a requirement that the closing date be on or before April 19, 2008.

17. The Purchase Contract contained the following provision relating to the Buyer's Premium:

8. BUYER'S PREMIUM - WHEN EARNED: it is understood and agreed by the Seller and the Buyer that the Buyer's Premium is paid to the Auctioneer at the time of the Auction Sale and is the sole property of the Auctioneer, and he is entitled to this money as his fee at the time of said payment.

18. Respondent told Mr. Gordon that he would cash the check Mr. Gordon gave to him on March 20, 2008, after Mr. and Mrs. Gordon had an executed contract signed by both parties. Respondent cashed Mr. Gordon's check on March 21, 2008.

19. Respondent never presented the Purchase Contract to Mr. Mover, and the transaction never closed. The Gordons were unable to secure financing because they had no contract.

Mr. Gordon has made repeated demands for the return of the proceeds from the check he gave to Respondent. Respondent has refused those demands.⁴

20. Respondent was aware of the foreclosure proceeding before he conducted the auction. Respondent did not disclose the foreclosure proceeding to Mr. Gordon prior to the auction.

21. After the auction, Mr. Mover filed for bankruptcy. Mr. Gordon filed no claim in that proceeding.

CONCLUSIONS OF LAW

22. DOAH has jurisdiction over the subject matter of and the parties to this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

23. Petitioner has the burden of proving by clear and convincing evidence the allegations against Respondent. See Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112 (Fla. 1st DCA 1989); and Inquiry Concerning a Judge, 645 So. 2d 398 (Fla. 1994). The following statement has been repeatedly cited in discussions of the clear and convincing evidence standard:

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 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 of (sic) 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).

24. The definition of the term broker set forth in Subsection 475.01(1)(a), Florida Statutes, includes one who auctions property for compensation.

25. Petitioner has charged Respondent with violating the provisions of Subsections 475.25(1)(b) and (d), Florida Statutes. Those provisions provide, in relevant part, 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. . . .

26. Petitioner proved by clear and convincing evidence that Respondent engaged in fraud in violation of Subsection 475.25(1)(b), Florida Statutes, as alleged in Count I of the Administrative Complaint by declaring Mr. Gordon to be the winning bidder at the auction when he knew that Mr. Mover had rejected Mr. Gordon's bid and by cashing Mr. Gordon's check when he knew there was no fully executed contract.

27. Petitioner also proved by clear and convincing

evidence that Respondent violated the provisions of Subsection 475.25(1)(d), Florida Statutes, by failing to account for the money given to him by Mr. Gordon as a partial deposit.

28. There was no evidence of aggravating or mitigating circumstances.

29. Florida Administrative Code Rule 61J2-24.001(3)(c) and (e) provides disciplinary guidelines for violations of Subsections 475.25(1)(b) and (d), Florida Statutes.

30. The disciplinary guideline for the violation found in Count I is an administrative fine of \$1,000.00-\$2,500.00 and a 30-day suspension to revocation.

31. The disciplinary guideline for the violation found in Count II is an administrative fine of \$250.00-\$1,000.00 and suspension to revocation.

32. No recommendation is made as to an award of costs of investigation pursuant to Subsection 455.227(3), Florida Statutes, because no evidence was presented as to those costs.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby RECOMMENDED that the Division of Real Estate find Respondent guilty of the violations alleged in Counts I and II of the Administrative Complaint. For the violation found in Count I, it is recommended that the final order impose against Respondent an administrative fine in the

amount of \$1,000.00 and that it revoke his broker's license. For the violation found in Count II, it is recommended that the final order impose an administrative fine in the amount of \$250.00 and that it revoke his broker's license.

DONE AND ENTERED this 14th day of July, 2010, in Tallahassee, Leon County, Florida.



CLAUDE B. ARRINGTON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of July, 2010

ENDNOTES

^{1/} Unless otherwise noted, all statutory references are to Florida Statutes (2009). There has been no material change to any statute cited herein at any time relevant to this proceeding.

^{2/} There was a dispute in the evidence as to whether Mr. Mover subsequently agreed to reduce the minimum amount he would accept to the sum of \$300,000.00. Respondent testified that he did, while Mr. Mover testified that he did not. Respondent, Mr. Mover, and prospective bidder Robert Deutsch met for lunch just prior to the auction. Respondent testified that it was at that meeting that Mr. Mover agreed to reduce the minimum amount to \$300,000.00. Respondent's Exhibit 1 purports to be a copy of the auction contract with a strike-through of the sum of \$350,000.00 and the insertion of the amount of \$300,000.00.

Someone inserted the initials D. M. above the strike-through and next to the inserted amount. Mr. Mover testified, credibly, that he did not alter the auction contract and that he did not insert the initials D. M. Mr. Mover also testified, credibly, that he first saw the altered auction contract days after the auction. Mr. Deutsch testified that Respondent wanted Mr. Mover to reduce the minimum price, but that Mr. Mover wanted more money. Based on the testimony of Mr. Mover and Mr. Deutsch, together with the undisputed fact that Mr. Mover did not accept a bid of less than \$350,000.00, and his explanation as to why he would not do so, it is found that Mr. Mover did not agree to reduce the minimum acceptable amount.

^{3/} Although Mr. Mover believed that \$350,000.00 was a starting point for the auction, the auction contract may have required him to accept that bid. Because the high bid was less than \$350,000.00 and because Mr. Mover did not approve a figure less than \$350,000.00, it is not necessary to determine whether Mr. Mover would have been required to accept a bid in the amount of \$350,000.00 because that issue is moot.

^{4/} Respondent contends that he earned the \$10,000.00 by conducting the auction. Respondent's contention is rejected because Mr. Mover never accepted the bid. Respondent also contends that he provided Mr. Gordon with sufficient documentation for Mr. Gordon to sue Mr. Mover for specific performance. While that contention may or may not be true, it is obvious that such a suit would not have given Mr. Gordon relief because of the foreclosure proceeding. Even if it were determined that Respondent was entitled to the sum of \$10,000.00, he was not entitled to take Mr. Gordon's check as payment for that sum before the Gordons had a valid contract because the check was given as a "partial deposit." The check was not in payment of the Buyer's Premium.

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.