

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
) Case No. 10-7449PL
Petitioner,)
)
vs.)
)
Alix Aldonis,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Administrative Law Judge, John D. C. Newton, II, of the
Division of Administrative Hearings, heard this case, as
noticed, on November 12, 2010, by video teleconference at sites
in Fort Lauderdale and Tallahassee, Florida.

APPEARANCES

For Petitioner: Nicole McLaren, Senior Attorney
Division of Real Estate
Department of Business and
Professional Regulation
400 West Robinson Street, Suite N801
Orlando, Florida 32801

For Respondent: Alix Aldonis, pro se
1739 Northwest 80th Avenue
Margate, Florida 33063

STATEMENT OF THE ISSUES

The issues in this case are:

1. Did the Respondent, Alix Aldonis (Mr. Aldonis), commit fraud; misrepresentation; concealment; false promises; false pretense; dishonest dealings by trick, scheme or device, culpable negligence; or breach of trust in a business transaction by: (a) misrepresenting the sales price of real estate in a sale and purchase contract, (b) misrepresenting a commission amount in a sales and purchase contract, and (c) misrepresenting receipt by an escrow agent of a \$5,000 deposit?

2. Did Mr. Aldonis fail to obtain and retain written confirmation from the escrow agent of delivery of the Buyer's funds for purchase of the property?

PRELIMINARY STATEMENT

The Petitioner, Florida Department of Business and Professional Regulation, Division of Real Estate (Department), issued a two-count Administrative Complaint (Complaint) against Mr. Aldonis on June 1, 2010. Mr. Aldonis disputed the facts alleged in the Complaint and requested a formal hearing. The Department referred the case to the Division of Administrative Hearings (DOAH) on August 12, 2010. DOAH scheduled the requested hearing for November 12, 2010. The undersigned conducted the hearing as scheduled.

The parties waived opening statements. The Department presented the testimony of Lawrence Ligonde, Cheryl Phen, and Jennifer North. It offered Exhibits one through six. Mr. Aldonis did not object to the exhibits. All were received into evidence. Mr. Aldonis did not present evidence. The parties waived making closing arguments.

At the hearing's conclusion, the Department moved to extend the time period during which proposed recommended orders may be filed to thirty days after filing of the transcript. Mr. Aldonis agreed. The motion was granted.

The court reporter filed the transcript on December 6, 2010. The Department filed a Proposed Recommended Order on December 27, 2010. Mr. Aldonis did not file a proposed recommended order.

FINDINGS OF FACT

1. The Department is the state agency charged with the licensing and regulation of the real estate industry in the State of Florida, under the authority of section 20.165, Florida Statutes (2010), and chapters 455 and 475, Florida Statutes (2010).

2. At all times material to this proceeding, the Department licensed Mr. Aldonis as a State of Florida real estate sales associate. He holds License Number SL-3117116, which is in effect until March 31, 2011.

3. At all times material to this proceeding, Total Stop, Inc., d/b/a Total Stop Real Estate (Total Stop Real Estate), contracted with Mr. Aldonis to affiliate with it as a sales associate. At all times material to this proceeding, Lawrence Ligonde, of Total Stop Real Estate, was the licensed real estate broker with whom Mr. Aldonis was affiliated. Mr. Ligonde did not employ Mr. Aldonis. Currently, Mr. Aldonis is affiliated with Tropical Springs Realty, Inc.

4. The agreement between Mr. Aldonis and Total Stop Real Estate did not provide for Total Stop Real Estate or Mr. Ligonde's receiving a percentage commission based on the price of sales that Mr. Aldonis made. Mr. Aldonis paid a flat fee of \$495 to be affiliated with Mr. Ligonde.

5. In 2006, Joseph Phen and Cheryl Phen listed a home that they owned, located at 3500 S.W. Viceroy Street, Port St. Lucie, Florida, for sale. They listed the property for \$330,000. Ms. Phen was a real estate sales broker. She was the listing agent for the property.

6. Mr. Aldonis represented a buyer in the sale of the Viceroy Street property. The buyer, Manuela Celestin, signed a Residential Sale and Purchase Contract for the property on August 2, 2006. Mr. and Ms. Phen signed the contract on August 3, 2006. They also initialed each page.

7. The contract set forth a purchase price of \$272,000. The contract also indicated that the buyer was providing a \$5,000 deposit. Mr. Aldonis sent Ms. Phen a copy of the contract and a copy of a deposit check by facsimile transmission. The record does not reveal the sequence of contract signing, contract transmission, check transmission, the date of the check transmission, or whether the contract was transmitted more than once to Ms. Phen.

8. Due to conversations with Ms. Augustine at Premier Choice Title & Escrow, the escrow agent identified in the contract, Ms. Phen grew concerned about whether the deposit had been placed in escrow. She spoke to Ms. Augustine about her concerns. Ms. Phen also told Mr. Aldonis she was concerned that the deposit check may not have been deposited in an escrow account.

9. After the conversation, Mr. Aldonis sent Ms. Phen a copy of a check payable to Total Stop Real Estate from Charassard & Associates, P.A., for \$5,000. "Phen/Celestin" is written in the "Memo" section of the check. The check bears the date August 6, 2006. Persuasive evidence does not establish if this was a copy of a second check or another copy of the check Mr. Aldonis transmitted earlier.

10. Ms. Phen requested and received a copy of the Residential Sale and Purchase contract from the title company. The first page of this copy listed the sale price as \$330,000.

11. Although Ms. Phen testified about two HUD closing statements, the Department did not offer a copy of a HUD closing statement into evidence.

12. The sale of the property occurred. The closing sale price was \$272,000.

13. The Department entered a second copy of the contract signed by the Phens and Ms. Celestin into evidence. The first page of the second contract reflected a sales price of \$330,000. The initials at the bottom of the first page are not the initials of the Phens. The rest of the contract is identical to the contract signed by the Phens on August 3, 2006. Nothing in either contract provides for a four percent commission to be paid to any person or entity.

14. There is no persuasive evidence indicating who created the second contract or how the title company obtained it.

15. Mr. Ligonde testified that the contract with the higher purchase price "looks like" the one Mr. Aldonis provided him. The contracts "look" the same. Only a very close examination would identify the differences in the initials on the first page. The difference in amounts is more obvious, but

it still requires a reading of the contract, not just looking at it, to note the different amount.

16. Mr. Ligonde did not testify that the second contract entered into evidence came from his files. He also did not provide any information about how files are maintained at his business or who has access to them. He did not know when the contract arrived at his office or how. In addition, Mr. Ligonde's statement that a document "looks like" one provided him by Mr. Aldonis does not equate to testimony that the document is in fact the document Mr. Aldonis provided.

17. At some point in the transaction, the employees of Mr. Ligonde's office, the employees of a title insurance company, and the employees of a mortgage broker had possession and control of the sales contract or a copy of it. The Department did not present credible, persuasive evidence that ruled out any of those individuals having created the new page one with the \$330,000 sales price.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with sections 120.569 and 120.57(1), Florida Statutes (2010).

19. The Department seeks to take disciplinary action against Mr. Aldonis. It bears the burden of proving the

Complaint's allegations by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

20. As stated by the Florida Supreme Court:

[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 testimony 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 a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Henson, 913 So. 2d 579, 590 (Fla. 2005) (quoting Slomowitz v. Walker, 429 So. 797, 800 (Fla. 4th DCA 1983)).

21. Count I of the Complaint charges Mr. Aldonis with violating section 475.25(1)(b), Florida Statutes (2006). That section, among other things, makes fraud, misrepresentation, concealment, false promises, false pretenses, negligence, or breach of trust in any business transaction a disciplinary offense. The Department maintains that Mr. Aldonis committed the offense by (1) misrepresenting the sales price of the Viceroy Street house in the second sales and purchase contract, (2) misrepresenting in the second contract that Mr. Ligonde would receive a four percent commission based on a sales price of \$330,000¹ instead of a sales price of \$272,000, and (3)

misrepresenting that the escrow agent had received the \$5,000 deposit.

22. Clear and convincing evidence established that someone created a second first page for the contract showing a sales price of \$330,000. Clear and convincing evidence also established that someone other than Mr. and Ms. Phen initialed the new first page. But there was no clear and convincing evidence that Mr. Aldonis was the person who created the page with the \$330,000 price or that he was the person who wrote the Phens' initials on that page.

23. There is no direct evidence that Mr. Aldonis changed the first page. The circumstantial evidence does not support a finding that Mr. Aldonis made the change.

24. The evidence does not credibly establish where the second contract that was received into evidence came from or who changed it. The facts show that individuals working for at least three different businesses had the opportunity to make the change. These facts do not support a conclusion that of all the individuals with an opportunity to change the contract, Mr. Aldonis was the person who changed it.

25. Neither version of the contract represents that an employer of Mr. Aldonis or any other person or entity would receive a four percent commission.

26. There is no clear and convincing evidence that Mr. Aldonis misrepresented placing the \$5,000 deposit with an escrow agent. The only evidence on this subject is Ms. Phen's testimony about a conversation with a title company representative and an e-mail from the representative. It is hearsay that would not be admissible over objection in a civil proceeding. The hearsay evidence is not sufficient to support a finding of fact. Wark v. Home Shopping Club, 715 So. 2d 323, 324 (Fla. DCA 2d 1998). In addition, the testimony and e-mail by themselves are not clear and convincing evidence that Mr. Aldonis did not submit the deposit.

27. Count II charges Mr. Aldonis with violating section 475.25(1)(e), Florida Statutes (2006) by violating the 2006 version of Florida Administrative Code Rule 61J2-14.008. That rule created definitions of "deposit," "trust account," "escrow account," and "immediately." The definition of "trust" or "escrow" account included the following provision.

When escrow funds are placed with a title company or an attorney, the licensee shall indicate on the sales contract the name and address of said entity. The licensee shall obtain and retain written verification of said deposit upon delivery of the funds to the title company or attorney.

Fla. Admin. Code R. 61J2-14.008(2)(b).

28. Assuming, without deciding, that a rule definition alone can create a disciplinary offense, Count II fails for

simple lack of proof. There is no clear and convincing evidence that Mr. Aldonis did not obtain and retain written verification of depositing the \$5,000 with a title company or attorney.

29. In its Proposed Recommended Order, the Department argues for the first time that Mr. Aldonis committed a disciplinable offense by not including the address of the escrow agent, Premier Title Company, in the contract. The Complaint does not allege that Mr. Aldonis did not include the address of the escrow agent in the contract. Count II does not assert failure to include the address as a basis for discipline. Count II asserts only failure to obtain and retain written verification of depositing the \$5,000 with a title company or attorney as a basis for discipline.

30. An agency may not base disciplinary action against a licensee on conduct never alleged in an administrative complaint or similar pleading. Cottrill v. Dep't of Ins., 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996). Just as in Cottrill, the Complaint here refers to the statute and rule relied upon. But, just as in Cottrill, the Complaint does not allege the act or omission the Department now relies upon to support disciplinary action.

31. The evidence does not create a firm or unhesitating conviction that Mr. Aldonis committed any of the offenses charged.

RECOMMENDATION

Upon consideration of the facts found and conclusions of law reached, it is RECOMMENDED that the Florida Real Estate Commission enter a Final Order dismissing the Administrative Complaint.

DONE AND ENTERED this 2nd day of February, 2011, in Tallahassee, Leon County, Florida.



John D. C. Newton, II
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of February, 2011.

ENDNOTE

¹ Paragraph 26(b) of the Administrative Complaint refers to a sales price of \$337,000. This appears to be scrivener's error. The rest of the Administrative Complaint and the evidence establish that the second contract reflected a sales price of \$330,000.

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.