

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) Case No. 10-8009PL
)
ALEXANDRIA MARTIN,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On April 18, 2011, a duly-noticed hearing was held by video teleconference in Daytona Beach and Tallahassee, Florida, before Lisa Shearer Nelson, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Joseph Solla, Esquire
Department of Business and
Professional Regulation
Division of Real Estate
400 West Robinson Street, Suite N801
Orlando, Florida 32801

For Respondent: Robert J. Riggio, Esquire
400 South Palmetto Avenue
Daytona Beach, Florida 32114

STATEMENT OF THE ISSUE

The issue to be determined in this proceeding is whether Respondent violated section 475.125(1)(b), Florida Statutes (2008), and if so, what penalty should be imposed?

PRELIMINARY STATEMENT

On July 16, 2010, Petitioner, the Department of Business and Professional Regulation, Division of Real Estate (Petitioner or the Department), filed an Administrative Complaint charging Respondent, Alexandria Martin (Respondent or Ms. Martin) with violating section 475.25(1)(b). Respondent executed an Election of Rights form disputing the allegations in the Administrative Complaint and requesting a section 120.57(1) hearing. On August 19, 2010, the case was referred to the Division of Administrative Hearings for assignment of an administrative law judge.

The case was originally scheduled for hearing October 14, 2010, and after multiple continuances, took place April 18, 2011. Petitioner filed a Motion to Amend the Administrative Complaint, which was granted. The parties also filed a Joint Prehearing Statement, in which the parties stipulated that the first six paragraphs in the Amended Administrative Complaint did not require additional evidence. At hearing, Petitioner presented the testimony of Steven Pitts, Andrew Walker, Anthony Conklin, Robert Millward and Deborah Artzner. Petitioner's Exhibits 1-8 were admitted into evidence. Respondent testified on her own behalf and presented the testimony of Natalie Klindt. Respondent's Exhibits 1-4, 7, and 10-11 were admitted into evidence.

The two-volume Transcript of the proceedings was filed with the Division May 4, 2011. Both parties timely filed Proposed Recommended Orders, which have been carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is the state agency charged with regulating the practice of real estate professionals pursuant to section 20.125 and chapters 455 and 475, Florida Statutes.

2. At all times material to the allegations in the Administrative Complaint, Respondent was a real estate associate licensed with All Pro Realty Co., Volusia County, Inc., d/b/a RE/MAX All Pro Realty, a real estate corporation (All Pro).

3. Respondent's license number is 3051505.

4. Respondent's broker at All Pro was Robert Millward.

5. Respondent was the listing agent for a property located at 3301 Tropical Terrace, Deland, Florida (the Tropical Terrace property).

6. Respondent specialized in handling the sale of foreclosure properties. The Tropical Terrace property was a foreclosure property, and was owned by Premier Asset Services (Premier).

7. Sales for bank-owned properties such as the Tropical Terrace property that Respondent handled were different from most real estate transactions. For example, offers were communicated to Respondent, whether verbally with written follow-up, by fax or

e-mail, or by a conventional real estate sales contract. If no offer was currently pending for a piece of property, the data related to the offer would be entered into a dedicated electronic communication system, referred to as the portal, for consideration by the seller.

8. If the property was already under contract, the listing agent could not communicate any further offers on the property. It was not unusual for the potential buyer to receive no response if this was the case.

9. If there were no pending offers on a property, the Seller, through use of the portal, would accept the offer, provide a counter-offer, or send the offer back for a "highest and best" offer. However, all transactions generated a generic counter-offer form with the final terms, even if the original offer was accepted.

10. Any counter-offer would be sent to the buyer's agent for approval. If acceptable, the counter-offer would be initialed, and returned for submission to Premier. The documents required for submission were the FLA/BAR form, the counter-offer, an escrow check and a pre-qualification letter for financing purposes.

11. Premier would not sign off on the purchase until the complete package was submitted. Once the complete package was reviewed, the asset manager for Premier would sign the contract

and the entire packet would be returned to the seller's agent, either by fax or through the portal.

12. Anthony Conklin wanted to purchase the Tropical Terrace property for investment purposes. He submitted an offer, through his realtor, Debbie Artzner, for \$100,000, which was below the listed price for the property. Neither he nor his agent received any response to this offer.

13. On March 11, 2009, Conklin signed another offer on the property for \$105,000. Ms. Artzner faxed him the forms to sign and he faxed them back to her to submit to Respondent. Anthony Conklin did not sign the forms in her presence.

14. There is some dispute as to whether the offer was actually forwarded to Respondent on March 11: Ms. Artzner says that she sent it by email but did not confirm that Respondent had received it. Ms. Artzner also stated that she would not have submitted an offer if there was an existing offer on the property. Respondent insists that there was in fact an existing offer on March 11 and denies receiving the Conklin offer.

15. There is also no certainty that the exhibit identified as the March 11, 2009, offer and admitted as Petitioner's 2 is, in its entirety, the document that was actually signed by Mr. Conklin on that date. For example, the first page of the contract lists a price of \$105,000, and has a deadline for acceptance of March 26, 2009. Pages one, four and five of the exhibit have no fax header on the bottom or top of the document,

while pages two and three have two or three fax headers dated March 11, 2009, at the bottom of the document. The signature page, dated March 11, 2009, is page three. What remains unclear is whether the offer forwarded to Respondent for input in the portal resulting in a counter-offer that was accepted was the offer dated March 11, 2009, for \$105,000, or was yet another offer for \$108,000.

16. In any event, on March 25, 2009, Premier issued a counter-offer for \$108,000, and on March 26, 2009, the counter-offer was accepted. On March 31, 2009, Mr. Conklin wrote an escrow check for the purchase, and the documents necessary for Premier's asset manager's signature were uploaded to the portal. On April 6, 2009, the asset manager signed the contract and the entire package, including the FLA/BAR form, was returned for transmission to the Buyer, via the portal. The agreed-upon purchase price for the property was \$108,000.

17. At this point, the road to closing on the property became problematic. While Respondent claims there would have been no reason for her to not provide the entire package to the buyer's broker, Ms. Artzner claims that she did not receive it, and her testimony is credited. Multiple requests were made for a copy of the FLA/BAR form, which were not honored. When Ms. Artzner was unsuccessful in getting a copy of the form, which was needed for financing purposes, Mr. Conklin began calling Respondent directly. Respondent did not provide the form, but

instead called Ms. Artzner's licensure into question.

(Ms. Artzner, who testified on behalf of the Department, indicated that she has been licensed for 20 years.) No real basis for doubting her licensure was presented to justify such an accusation.

18. This refusal to send the FLA/BAR form became a hurdle for completing the financing. After several attempts by both Mr. Conklin and Ms. Artzner, after approximately two weeks, a telephone conference call was arranged involving Mr. Conklin, Ms. Artzner, Respondent, and Andy Walker, who was assisting with the processing of Mr. Conklin's loan. According to Mr. Walker, Respondent remained unhelpful in providing documents when requested.

19. Mr. Conklin and Respondent are like oil and water. Some evidence was presented to indicate the lack of the FLA/BAR form was not the only barrier to closing, but it certainly contributed to the delay. While Mr. Conklin should have worked through his realtor instead of calling Respondent directly, Respondent could have solved the document problem by simply forwarding a copy of the FLA/BAR form. Instead, she took the position that she had already provided it and did not need to do so again. At hearing, Respondent stated, "I don't want to sound arrogant or anything, but I really don't want to do anybody else's paperwork." Her testimony is consistent with the claims

by others that she was uncooperative in getting the transaction ready to close, and it is so found.

20. On April 30, 2009, Andy Walker received a fax that included a cover page and a copy of what purports to be the FLA/BAR contract (Petitioner's Exhibit 4). The document contains an offer price of \$108,000, which while the ultimate price, is not the price Mr. Conklin claims was on the offer that was forwarded to Respondent. In addition, Mr. Conklin claims that the document contains a signature that purports to be his but is not. Mr. Conklin and the Department contend that Respondent forwarded this copy of the contract and that she knew or should have known that the signature on the document is not Mr. Conklin's.

21. The fax sheet accompanying the document is from an establishment in Jacksonville called "The Retreat at St. Johns." The cover sheet indicates that it is addressed to "Conklin" at fax number 407-389-5111. However, there is no indication as to who sent the fax, and Respondent denies doing so.

22. No persuasive evidence was submitted to demonstrate that Respondent was responsible for sending the fax or that she reviewed the signatures contained in the fax. While it is somewhat different from other examples of Mr. Conklin's signature in the documents, the differences are not so great that that they could not be attributed to the natural variances in a person's handwriting. Further, while the first five pages of Exhibit 4

have a fax header at the top indicating they were sent on April 30, 2009, the page with the disputed signature and the signature of the asset manager, Donna West, has no fax header.

23. In short, no clear and convincing evidence was presented to demonstrate that Respondent was responsible for sending the fax. Further, no clear and convincing was presented to indicate that Mr. Conklin's signature contained in Petitioner's Exhibit 4 was forged or that Respondent had any involvement in crafting, reviewing, or transmitting Petitioner's Exhibit 4.

24. Eventually, Mr. Conklin directed Ms. Artzner to prepare a new FLA/BAR contract with the agreed-upon purchase price in order to get the financing processed and approved. The transaction eventually closed and Mr. Conklin successfully purchased the property for the agreed-upon \$108,000.

CONCLUSIONS OF LAW

25. 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.

26. This disciplinary action by Petitioner is a penal proceeding in which Petitioner seeks to suspend or revoke Respondent's license as a real estate associate. Petitioner bears the burden of proof to demonstrate the allegations in the Administrative Complaint 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).

27. As stated by the Florida Supreme Court:

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 testimony must be precise and lacking in confusion as to the facts in issue. The evidence must be of such a 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. 2d 797, 800 (Fla. 4th DCA 1983).

28. The Administrative Complaint alleges that the Respondent's conduct violated section 475.25(1)(b), which provides in pertinent part that the Florida Real Estate Commission may discipline a licensee who:

(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.

29. The Administrative Complaint alleges that Respondent's conduct was a violation of section 475.(1)(b) in the following specific ways:

12. At all times material, Respondent failed to deliver a copy of the Seller's signed acceptance of the Buyer's original written offer to purchase.

13. On or about April 30, 2009, in response to repeated requests from the Buyer and the Buyer's representative(s), Respondent delivered to Buyer, or Buyer's representative(s), a copy of a sales and purchase contract for the Subject Property which she represented to be the Seller's executed acceptance of the Buyer's original written offer of March 11, 2009.

* * *

15. Respondent knew or should have known that the Buyer's signature, in the contract identified as Exhibit 3 (introduced at hearing as Petitioner's Exhibit 4) was fraudulent, and that the document represented as the Seller's executed acceptance of the Buyer's original offer was not the document originally submitted by the Buyer.

* * *

18. As set forth above, Respondent committed fraud, misrepresentation, concealment, false promises, false pretenses, dishonest dealings by trick, scheme or devise, culpable negligence, or breach of trust in any business transaction, in one or more of the following ways:

a. By misrepresenting that the sales and purchase contract, identified as Exhibit 3, was the Seller's acceptance of the Buyer's original offer.

b. Respondent knew or should have known that the Buyer's signature in Exhibit 3 was a forgery.

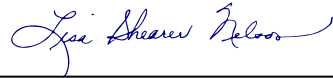
30. Respondent can only be held accountable for those allegations actually contained in the Administrative Complaint. Trevisani v. Dep't of Health, 908 So. 2d 1108 (Fla. 1st DCA 2005); Lusskin v. Ag. for Health Care Admin., 731 So. 2d 67, 69 (Fla. 4th DCA 1999). Here, the specific basis for asserting a violation of section 475.25(1)(b), involves the authenticity of Petitioner's Exhibit 4, and Respondent's knowledge thereof. However, the Department did not establish that Respondent sent the document or ever reviewed it. Under these circumstances, there is no clear and convincing evidence to support a violation of section 475.25(1)(b).

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 25th day of May, 2011, in Tallahassee,
Leon County, Florida.



LISA SHEARER NELSON
Administrative Law Judge
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Filed with the Clerk of the
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this 25th day of May, 2011.

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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.