

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) Case No. 10-9845
)
KIMBERLY D. CASELLA CAPIELLO,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On December 6, 2010, a telephonic administrative hearing was conducted between Orlando and Tallahassee, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Patrick J. Cunningham, Esquire
Lauren N. Roderick,
Qualified Representative
Department of Business and
Professional Regulation
400 West Robinson Street
Hurst Building-North Tower, Suite N801
Orlando, Florida 32801

For Respondent: (No appearance)

STATEMENT OF THE ISSUES

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

PRELIMINARY STATEMENT

By Administrative Complaint dated July 16, 2007, the Department of Business and Professional Regulation, Board of Real Estate (Petitioner), alleged that Kimberly D. Casella Capiello (Respondent) violated Florida law by operating, without proper licensure, as a broker in a real estate transaction. The Respondent disputed the allegations of the Administrative Complaint and requested a formal hearing. On October 19, 2010, the Petitioner forwarded the request to the Division of Administrative Hearings, which scheduled and conducted the proceeding.

At the hearing, the Petitioner presented the testimony of two witnesses and had exhibits numbered 1 through 7 admitted into evidence. The Respondent did not appear at the final hearing.

A Transcript of the hearing was filed on January 5, 2011. The Petitioner filed a Proposed Recommended Order that has been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. In June 2005, the Respondent resided at a house located at 14213 Sports Club Way, Orlando, Florida, 32837. The Respondent had no ownership interest in the house.

2. The house was owned by Jack Girton (Mr. Girton), who did not reside in the house, and was "for sale by owner," according to a sign in the yard.

3. In June 2005, the Respondent was contacted by a licensed real estate agent, Eleanor Dioneda (Ms. Dioneda), who was seeking to locate a suitable house for purchase by Arnold Macabugao and his wife (buyers).

4. Ms. Dioneda wrote a contract for purchase of the house between the buyers and Mr. Girton.

5. A separate contract between the buyers and the Respondent, titled "SIDE AGREEMENT TO PURCHASE CONTRACT," required payment of \$10,000 directly to the Respondent by the buyers. The document provided in relevant part as follows:

This side agreement is between Buyers named above and Kim Capiello wherein the buyers agree to give \$10,000 to Kim Capiello for services rendered in the search and purchase of the above named property. This agreement is contingent upon the buyers securing a loan, its lender determining a firm closing date and last but not the least, actual closing and funding of the above named property.

The amount will be paid as follows:

\$5,000 to be paid at the time the Purchase contract is signed by all parties for the above property and contingent upon the buyers securing a loan and its lender determining a firm closing date.

\$5,000 to be paid the day after the closing under the condition being that the above property has been vacated and in move in condition.

Kim Capiello further agrees that this side agreement is between her and the buyers only and has nothing to do with the actual purchase agreement entered into by the buyers and Jack Girton.

6. Ms. Dioneda forwarded the document to the buyers and instructed the buyers on how to make the payments. She collected the first \$5,000 installment from the buyers; apparently deposited the funds into her personal checking account; and then wrote a \$5,000 check to the Respondent.

7. The buyers eventually completed the purchase of the house from Mr. Girton and wrote a \$5,000 check directly to the Respondent from their checking account.

8. The Respondent received both checks for a total of \$10,000 as stated in the "side agreement."

9. The Respondent was not licensed in the State of Florida as a real estate broker or sales associate at any time material to this case.

CONCLUSIONS OF LAW

10. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2010).

11. Section 475.42(1)(a), Florida Statutes (2005),^{1/} prohibits any person from operating "as a broker or sales associate without being the holder of a valid and current active license therefor."

12. Section 475.01 provides, in relevant part, as follows:

(1) As used in this part:

(a) "Broker" means a person who, for another, and for a compensation or valuable consideration directly or indirectly paid or promised, expressly or impliedly, or with an intent to collect or receive a compensation or valuable consideration therefor, appraises, auctions, sells, exchanges, buys, rents, or offers, attempts or agrees to appraise, auction, or negotiate the sale, exchange, purchase, or rental of business enterprises or business opportunities or any real property or any interest in or concerning the same, including mineral rights or leases, or who advertises or holds out to the public by any oral or printed solicitation or representation that she or he is engaged in the business of appraising, auctioning, buying, selling, exchanging, leasing, or renting business enterprises or business opportunities or real property of others or interests therein, including mineral rights, or who takes any part in the procuring of sellers, purchasers, lessors, or lessees of business enterprises or business opportunities or the real property of another, or leases, or interest therein, including mineral rights, or who directs or

assists in the procuring of prospects or in the negotiation or closing of any transaction which does, or is calculated to, result in a sale, exchange, or leasing thereof, and who receives, expects, or is promised any compensation or valuable consideration, directly or indirectly therefor; and all persons who advertise rental property information or lists. A broker renders a professional service and is a professional within the meaning of s. 95.11(4) (a). Where the term "appraise" or "appraising" appears in the definition of the term "broker," it specifically excludes those appraisal services which must be performed only by a state-licensed or state-certified appraiser, and those appraisal services which may be performed by a registered trainee appraiser as defined in part II. The term "broker" also includes any person who is a general partner, officer, or director of a partnership or corporation which acts as a broker. The term "broker" also includes any person or entity who undertakes to list or sell one or more timeshare periods per year in one or more timeshare plans on behalf of any number of persons, except as provided in ss. 475.011 and 721.20.

* * *

(3) Wherever the word "operate" or "operating" as a broker, broker associate, or sales associate appears in this chapter; in any order, rule, or regulation of the commission; in any pleading, indictment, or information under this chapter; in any court action or proceeding; or in any order or judgment of a court, it shall be deemed to mean the commission of one or more acts described in this chapter as constituting or defining a broker, broker associate, or sales associate, not including, however, any of the exceptions stated therein. A single such act is sufficient to bring a person within the meaning of this chapter, and each

act, if prohibited herein, constitutes a separate offense.

13. The Petitioner has the burden of establishing the truthfulness of the allegations in the Administrative Complaint by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). In this case, the burden has been met.

14. The Respondent acted as a broker in this transaction because she received \$10,000 from the buyers for the "services rendered in the search and purchase" of the Girton house by the buyers. The Respondent did not hold a proper license at the time of the transaction.

15. Florida Administrative Code Rule 61J2-24.001(3) identifies the penalties applicable to a first violation of section 475.42(1)(a) as an administrative penalty from \$250 to \$2,500 and suspension or revocation of licensure. The Respondent has no licensure.

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 finding Kimberly D. Casella Capiello guilty of violating section 475.42(1)(a) and imposing a fine of \$2,500.

DONE AND ENTERED this 10th day of February, 2011, 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 10th day of February, 2011.

ENDNOTE

^{1/} Unless otherwise indicated, all references to the Florida
Statutes are to the 2005 version.

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.