

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
) Case Nos. 10-9926PL
vs.)
)
VICTOR JESUS MONZON,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on March 9, 2011, by video-teleconference between Miami and Tallahassee, Florida, before Administrative Law Judge Claude B. Arrington of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Donna Christine Lindamood, Esquire
Department of Business and
Professional Regulation
400 West Robinson Street, Suite N801
Orlando, Florida 32801-1757

For Respondent: Daniel Villazon, Esquire
Daniel Villazon, P.A.
1420 Celebration Boulevard, Suite 200
Celebration, Florida 34747

STATEMENT OF THE ISSUE

Whether Victor Jesus Monzon (Respondent) committed the violations alleged in the subject Administrative Complaint, and, if so, the penalties that should be imposed.

PRELIMINARY STATEMENT

Respondent is a real estate appraiser. On July 20, 2010, the Department of Business and Professional Regulation, Division of Real Estate (Petitioner) filed the subject Administrative Complaint containing factual allegations as to an appraisal report (the Report) of condominium unit 1803 located at 1331 Brickell Bay Drive, Miami, Florida (the Subject Property) as of April 23, 2007. In addition to the statutory references, the Administrative Complaint cited certain Uniform Standards of Professional Appraisal Practice (USPAP).

Count One of the Administrative Complaint charged that Respondent "violated section 475.624(2), Florida Statutes (2007) by culpable negligence or breach of trust in a business transaction; or has violated a duty imposed upon Respondent by the terms of a contract, whether written, oral, express or implied, in an appraisal assignment, by certifying Respondent complied with the above USPAP Standards when he did not.

Count Two alleged that Respondent "engaged in fraud, misrepresentation, concealment, or dishonest conduct by concealing prior sales of the Subject Property; concealing or

misrepresenting the true ownership of the Subject Property; acquiescing in the client's demand to conceal the true ownership of the Subject Property and to alter the [appraisal report] to reflect a 'change' in ownership; used a Comparable Sale 1 that sold under circumstances suggestive of fraud to arrive at a higher valuation for the Subject Property; using other Comparable Sales located in a development noted for fraud, in violation of section 475.624(2)."

Count Three alleged that Respondent violated section 475.624(15) by failing to "practice appraisal practice with that level of care and skill which is recognized by a reasonably prudent appraiser as being acceptable under similar conditions and circumstances by failing to comply with the USPAP provisions governing the development and communication of the [Report]."

The final count of the Administrative Complaint, Count Four, was dismissed by Petitioner at the outset of the formal hearing.

Respondent timely requested a formal administrative hearing the matter was referred to DOAH, and this proceeding followed.

At the formal hearing, Petitioner presented the testimony of Arthur Soule (an investigator employed by Petitioner) and Phillip G. Spool (an appraiser). Petitioner offered eight sequentially-numbered exhibits, each of which was admitted into

evidence. Respondent testified, but offered no other testimony and no exhibits.

The Transcript, consisting of two volumes, was filed April 4, 2011. Both parties timely filed Proposed Recommended Orders, which have been duly considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times relevant to this proceeding, Respondent has been a state certified residential real estate appraiser, having been issued license RD-4245 on January 3, 2004.

2. Respondent's licensure has not been previously disciplined by Petitioner.

3. Respondent's business is named Heartland Appraisal Group, Inc.

4. Respondent is subject to the regulatory jurisdiction of the Florida Real Estate Appraisal Board (Board) by operation of chapters 455 and 475, Florida Statutes (2010).

5. Petitioner has jurisdiction over disciplinary proceedings for the Board. Petitioner is authorized to prosecute administrative complaints by operation of chapters 455 and 475, Florida Statutes.

6. On April 23, 2007, Respondent developed the Report on the Subject Property, which is a condominium unit located in a condominium complex known as the Jade Residences.

7. Respondent prepared the Report for his client, Infinity Mortgage (Infinity).

8. The Administrative Complaint was prepared in response to a complaint from J. P. Morgan Chase, also known as Chase Home Finance (Chase). No representative of Infinity or Chase testified at the formal hearing, so no finding has been made as to how Chase came to possess or utilize the Report. There is also no finding made as to whether Infinity or Chase was misled by any iteration of the Report.

9. Respondent's work file contains a copy of a contract between "John Michael Pla" as seller and "Jeannette H. Lee Declaration of Trust Dated 9/25/98" as purchaser for the sale of the Subject Property in the amount of \$1,307,500 (the contract price).

10. In addition to the iteration of the Report that Petitioner received from Chase, Petitioner introduced four iterations of the Report as part of its Exhibit 1 that were copied from Respondent's work file. What was thought to be a fifth iteration obtained from Respondent's work file was also part of Petitioner's Exhibit 1, but it was later determined to be a duplicate of one of the other iterations. For ease of reference, the five iterations will be referred to by the letter I followed by a hyphen and its assigned number.

11. Pages 18-40 of Petitioner's Exhibit 1 constitute the iteration of the Report Petitioner's investigator obtained from Chase (I-1).

12. Respondent's work file did not have a copy of I-1.

13. Page 20 of I-1 contains a photocopy of Respondent's handwritten notation: "Original 1." The handwritten notation does not appear on any of the other iterations.

14. Pages 211-234 of Petitioner's Exhibit 1 constitute I-2., pages 236-259 constitute I-3, pages 261-284 constitute I-4, and pages 311-335 constitute I-5.

15. All five iterations of the Report were signed by Respondent. I-1 was signed April 24, 2007; I-2, I-4, and I-5 were signed on April 25, 2007; and I-3 was signed on July 25, 2007. All five iterations were effective as of April 23, 2007.

16. All five iterations of the Report valued the Subject Property at \$1,400,000. There was no evidence that the Report overstated the value of the Subject Property.

17. There are two separate pages for I-1 marked "page one." On the I-1 page one with the handwritten notation, the name of the borrower is Jeannette Lee and the name of the owner of public record is John Pla. This same information is found on the page ones of I-2 and I-3.

18. On the page one of I-1 without the handwritten notation, the name of the borrower is "LEE," and the name of the owner of record is "Wells Fargo Bank NA" (Wells Fargo).

19. On the page one of I-4 and I-5, the name of the owner of record is Wells Fargo and the name of the borrower is Jeannette Lee.

20. The contract price listed on all iterations except I-1 is \$1,307,500. On both pages marked "one" on I-1, the contract price is listed as being \$1,307,500 in one place and \$1,370,500 in another place.

21. In the "Comparable Sale" section of the reports, the unit number for comparable sale 3 is not listed for I-1 or I-5. The unit number for comparable sale 3 is listed for the other iterations.

22. Also in the Comparable Sale section of the reports, I-1 reflects the contract price for the subject property as being \$1,370,500. In the same place on the other iterations, the contracted sales price is listed as being \$1,307,500. Stating the contracted sales price for the subject property at \$63,000 more than the actual contracted sales price was a mistake. There was insufficient evidence to establish that it was a deliberate mistake. There is nothing in the record to suggest that the mistake was anything other than a typographical error that Respondent subsequently caught and corrected. Petitioner

failed to prove that the error had any effect on the appraised value Respondent put on the subject property.

23. FARES is a software program which stands for "First American Real Estate Solutions." It is acceptable practice for an appraiser to use FARES in determining the ownership of property. Utilizing FARES, Respondent determined that the owner of the subject property was Wells Fargo. A Multiple Listing Service (MLS) entry reflected an unknown closed sale of the subject property with a sales price of \$1,133,000.

24. Respondent advised Infinity of the conflict, and he advised that he was using FARES instead of the MLS listing because he believed that FARES was more reliable.

25. The copy of the sales contract in Respondent's work file reflected that the seller was JJohn (sic) Michael Pla.

26. On March 8, 2007, Wells Fargo deeded the subject property to John Pla. This deed was recorded on April 14, 2007. The FARES search done by Respondent did not reveal the deed. The likely explanation for that failure is the delay in indexing public records in Dade County.

27. After Respondent was able to verify this sale, he changed the name of the owner of the subject property on his Report and reflected the date of sale and the sales price of \$1,133,000.

28. I-1 and I-5 do not reflect a sale of the Subject Property in September 2004 for the amount of \$860,000. Petitioner's expert agreed that that failure had no effect on the appraised value of the Subject Property in April 2007.

29. I-2 and I-3 reflect that Pla was the owner and they reflected the \$860,000 sale of the Subject Property in September 2004 and the sale of the property to Pla in 2007. On July 5, 2007, Infinity requested that Respondent change the name of the owner from Wells Fargo to Pla and provided Respondent with a copy of the deed from Wells Fargo to Pla. I-3, signed by Respondent on July 5, 2005, was prepared in response to that request. The record is unclear how I-2, signed on April 25, 2007, had that updated information.

30. After I-3 was issued, the owner of record, the amount of the contract, and the sales history of the property were correctly stated.

31. Respondent used four comparable sales in determining the value of the subject property. Respondent used a computer program to search for comparable sales that were similar in square footage, distance from the subject property, and time of sale. The use of the computer program and the parameters he used in selecting the comparable sales were reasonable.

32. Petitioner asserted that Respondent erred in using comparable sale 1 because the use of that comparable inflated

the price of the subject property. There was insufficient evidence to establish that comparable sale 1 was a fraudulent transaction or that Respondent erroneously relied on comparable sale 1 in determining the value of the subject property. Comparable sale 1 was another unit in the Jades Residences condominium complex that was on a higher floor than the Subject Property. Respondent made an adjustment to the sales price for comparable sale 1 to reflect the differences between the two units. There was insufficient evidence to establish that the adjustment was inappropriate. Further, Respondent used a weighted average which gave less consideration to comparable sale 1 than to the other comparables used.

33. Respondent testified, credibly, that he sent two iterations of the Report to Infinity. The first report listed Wells Fargo as the owner and did not list the September 2004 sale of the property or the sale of the property to Pla in March 2007. That appears to be I-5, which was signed April 25, 2007. The other iteration was I-3, which was signed July 5, 2007.

34. Petitioner's expert agreed that it was reasonable for Respondent to amend his Report in July 2007 after he learned of the September 2004 sale and after he verified the sale from Wells Fargo to Pla.

35. The Jade Residences condominium complex became notorious for mortgage fraud in the latter part of 2007. There

was no evidence that Respondent was aware of that mortgage fraud when he prepared his original Report in April 2007 or when he amended his original Report in July 2007.

36. Respondent signed the Report which included the following representation:

I performed this appraisal in accordance with the requirements of the Uniform Standard of Professional Appraisal Practice that were accepted and promulgated by the Appraisal Standards Board of the Appraisal Foundation and that were in place at the time this appraisal report was prepared.

37. Appraisers are not required by state law to comply with USPAP standards, but it is the industry practice to do so.

CONCLUSIONS OF LAW

38. 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 (2010).

39. 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. Dep't of Agric. & Consumer Servs., 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).

40. Section 475.624, Florida Statutes (2007) provided, in relevant part, as follows:

Discipline.--The board may deny an application for registration or certification; may investigate the actions of any appraiser registered, licensed, or certified under this part; may reprimand or impose an administrative fine not to exceed \$5,000 for each count or separate offense against any such appraiser; and may revoke or suspend, for a period not to exceed 10 years, the registration, license, or certification of any such appraiser, or place any such appraiser on probation, if it finds that the registered trainee, licensee, or certificateholder:

* * *

(2) Has been guilty of fraud, misrepresentation, concealment, false promises, false pretenses, dishonest conduct, 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 contract, whether written, oral, express, or implied, in an appraisal assignment; 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 such misconduct and committed an overt act in

furtherance of such intent, design, or scheme. It is immaterial to the guilt of the registered trainee, licensee, or certificateholder 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 registered trainee, licensee, or certificateholder, or was an identified member of the general public.

* * *

(15) Has failed or refused to exercise reasonable diligence in developing an appraisal or preparing an appraisal report.

41. Count One of the Administrative complaint alleged that Respondent violated section 475.624(2), Florida Statutes by certifying that he had complied with USPAP standards when he did not. Adherence to USPAP standard 1-5 would have required Respondent to analyze all sales of the subject property that occurred within the three years prior to the effective date of the appraisal. The iteration of the Report Respondent sent to Infinity did not include the September 2004 sale in the amount of \$860,000 or the March 2007 sale of the property to Pla. Respondent testified, credibly, that he considered the September 2004 sale but not reference the sale because he mistakenly thought it was without the three-year period and because he did not think the 2004 sale had any bearing on the 2007 appraisal. While Respondent admitted that he should have included the 2004

sale in his first report to Infinity, both Mr. Spool and Respondent testified that the 2004 sale had no bearing on the appraised value. That deviation from USPAP standard 1-5 does not rise to the level of misconduct contemplated by section 475.624(2), Florida Statutes. Respondent's inability to access the Wells Fargo to Pla deed in April 2007 explains the absence of that sale in the first Report Respondent sent to Infinity.

42. Petitioner failed to establish that Respondent otherwise violated USPAP standards or that he violated section 475.624(2), Florida Statutes, as alleged in both Counts One and Two.

43. Petitioner failed to establish that Respondent violated section 475.624(15), Florida Statutes, as alleged in Count Three.

44. Petitioner has failed to meet its burden in this proceeding.

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 Respondent not guilty of the violations alleged in the Administrative Complaint.

DONE AND ENTERED this 7th day of June, 2011, in
Tallahassee, Leon County, Florida.



CLAUDE B. ARRINGTON
Administrative Law Judge
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Filed with the Clerk of the
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this 7th day of June, 2011.

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.