

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
DIVISION OF REAL ESTATE, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 10-10432PL  
 )  
PAMELA SUE SIMMONS AND )  
KARLE JOHN SIMMONS, )  
 )  
Respondents. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

On February 18, 2011, a duly-noticed hearing was held by video teleconference with sites in Tallahassee and Jacksonville, Florida, before Lisa Shearer Nelson, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Patrick Cunningham, Esquire  
Department of Business and  
Professional Regulation  
400 West Robinson Street, Suite N-801  
Orlando, Florida 32801

For Respondents: No appearance

STATEMENT OF THE ISSUE

The issue to be determined is whether Respondents, Pamela Sue and Karle Simmons, are guilty of violating section 475.25(1)(b), Florida Statutes (2007), and if so, what penalty should be imposed?

PRELIMINARY STATEMENT

On December 15, 2009, Petitioner, Department of Business and Professional Regulation (Petitioner or the Department), filed a two-count Administrative Complaint against Respondents, Pamela Sue Simmons and Karle John Simmons, alleging that they had violated section 475.25(1)(b), Florida Statutes. Respondents disputed the allegations in the Administrative Complaint and on November 22, 2010, the matter was referred to the Division of Administrative Hearings for a section 120.57(1) hearing.

On December 20, 2010, a Notice of Hearing was issued scheduling the case to be heard February 18, 2011, and the case proceeded as scheduled. Respondents were provided notice at the address provided by the Department at the time the case was referred to the Division, and nothing has been returned to the Division as undeliverable. When the hearing commenced February 18, 2011, at 9:30 a.m., the Respondents did not appear. A twenty-minute recess was taken in order to give Respondents an opportunity to arrive. When the hearing reconvened, Respondents had not appeared, and the Department elected to proceed with its case. The Department presented the testimony of Robert Krantz, Patsy Bickel and David Bickel, and Petitioner's Exhibits 1 through 5 were admitted into evidence. When the hearing concluded at 10:56 a.m., Respondents had not appeared.

The Transcript of the hearing was filed with the Division March 16, 2011, and the Department filed its Proposed Recommended Order on March 18, 2011. Respondents did not file a post-hearing submission. Unless otherwise specified, all references to Florida Statutes are to the 2007 codification.

#### FINDINGS OF FACT

1. Petitioner is the state agency charged with the responsibility to license and regulate real estate professionals pursuant to section 20.165 and chapters 120, 455, and 475, Florida Statutes.

2. At all times relevant to the Administrative Complaint, Respondent Pamela Simmons was a licensed real estate sales associate issued license number 695141. The last license issued was as an active sales associate with Atlantic Partners Realty, LLC, 4116 3rd Street, Jacksonville Beach, Florida 32250.

3. At all times material to the Administrative Complaint, Respondent Karle Simmons was a licensed real stated sales associate, issued license number 3106888. The last license issued to Karle Simmons was as an inactive sales associate at 4045 Lionheart Drive, Jacksonville, Florida.

4. Sometime in 2005, Pamela Simmons sold a home to David and Patsy Bickel located at 1613 Rain Bird Court, Jacksonville, Florida.

5. After living in the home for approximately a year, Mr. Bickel was offered a job in North Carolina, and the Bickels

decided to sell the Rain Bird Court home. They were able to stay at a home owned by Ms. Bickel's father in North Carolina and planned to do so until the Rain Bird Court home sold.

6. The listing agreement to sell the Rain Bird Court home lists Pamela Simmons as the listing sales agent for Prudential Network Realty, and the term for the listing was September 1, 2006, through March 1, 2007.

7. The Bickels believed that their stay in Mrs. Bickel's father's home would be short, and they left their personal belongings, such as furniture, linens, china and kitchenware, intact at the Rain Bird home.

8. The items remaining at the home included personal financial information, which the Bickels would not have left if someone else would be living in their home. While cable and phone had been disconnected, the Bickels continued to pay for water and electricity at the home.

9. The house did not sell during the listing period.

10. Mrs. Bickel kept in contact with the Simmons through phone calls and e-mails. Her primary contact was with Pamela Simmons.

11. After several months, the Bickels discussed options for dealing with the home, including the possibility of a lease purchase arrangement. They were hesitant to go in this direction, however, because of the potential for damage to their

home. Moreover, they never agreed to rent the home and never were presented with a lease of any kind for any tenant.

12. On or about July 9, 2007, the Bickels returned to Jacksonville to check on their home and see how to proceed in terms of relisting it. When they arrived at the Rain Bird Court home, it was after midnight. Upon approaching the house, they could see lights on inside and it appeared that the house was occupied.

13. Mr. Bickel got out of the car and approached the house. He saw that there was a missing pane on the garage door, and he could hear the washer and dryer running. At this point, Mr. Bickel called the police.

14. The police verified that the Bickels owned the home and then spoke to the man and woman who were in the house. The man represented that the realtor, "Karle," had rented the house to him, but that while he had been in the home for approximately two weeks, he had paid no rent and had no lease agreement.

15. The officer called Karle Simmons, who then spoke briefly to Mr. Bickel. Karle apparently attempted to remind Mr. Bickel that permission to obtain a renter had been obtained verbally, but Mr. Bickel was not interested in entertaining such a suggestion.

16. The Bickels were very disturbed by finding someone in their home, among their belongings, and filed a complaint with the Northeast Florida Association of Realtors (NEFAR) and with

the Department of Business and Professional Regulation. After a hearing which both the Bickels and the Simmons attended, NEFAR imposed a fine and required the Simmons to attend ethics classes.

17. During DBPR's investigation into the Bickels' complaint, Karle and Pamela Simmons spoke to the investigator, Robert Krantz. They also submitted two joint, unsigned letters, one during the investigation and one in response to the Administrative Complaint. In both letters, consistent with their statements to Mr. Krantz, Respondents indicated that they had rented the Rain Bird Court home to Mr. Moffett, the man found there on July 9, 2007, on a month-to-month basis, but that they believed the Bickels had given them verbal authorization to do so. They acknowledged that they had no written authorization to rent the property; had collected no rent or security deposit; did not have a lease signed by Moffett or the Bickels; and had no property management agreement with the Bickels.

18. Clear and convincing evidence indicates that the Bickels neither authorized the pursuit of having a tenant in their home, nor agreed to have this specific tenant. Clear and convincing evidence was also presented that the Bickels received no compensation for Mr. Moffett's use of their home.

#### CONCLUSIONS OF LAW

19. 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).

20. This disciplinary action by Petitioner is a penal proceeding in which Petitioner seeks to suspend or revoke Respondents' licenses as real estate associates. 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).

21. 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. 797, 800 (Fla. 4th DCA 1983).

22. Count One of the Administrative Complaint alleges that the Respondent Pamela Sue Simmons' conduct violated section 475.25(1)(b), Florida Statutes. Count Two makes the same allegation with respect to Karle Simmons. Section 475.25(1)(b), 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.

23. The Department has proven the allegations in the Administrative Complaint by clear and convincing evidence. While only Pamela Simmons' name is on the listing agreement, it is clear that Pamela and Karle Simmons worked together with respect to the Bickels' property. Clear and convincing evidence was presented to demonstrate that the Respondents provided access to someone to stay in the Bickels' home without their permission. Not only was there no property management agreement in place, the Bickels gave neither written nor verbal permission to have someone live in their home. Moreover, the Respondents provided access for Mr. Moffett to stay in the home without a lease; without paying rent; and without paying any sort of security



deposit. Their actions clearly represent a blatant breach of trust in violation of section 475.25(1)(b).

24. The Florida Real Estate Commission has adopted Disciplinary Guidelines to provide notice of the range of penalties normally imposed for violations of disciplinary provisions over which the Commission has final order authority. § 455.2273, Fla. Stat. At the time of the conduct in this case, Florida Administrative Code Rule 61J2-24.001(3)(c) provided that, for culpable negligence or breach of trust, the recommended range of penalty was from a \$1,000 fine to a one-year suspension. The rule has since changed to provide, for a first-time offense, a fine of \$1,000 to \$2,500 and a 30-day suspension to revocation.

25. Petitioner has cited to the version of the rule now in effect. An administrative rule is operative from its effective date. Jordan v. Dep't of Prof. Reg., 522 So. 2d 450, 452 (Fla. 1st DCA 1988) (rules are presumed to operate prospectively, especially where the rule has penal characteristics). In Jordan, the question arose whether disciplinary guidelines adopted after the recommended order was submitted to the Board of Nursing and before the case was considered by the Board should be applied. The court held that there were no circumstances present that would required the agency to apply the rule retroactively.

26. The undersigned concludes that the more prudent view requires that the version of the Disciplinary Guidelines in effect at the time of the conduct by Respondents must be applied.

Application of this iteration of the guidelines ensures that the licensees are on notice of the type of penalty applicable to prohibited conduct at the time the conduct is committed. Under that version of the rule and under section 475.2273(3), however, the Commission is allowed to consider aggravating factors in determining the appropriate penalty to be imposed. In this case, Respondents' actions are particularly horrific. Not only did they act without specific, written permission, but they allowed a stranger to occupy the Bickels' home with absolutely no arrangements made to protect their property, and no way to limit access to their confidential documents contained in the home. While the Bickels were struggling to sell their home, Respondents' actions meant that they were also paying for utilities for an occupied home as opposed to a vacant one, with no mechanism to be reimbursed. To allow Mr. Moffett and his companion access to the house was an egregious violation of the Bickels' trust and privacy, which could have had disastrous consequences. Those who can be so cavalier about the belongings of others should not have another person's most valuable asset placed in their care.

#### 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 finding that Respondents, Pamela Sue Simmons and Karle Simmons, violated section 475.25(1)(b), imposing fines of \$1,000 each and revoking each Respondent's license.

DONE AND ENTERED this 14th day of April, 2011, in Tallahassee, Leon County, Florida.



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LISA SHEARER NELSON  
Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 14th day of April, 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.