

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
FLORIDA REAL ESTATE COMMISSION,)
)
Petitioner,)
)
vs.) Case No. 12-1969PL
)
THERESIA MARIE HELTON,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On October 29, 2012, an administrative hearing in this case was conducted by video teleconference in Ft. Myers and Tallahassee, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Christina Ann Arzillo, Esquire
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399

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

STATEMENT OF THE ISSUES

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

PRELIMINARY STATEMENT

By Administrative Complaint dated November 21, 2011, the Department of Business and Professional Regulation, Division of Real Estate (Petitioner), alleged that Theresa Marie Helton (Respondent) failed to account for funds collected on behalf of, and due to, the owners of rental property managed by the Respondent. The Respondent disputed the allegation and requested a formal administrative hearing. The Petitioner forwarded the request to the Division of Administrative Hearings, which scheduled the hearing. On July 30, 2012, the Petitioner filed a Motion to Amend Administrative Complaint that was granted without objection by Order dated August 17, 2012.

At the hearing, the Petitioner presented the testimony of four witnesses and had Exhibits numbered 1 through 18 admitted into evidence. The Respondent testified on her own behalf and had Exhibits numbered 1 and 4 through 6 admitted into evidence.

A Transcript of the hearing was filed on December 6, 2012. The parties filed a Joint Motion for Extension of Time to file proposed recommended orders, and the motion was granted. Thereafter, the parties filed proposed recommended orders on

December 26, 2012, that have been reviewed in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times material to this case, the Respondent was a licensed real estate broker, holding Florida license numbers 3077530 and 3248280.

2. At all times material to this case, the Respondent was the registered broker and director of 1010 Apartments, Inc.

3. The Respondent's address of record is 4100 Corporate Square Office Center, Suite 133, Naples, Florida 34104.

4. At all times material to this case, Leonard and Brenda Brown, part-time Florida residents, owned two residential rental properties in Naples, Florida.

5. The Respondent provided property management services to the Browns.

6. There was no written agreement governing the services to be provided by the Respondent to the Browns.

7. The Respondent first provided property management services to the Browns' rental property located at 1225 Reserve Way, Unit 203 (hereinafter "Reserve Way").

8. During the time that the Respondent managed the Reserve Way rental for the Browns, the Respondent provided all relevant documentation to the Browns, including the tenant's identification and the lease, various telephone contact numbers,

and the rent being paid. The Browns were satisfied with the Respondent's management of the Reserve Way property.

9. The Browns' second rental property was located at 193 Santa Clara Drive, Unit 12 (hereinafter "Santa Clara"). Because Mrs. Brown was satisfied with the Respondent's management of the Reserve Way property, she asked the Respondent to manage the Santa Clara property.

10. Mrs. Brown testified that she expected that the Santa Clara property would be managed in the same way as the Reserve Way property had been.

11. When the Respondent began to manage the Santa Clara property, it was rented to tenants who had defaulted in making their rent payments. In September 2010, the tenants were evicted from the property.

12. After the tenants were evicted, the Santa Clara property required various repairs. On September 2, 2010, the Respondent provided a written estimate of \$3,500 to the Browns for the costs of repairing the Santa Clara property and preparing it to be rented again. On September 7, 2010, the Browns gave the Respondent a check for \$3,500 made payable to the Respondent's company, 1010 Apartments, Inc., to pay for the repairs.

13. In October 2010, the Respondent asked the Browns if they would agree to a short-term lease of the Santa Clara property, and they consented.

14. Communication between the Respondent and the Browns thereafter became erratic. Between October 2010 and January 2011, the Browns repeatedly contacted the Respondent to inquire into the status of the Santa Clara property and were dissatisfied with the information they were provided.

15. The Respondent testified that she verbally advised the Browns that the property had been rented and that the Browns agreed to receive \$600 each month as their share of rent. The Respondent testified that she advised the Browns she would retain the balance of the rental payment to reimburse for expenses allegedly incurred in preparing the property for the short-term lease.

16. Mr. and Mrs. Brown recollect the Santa Clara transaction differently. There is confusion as to whether both of the Browns were aware that the property had been leased. In any event, it is clear that there was no written agreement between the Respondent and the Browns documenting any agreement as to the management of the property or the disposition of rental proceeds. The Respondent provided no documentation to the Browns related to any tenant in the Santa Clara property and provided no accounting for any rental proceeds the Respondent received related to the property.

17. In January 2011, the Browns, in Florida for the winter, made contact with the Respondent, who agreed to meet with them at the Santa Clara property on January 21, 2011.

18. On January 21, as the Browns drove to the Santa Clara property to meet with the Respondent, the Respondent called them and stated that she was unable to keep the appointment, but advised them that they could proceed to the property and meet the tenant.

19. Prior to the Respondent's telephone call on January 21, 2011, Mr. Brown was apparently unaware that the Santa Clara property had been rented to a tenant.

20. The Browns drove to the Santa Clara property and met the tenant. At the hearing, the tenant was identified as a nurse, working in Naples on a temporary basis, whose rent was paid by her employer.

21. After meeting the tenant, the Browns called the Respondent but were unsuccessful in contacting her by telephone.

22. On January 23, 2011, the Browns faxed a letter to the Respondent, requesting documentation related to the Santa Clara rental and information about the rental proceeds that had been paid by the tenant's employer. The Respondent did not respond to the Browns' letter.

23. After receiving no response from the Respondent, Mrs. Brown contacted the tenant's employer and received copies of

the lease agreement as well as copies of four rent checks that had been paid to the Respondent by the employer.

24. Mrs. Brown thereafter took responsibility for management of the Santa Clara property. The employer paid monthly rent directly to the Browns until April 2011, when the tenant vacated the property.

25. At the hearing, the Respondent testified that she was owed funds for furnishing, managing, and maintaining the Santa Clara property and that she retained the Browns' share of the rent as reimbursement of her expenses.

26. The Respondent offered no credible evidence in support of the testimony and no credible accounting of the funds she received for the Santa Clara property on behalf of the Browns.

27. At the hearing, the Respondent offered an invoice from "1010 Condo Cleaning" for \$2,134.50, dated September 8, 2010, which had a payment due date of September 8, 2010.

28. "1010 Condo Cleaning" is an entity operated by the Respondent's sister.

29. A printed statement on the invoice declared that it had been paid by the Respondent's company, 1010 Apartments, Inc., clearly indicating that the invoice had already been paid prior to the time the invoice was actually printed. However, notwithstanding the due and paid dates on the invoice, six of the 12 charges on the invoice were for charges allegedly incurred

after the date of the invoice, one as late as October 31, 2010. Additionally, the invoice reflected charges for repairs that had been listed on the September 2, 2010, estimate, which the Browns had already paid.

30. The Respondent's testimony as to funds she allegedly spent to acquire furnishings or household items for the Santa Clara property lacked credibility, was otherwise unsupported by evidence, and has been rejected. The Respondent failed to account for the funds she received from the Santa Clara tenant's employer prior to January 21, 2011.

CONCLUSIONS OF LAW

31. The Division of Administrative Hearings has jurisdiction over the parties to, and subject matter of, this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2012).

32. License revocations and disciplinary proceedings are penal in nature. The Petitioner must demonstrate the truthfulness of the allegations in the Amended 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). In order to be "clear and convincing," 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." See Slomowitz v. Walker, 429 So. 2d

797, 800 (Fla. 4th DCA 1983). In this case, the burden has been met.

33. In relevant part, section 475.25, Florida Statutes (2010), provides as follows:

475.25 Discipline.--

(1) The commission may deny an application for licensure, registration, or permit, or renewal thereof; may place a licensee, registrant, or permittee on probation; may suspend a license, registration, or permit for a period not exceeding 10 years; may revoke a license, registration, or permit; may impose an administrative fine not to exceed \$5,000 for each count or separate offense; and may issue a reprimand, and any or all of the foregoing, if it finds that the licensee, registrant, permittee, or applicant:

* * *

(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. . . .

* * *

(d)1. Has failed to account or deliver to any person, including a licensee under this chapter, at the time which has been agreed upon or is required by law or, in the absence of a fixed time, upon demand of the person entitled to such accounting and delivery, any personal property such as money, fund, deposit, check, draft, abstract of title, mortgage, conveyance, lease, or other document or thing of value, including a share of a real estate commission if a civil judgment relating to the practice of the licensee's profession has been obtained against the licensee and said judgment has not been satisfied in accordance with the terms of the judgment within a reasonable time, or any secret or illegal profit, or any divisible share or portion thereof, which has come into the licensee's hands and which is not the licensee's property or which the licensee is not in law or equity entitled to retain under the circumstances. . . .

34. The evidence clearly establishes that the Respondent leased the Santa Clara property to a tenant without advising the property owners that she had done so and that the Respondent collected rent from the tenant's employer without accounting to the property owners for the rental payments.

35. At the hearing, the Respondent asserted that she had expended funds on behalf of the property owners and that she was entitled to retain rental payments she collected from the tenant's employer. The Respondent offered no credible documentation of, or accounting for, her alleged expenditures, and her claim has been rejected.

36. Florida Administrative Code Rule 61J2-24.001 (2010) sets forth disciplinary guidelines applicable to this proceeding. Pursuant to the rule, a first violation of section 475.25(1)(b), Florida Statutes, warrants an administrative fine ranging from \$1,000 to \$2,500 and imposition of a license penalty from a 30-day suspension to revocation. The same rule states that a first violation of section 475.25(1)(d)1., Florida Statutes, warrants an administrative fine ranging from \$250 to \$1,000 and imposition of a license penalty from suspension to revocation.

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 Theresa Marie Helton in violation of sections 475.25(1)(b) and 475.25(1)(d)1., Florida Statutes (2010), and revoking the licenses identified herein.

DONE AND ENTERED this 30th day of January, 2013, 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 30th day of January, 2013.

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.