IN THE SUPREME COURT OF MISSISSIPPI

NO. 2007-CC-01660

DELL H. PALMER, broker, TANJA E. ADAMS, salesperson, and AUDREY NEELY, salesperson

Appellants/Respondents

vs.

MISSISSIPPI REAL ESTATE COMMISSION

Appellee/Complainant

On Appeal from the Circuit Court of Madison County, Mississippi

REPLY BRIEF OF APPELLANTS DELL H. PALMER, TANJA E. ADAMS, and AUDREY NEELY

Oral Argument Requested

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FORM OF CITATIONS TO THE RECORD

References to transcribed testimony shall be designated as "Tr. ___." References to exhibits shall be the same as their marking as exhibits at the hearing before the Mississippi Real Estate Commission. (*E.g.*, "Exh. 1 ..." for exhibits.) References to record excerpts are referred to herein as "RE-___."

INTRODUCTION

Despite the Commission's assertions, there is a lack of any evidence - -much less substantial evidence - - in the record to support its January 29, 2007 Order (the "Order"). The record evidence certainly does not "clearly establish" the guilt of the real estate agents as required in order to allow license suspension. In sum, the basis for the Commission's ruling is completely unsupported by the facts and applicable law.

The Commission's entire case against Palmer, Adams, and Neely derives from conclusory opinions of alleged wrongdoing offered by Administrator Praytor. These opinions, of course, are not factual evidence, and they do not have the force of law or a basis in the law.

Moreover, Praytor's key admissions detailed in the Brief of Appellants (that down payment assistance is legal and proper where buyer appears at closing with funds and HUD-1 accurately reflects contribution from buyer (Tr. 66-68 & 76)) underscore the absence of *any* basis for the Commission's ruling.

As for the discipline imposed on Palmer, the Commission acknowledges for the first time in its response that Palmer's suspension and the ordering of additional continuing education was not based on her alleged failure to properly supervise Adams and Neely. The Commission, however, fails to attribute any conduct specifically to Palmer which provides a basis for the discipline imposed upon her.

Due to the absence of substantial evidence in support of its ruling, the circuit court's ruling which upheld the Commission's Order should be reversed and rendered in its entirety or, in the alternative, to the extent the Order provides for license suspension.

ARGUMENT

1. Record Fails to Establish Improper Dealing in Regard to Down Payment Assistance

A. Allegations of down payment assistance fail as a matter of law.

The Commission fails completely to respond to Appellants' argument that allegations regarding down payment assistance fail to state a claim as a matter of law. Nor does the Commission cite to any case, law, rule, statute, or regulation that creates a cognizable claim against real estate agents for involvement in transactions in which the buyer procures down payment assistance. Of course, none exists to support the Commission's arguments.

B. The Commission's findings regarding down payment assistance and HUD-1 disclosures fail for lack of evidentiary and/or legal support.

The Commission relies almost exclusively on Administrator Praytor's testimony which is nothing more than his self-serving opinions of alleged wrongdoing that have no support in the record. For instance, the Commission states that "[a] check was brought to the closing for the buyer as reflected on the HUD-1 in the amount of $27,442.79." (citing Commission's Brief at p. 6 and implying that Ms. Curley did not appear at closing with funds). However, specific testimony in the record established that Curley was given the check *in advance* of the closing and that *Curley* appeared at closing with the check. (Tr. 187-188). Such uncontradicted testimony is dispositive and supports the fact that Curley tendered her own money at the closing. *See Sprayberry v. Blount*, 336 So. 2d 1289, 1291 (Miss. 1976)(stating that appellee is bound by uncontradicted testimony). Moreover, Praytor himself admitted that where down payment assistance was validly used and the buyer appeared at closing with funds, a HUD-1 reflecting such a buyer contribution would be accurate. (Tr. 67). This admission and others render Praytor's opinions and conclusions of wrongdoing meaningless. They also demonstrate the core flaw in the Commission's case against

Appellants.

The Commission also notes that "[t]he lender required confirmation of Curley's ability to pay a 20 percent down payment." This is irrelevant to the claims and does not implicate the real estate agents but, in any event, has absolutely no evidentiary basis in the record. Not surprisingly, the Commission fails to offer a single record citation to support this statement. Most importantly, however, there is no evidence of any kind that Palmer, Adams, and Neely had any involvement in any verification of funds or procurement or delivery of down payment assistance. That was all handled by a charity unrelated to Appellants and would not possibly support any claim against Appellants.

In the same vein, the Commission contends that the verification of funds "was accomplished by deposit of $25,200 by Maranatha Industries into Curley's credit union account where it was held for six days and then drafted out of the account." (citing Commission's Brief at p. 6). Again, the record is devoid of any evidence that Palmer, Adams, or Neely were involved in this verification of funds or that there was anything improper about it. Thus, whatever transpired in the verification of funds in Curley's account cannot be the basis of any claim or sanction against Palmer, Adams, or Neely.

The Commission states that "[t]he details of the transaction were not accurately reflected in the Contract of Sale or on the closing statement." (citing Commission's Brief at p. 6). This statement is, once again, merely a self-serving conclusion or opinion presented by Administrator Praytor which is not supported by evidence in the record, and which is contradicted by Praytor's own admissions. (Tr. 67). Indeed, Praytor's opinions - - which are not evidence - - are belied by the record. Praytor admitted that he does not regulate down payment assistance and could not state whether down payment assistance was unlawfully utilized in this case. (Tr. 56-58 & 76). Praytor

testified that the Commission's rules and regulations *do not even address* down payment assistance. (Tr. 56). There is no factual evidence in the record of these proceedings that the HUD-1 closing statement was inaccurate in any way. To the contrary, the only affirmative evidence bearing on the accuracy of the HUD-1 was *Curley's own testimony* that the HUD-1 was accurate. (Tr. 123). Curley deferred to one of the agent's recollection of seeing the check given to Curley by the down payment assistance provider *before* closing. (Tr. 132). Praytor himself admitted that there would be nothing improper about the HUD-1 disclosures if Curley came to the closing and applied the funds received from down payment assistance, which was uncontradicted by the Commission. (Tr. 76). In sum, what the Commission admitted was proper is what the uncontroverted evidence shows happened.

Without even the appearance of an evidentiary basis, the Commission asserts that "the seller, in truth, sold the property which had a contract price of $126,000 for approximately $100,000." Again, the Commission is making a wildly unsubstantiated and conclusory opinion with absolutely no citation or basis in the record for such a position. In the alternative, the Commission is brazenly mischaracterizing evidence. The funds tendered at closing *matched the contract price.*

The Commission asserts or implies that Curley paid more than the house was worth. It is uncontradicted, however, in the record that at the time of the hearing Curley was selling the house for *more than what she bought it for*, and the Commission is not prosecuting the current selling agent for a fraudulent or misleading sale. (Tr. 113-114; Exh. 18).

Astonishingly, the Commission asserts that "there was testimony that the actual value of the sale here was substantially below the $126,000 contract sales price;" however, no citation to record evidence is offered in support of this statement. There is no support for this statement in the record. To the extent the Commission bases any part of its claims on the value of the home, the claims must fail for complete lack of evidentiary support.

The Commission elicited no testimony from an appraiser or anyone else that demonstrated that the home was not worth what it was sold for. It bears mentioning that the Commission subpoenaed the appraiser to testify, but decided not to call him to testify for reasons known only by the Commission. Perhaps the Commission anticipated that the appraiser would offer testimony damaging to the Commission as to value. In any event, the only record evidence that bears to any extent on value is the current listing (Exh. 18) that values the home at more than what Curley paid for it in the transaction in issue.

C. The *McCaughan* opinion is distinguishable from the instant matter.

The Commission relies principally on the *McCaughan* decision to support its position, but *McCaughan* is clearly distinguishable from the circumstances in this matter. In *McCaughan*, the agent increased the contract price in order for his client, who was the buyer, to receive an additional amount of money which was to be applied to a debt and would allow the buyer to qualify for the mortgage; however, the agent "never disclosed that fact to the seller." *See Mississippi Real Estate Comm'n v. McCaughan*, 900 So. 2d 1169, 1176-77 (Miss. Ct. App. 2004). Furthermore, the agent did not allow the seller to review an addendum that changed the contract price. *Id.* The agent then "allowed the buyers and sellers to sign a statement certifying that they had no knowledge of any loans . . . other than what was listed in the contract at closing." *Id.* Based on the above evidence, the court concluded that the agent had engaged in substantial misrepresentation. *Id.* Furthermore, the Commission had charged the parties involved with a violation of Rule IV.B.5 (currently Rule IV.B.6) of the Rules and Regulations of the Mississippi Real Estate Commission which provides that "[n]o licensee shall represent to a lender or any other interested party, either verbally or through the preparation of a false sales contract, an amount in excess of the true and actual selling price." *Id.* at 1172.

Unlike the agent in *McCaughan*, who failed to disclose the change in the contract price to the sellers, the parties in the subject transaction - Curley and Biz Z - were fully aware of the use of down payment assistance and benefitted from it. (Tr. 124-133 & 171). Curley was "thrilled' to be able to buy her house. (Tr. 115). The court in *McCaughan* noted that the agent clearly deceived the seller. *See McCaughan*, 900 So. 2d at 1178. In contrast, there is absolutely no evidence of deception in the subject transaction. (Tr. 124-128). While the agent in *McCaughan* was charged with representing a false sales contract with an amount in excess of the actual selling price, the Commission did not charge Palmer, Adams, or Neely with such a violation. *See McCaughan*, 900 So. 2d at 1172. The sale in the case at hand occurred on precisely the terms stated in the contract. This is beyond dispute.

The allegation that Palmer, Adams, and Neely were involved in a scheme to disguise the type of transaction is simply preposterous. While the Commission expresses concern with down payment assistance and the alleged affect on the secondary market, Palmer, Adams, and Neely were not involved in the lending process. There is no evidence in the record that the transaction in issue had a negative effect on the secondary market or was otherwise improper. Again, this is merely self-serving speculation by the Commission or its representatives designed to prop claims that must fail for lack of evidence or a legitimate legal footing. Administrator Praytor admitted, when pressed, that there is nothing illegal about the use of down payment assistance and that the Commission's rules and regulations do not address the subject. (Tr. 56-57).

2. <u>Record Lacks Evidence that Property Condition Disclosure was not Provided to Buyer</u>

The Commission based its sanctions on Palmer, Adams, and Neely, in part, on the alleged violation of Miss. Code Ann. §89-1-521(1) which requires the delivery of the property condition disclosure to the buyer. The Commission, however, failed to introduce any affirmative evidence that

the disclosure was not provided to Curley, the buyer. On the other hand, uncontradicted testimony established that Neely provided the disclosure to the buyer. (Tr. 202). As stated above, uncontradicted testimony is dispositive and supports the fact that the Commission failed to establish a violation of the relevant statute. *See Sprayberry*, 336 So. 2d at 1291 (Miss. 1976)(stating that appellee is bound by uncontradicted testimony). The Commission argues that "the fact that the disclosure was not included in the file transmitted to the Commission constitutes substantial evidence that the Respondents failed to comply with their statutory requirements;" however, such rationale falls far short of clearly establishing guilt, especially in light of uncontradicted testimony that the disclosure was provided to the buyer. *See Mississippi Real Estate Comm'n v. Anding*, 732 So. 2d 192, 196 (Miss. 1999)(indicating testimony must clearly establish guilt when suspension of license at stake). Evidence of failure to maintain a file copy of the disclosure is not evidence of failure to make the disclosure, particularly when considered with uncontroverted evidence from an agent that the disclosure was provided, and the absence of testimony from the buyer that the disclosure was not provided. The Commission's evidence is simply non-existent on this point as well.

3. **Dual Agency Disclosure Requirement is Patently Inapplicable to This Transaction Involving a Limited Liability Company**

Rule IV.E.4 of the Rules and Regulations of the Commission clearly provides the following exception to dual agency disclosure requirements: "[a] licensee shall not be required to comply with the provisions of Section 3, when engaged in transactions with any . . . limited liability company." Undisputed record evidence establishes beyond any question the fact that the Seller was in fact a limited liability company. (Exh. 14; Tr. 92-94). This fact alone triggers application of an exception from the dual agency disclosure requirements.

The Commission concedes applicability of the exception, but declines to follow the rule because the Seller allegedly signed various documents as an individual. However, such an assertion is contrary to the wording of the rule and, indeed, the Commission's own position in *Mississippi Real Estate Comm'n v. Hennessee*, 672 So. 2d 1209, 1215-16 (Miss. 1996). In *Hennessee*, the Commission successfully argued that a real estate agent was subject to disciplinary action, although the agent was selling private property for herself. The agent fell under the scope of the relevant statutory provision, since the individual was actually an agent. *Id.* at 1216.

The Commission's argument in *Hennessee* (that substance governs over form) demonstrates its hypocrisy in ruling in this case that the exception for dual agency disclosure does not apply in this matter, notwithstanding undisputed evidence that the seller was in fact a limited liability company. Since the Seller was a limited liability company, the exception applies. Form should not be exalted over substance.

4. **No Basis for Imposition of Discipline on Dell Palmer**

As for the discipline imposed on Palmer, the Commission acknowledges for the first time in its response that Palmer's suspension and the ordering of additional continuing education was not based on her alleged failure to properly supervise Adams and Neely. The Commission, however, suspiciously fails to attribute any conduct specifically to Palmer which provides a basis for the discipline imposed upon her. The Commission's Complaint and January 29, 2007 Order contain no allegations pertaining to Palmer's role in the transaction at issue. In fact, the Commission admits that Palmer was not present at the closing of the transaction. The only conceivable basis for the disciplinary action against Palmer relates to the responsibility of the broker (Palmer) to supervise its agents to avoid violations of the real estate law and regulations. Specifically, the Commission's January 29, 2007 Order states the following:

> The responsible broker is ultimately the licensee which the Commission relies on to supervise its agents sufficient to avoid violations of the real estate law and regulations. The responsible broker in this case failed in her duty to her agents and to this Commission.

(RE-000012-000013). In its response, the Commission states that "the Respondents were an integral part of a dishonest and misleading transaction." However, Palmer was not involved in the transaction at issue, and the Commission has not disputed that fact.

Since the Commission concedes that Palmer's supervisory role provided no basis for the discipline imposed upon her, there are no other allegations in the Complaint or the Commission's January 29, 2007 Order which attribute any wrongdoing to Palmer. Thus, the Commission has improperly applied evidence to Palmer which relates to the alleged conduct of Adams and Neely. Without substantial evidence to support the finding of alleged violations against Palmer, the circuit court's affirmance of the Commission's Order must be reversed. *See McDerment v. Mississippi Real Estate Commission*, 748 So. 2d 114, 118-19 (Miss. 1999)(remanding case when substantial evidence did not support each finding of alleged violations).

CONCLUSION

Based on the foregoing reasons, Appellants, Dell H. Palmer, Tanja E. Adams, and Audrey Neely respectfully ask that the Circuit Court of Madison County's ruling affirming the Mississippi Real Estate Commission's January 29, 2007 Order be reversed and rendered its entirety due to the lack of substantial evidence or, in the alternative, reverse and render the sanction of license suspension as to each Appellant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Roy H. Liddell, hereby certify that a true copy of the foregoing Reply Brief of Appellants Dell H. Palmer, Tanja E. Adams, and Audrey Neely was served on the following by being deposited in the U.S. Mail, first-class postage prepaid, on this 10th day of March, 2008:

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