

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 17-60907-CIV-MORENO/SELTZER

FEDERAL TRADE COMMISSION, and

STATE OF FLORIDA,

Plaintiffs,

v.

JEREMY LEE MARCUS, *et al.*,

Defendants and Relief Defendants.

Plaintiff's Reply to Amanda Finley's Omnibus Response in Opposition to Objections to Report and Recommendation

Pursuant to Magistrate Judge Rule 4(a)(1), S.D. Fla., L.R. and with the concurrence of co-Plaintiff, Federal Trade Commission ("FTC"), the Office of the Attorney General, State of Florida, Department of Legal Affairs ("Plaintiff," and together with the FTC, "Plaintiffs"), respectfully files this Reply to Amanda Finley's Omnibus Response in Opposition to the Receiver's Objection (Doc. 425) and Plaintiff's Objection (Doc. 426) to Magistrate Judge Seltzer's Report and Recommendation (the "Report")(Doc. 419).

Both the law and equity require that the Report, which recommends granting Ms. Finley's Expedited Motion for Imposition of Equitable Lien (the "Motion") on Real Property Located at 300 Royal Plaza Drive, Fort Lauderdale, Florida 33301 (the "Property"), be set aside. Ms. Finley's Omnibus Response is devoid of law or facts suggesting otherwise.

I. Florida Law Prohibits Ms. Finley's Claim

As set forth in both the Plaintiff's and the Receiver's Objections, Florida law prohibits real estate

sales associates from commencing any action for a commission or compensation in connection with a real estate brokerage transaction against any person except a person registered as her or his employer. Specifically, Section 475.42(1)(d), Florida Statutes, provides in pertinent part:

[N]o real estate sales associate, whether the holder of a valid and current license or not, **shall commence or maintain any action for commission or compensation in connection with a real estate brokerage transaction against any person except a person registered as her or his employer** at the time the sales associate performed the act or rendered the service for which the commission or compensation is due. (emphasis added)

See also Bergin v. Kickliter, 538 So.2d 950, 951 (Affirming trial court's summary judgment on the ground that Section 475.42(1)(d) prohibits a real estate salesman from maintaining an action to collect a real estate brokerage commission). Ms. Finley's Omnibus Response argues that Fla. Stat. § 475.42 only applies to a sales associate suing a seller for failure to pay a commission. However, Ms. Finley did not provide a single case to support such a narrow interpretation of the statute, and the plain language of the statute does not support Ms. Finley's unfounded assertion. Indeed, the statute has not been interpreted that narrowly. *See Fuller v. Alberts*, 382 So.2d 113 (Fla. 2nd DCA 1980)(Reversing trial court's judgment and holding that a real estate sales associate could not recover "finder's fee" for services rendered in connection with feasibility studies based on Section 475.42(1)(d)).

The record evidence submitted by Ms. Finley clearly shows that she is a sales associate. (See the Motion, Exhibit B, page 12 listing Ms. Finley as a Cooperating Sales Associate). The statute clearly states that a sales associate cannot bring **any action** for compensation in connection with a real estate brokerage transaction. Clearly, Ms. Finley is trying to maintain an action for compensation in connection with a real estate brokerage transaction. She is claiming that she is owed compensation in connection with her (or really, her employer) crediting a portion of the sales commission to the buyer at the time of closing. Ms. Finley's claim is barred by the plain language

of Section 475.42(1)(d), Florida Statutes.

Relatedly, the only record evidence submitted to the Court shows Ms. Finley has no standing to pursue her alleged claim. The only evidence submitted and relied upon by Ms. Finley shows that Florida Coastal Realty Group's ("Florida Coastal") total commission was \$157,500 and that Florida Coastal, not Ms. Finley, credited \$107,500 towards the purchase of the Property. (See Doc. 404, Exhibit A, lines 701 and 209). Ms. Finley argues, without providing any supporting documentation, that her Broker, Florida Coastal, received its full contractual fee of 10% or \$15,750 and that with her Broker's express permission, Ms. Finley contributed the remaining \$107,500 of the commission that was directly and contractually payable to her to the purchase of the Property. However, Ms. Finley has consistently failed to attach any contract or other evidence showing that it was Ms. Finley who rebated the \$107,500. Ms. Finley has not introduced any brokerage agreement nor the prenuptial agreement that she claims supports her position. Ms. Finley simply argues that her statements are "unrefuted and presumptively credible," citing to the Report at 4, which cites to *Holloway v. Arkansas*, 435 U.S. 475, 486 (1978). However, while *Holloway* recognized that "attorneys are officers of the court, and when they address the judge solemnly upon a matter before the, their declarations are virtually made under oath" it dealt with representations an attorney made regarding conflicts of interest representing defendants in a criminal matter. *Id.* (quotations omitted)(Report at 4). It did not involve an attorney seeking relief on their own behalf but failing to attach the underlying documents (*i.e.*, evidentiary support) that the attorney relies upon.

II. Ms. Finley's Alleged Real Estate Commission is Directly Traceable to the Proceeds of the Underlying Scam

The Report incorrectly determines, and Ms. Finley incorrectly argues in her Omnibus Response, that the \$107,500 real estate commission she claims to be owed is directly traceable

only to the seller's funds as noted in the HUD-1, Line 703. Respectfully, this conclusion is incomplete and incorrect. Although the HUD indicates that the real estate commission to Florida Coastal was "Paid from Seller's Funds at Settlement," (Doc. 404, Ex. A., lines 701 and 703), the HUD also reflects that the Property was purchased with **all cash from the buyer** (Doc. 404, Ex. A., ln. 303) and **no cash was provided from the seller** (Doc. 404, Ex. A., ln. 603)(emphasis added). Therefore, any money, including any commission, that was "paid from the seller's funds" actually came directly from the cash buyer.

As previously detailed, the forensic evidence submitted by the Receiver traced 100% of the funds used to purchase the Property to Receivership Defendant monies. (Doc. 136 at Ex. D). Specifically, the Receiver's forensic accountant identified \$2,550,000 that originated from consumer escrow funds transferred to Receivership Defendant Cockburn & Associates, LLC ("Cockburn"), along with \$2,100,000 from Receivership Defendant Associated Administrative Services, LLC ("Associated"), and \$600,000 from Receivership Defendant Halfpay International, LLC ("Halfpay"). Further, Plaintiffs obtained a Final Judgment on the Pleadings by Consent Against Halfpay, among others (Doc. 174), and a Default Final Judgment and Order for Permanent Injunctive Relief and Monetary Judgment against Cockburn and Associated, among others (Doc. 293). Thus, the entire \$5,250,000 purchase price was traced to proceeds of the scam. Ms. Finley does not dispute the forensic tracing, rather she argues that the closing statement shows the commission was paid from the seller's clean funds. As noted above, the closing statement shows the opposite—it shows that all funds used to purchase the property came from the buyer, that no cash was provided from the seller, and that any commission "paid from the seller's funds" came directly from the cash provided by the buyer.

III. The Equities Weigh in Favor of Consumers

As described above, the entirety of the funds used to purchase the Property, as well as any corresponding commission, actually came from the buyer and were fully traced to the underlying scam. It would be inequitable to give Ms. Finley any portion of those funds, especially when the Receivership Estate, and therefore consumers, will not be made whole given the Property decreased in value over a million dollars and was recently sold for \$4,000,000. (Doc. 430, Exhibits A and B).

In *CFTC v. Hudgins*, 620 F. Supp.2d 790, the CFTC brought an action to permanently enjoin Hudgins' fraudulent activities, for civil monetary penalties, and for other equitable relief. The Court appointed a Receiver to collect Hudgins' assets. *Id.* at 792. The Receiver discovered that Hudgins gave his girlfriend \$362,500, of which she used \$328,034.41 to pay off her existing mortgage. *Id.* The court reasoned that the girlfriend could not establish that she had any equity in the condominium since its last appraised value was \$260,000 and the girlfriend received over \$100,000 from Hudgins over what the Receiver would collect from the sale of her condominium. *Id.* at 795. As such, the court granted the Receiver an equitable lien on the condominium. *Id.* See also *In. re Fin. Federated*, 347 F.3d 880, 892 (imposing an equitable lien in the amount of the fraudulently obtained funds used to purchase the home, even though the home had substantially decreased in value).

Similarly, here the Receiver has traced the entire \$5,250,000 purchase price of the Property to Receivership entities, and thus should be entitled to an equitable lien in the full amount of \$5,250,000 notwithstanding the Property's decrease in value. The full \$5,250,000 represents fraudulently obtained funds. In contrast, Ms. Finley has no equity in the Property, especially given the Property's decrease in value by over \$1,000,000. Under these circumstances, it would be unfair and inequitable to the consumers who were victimized by the underlying scam, and whose money

was used to purchase the Property, if the entire proceeds of the Receiver's \$4,000,000 sale of the property are not returned to the Receivership Estate to be distributed as consumer redress. In addition, Ms. Finley's unfounded assertion that the Receiver would be getting a windfall is untrue; the Receivership Estate is actually losing over a \$1,000,000 related to the Property, without including Ms. Finley's purported claim.

IV. Ms. Finley's Alleged Real Estate Commission is Not Akin to a Purchase-Money Security Interest

Ms. Finley's alleged real estate commission is not akin to a purchase-money security interest and should not take priority over the Receiver's lien. Neither the statute cited in the Report nor the cases cited by Ms. Finley are applicable. The Report cites generally to § 679.324 which contains the priority rules applicable to purchase-money security interests in goods. Official comment 2 § 679.324. A purchase-money security interest can only be created in goods and software. *Id.* As set forth in Plaintiff's Objection, Ms. Finley's real estate commission is not a good within the meaning of Section 679.324, Florida statutes, has not been perfected, and is not akin to a purchase-money security interest. Further, the three cases cited in Ms. Finley's Omnibus Response are inapplicable—they dealt with wholly different circumstances, including vendor's liens and loans. *See Golden v. Woodward*, 15 So. 3d 664, 699 (Fla. 1st DCA 2009) (involving a vendor's lien as a result of an individual who sold his land to his neighbors under a contract requiring repayment, and the neighbors stopped paying under the contract); *Spikes v. OneWest Bank FSB*, 106 So.3d 475 (Fla. 4th DCA 2012) (involving a mortgagee who was entitled to a vendor's lien when a husband was loaned funds to purchase a house and executed a purchase money note and mortgage and subsequently defaulted on his payments); *Craven v. Hartley*, 102 Fla. 282 (1931) (involving an individual obtaining an equitable lien after the individual loaned a widow money to pay for land and the widow subsequently declined to execute a mortgage as

promised). None involved a Receiver, none discussed priority between a Receiver's equitable lien claim and a spouse's equitable lien claim, and unlike the cases cited, Ms. Finley did not loan Defendant Jeremy Marcus the \$107,500 she claims to be owed.

The credit or rebate of an alleged commission to reduce the purchase price of the buyer's and sales associate's home, which was purchased with fraudulently obtained consumer funds, does not give rise to an equitable lien allowing the sales associate to recover such funds later at the expense of a Receivership Estate. Both the law and equity demand the denial of such a claim. For all of these reasons and the reasons stated in Plaintiff's Objection, Plaintiff respectfully requests that this Court set aside the Report and deny Ms. Finley's Motion for Imposition of Equitable Lien. Co-Plaintiff FTC concurs in this filing.

Dated: November 1, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of November, 2019, I electronically filed the foregoing document with the Clerk of the Court by using the CM/ECF system. I also certify that the foregoing document is being served this date on all counsel of record or pro se parties via transmission of Notices of Electronic Filing generated by the CM/ECF system, or for those counsel or parties who are not authorized to receive CM/ECF Notices of Electronic Filing, is being served in the manner specified.

/s/ Ryann Flack
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