

STATE OF NEW YORK  
DEPARTMENT OF STATE

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In the Matter of the Complaint of

**DEPARTMENT OF STATE  
DIVISION OF LICENSING SERVICES,**

Complainant,

**DECISION**

-against-

**JEFFREY G. CHRISTIANA,  
MANOR HOMES BLAKE REALTY, INC.,**

Respondents.

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Pursuant to the designation duly made by the Hon. Gail S. Shaffer, Secretary of State, the above noted matter came on for hearing before the undersigned, Roger Schneier, on October 20, 1992 at the office of the Department of State located at 162 Washington Avenue, Albany, New York 12231.

The respondents, of 1222 Troy Schenectady Road, Schenectady, New York 12309, were represented by John K. Sharkey, Esq., Higgins, Roberts, Beyerl & Coan, PC, 502 State Street, Schenectady, New York 12305-2492.

The complainants were represented by A. Marc Pellegrino, Esq.

**COMPLAINT**

The complaint in the matter, as amended, alleges that the respondents operated a program under which their real estate brokerage clients were asked to enter into agreements to pay, upon the sale of their houses, \$250.00 in addition to an agreed upon commission, which money was to serve as an incentive to salespersons to provide preferential treatment to participating clients; that the fee did not bear any relevance to services rendered by the respondents; and that the program has been discontinued but the respondents continue to retain monies collected and not yet disbursed.

**FINDINGS OF FACT**

1) Notices of hearing together with a copy of the complaint were served on the respondents by certified mail received by them on December 20, 1991, and by order dated August 5, 1992 the complaint was amended (Comp. Ex. 1).

2) Jeffrey G. Christiana is duly licensed as a real estate broker representing Prudential Manor Homes Blake Realty Inc.; Blake Realty Inc.; Manor Homes Blake Realty Inc.; and Prudential Blake Group Blake Realty Inc., all with main offices located at 1492 Central Avenue, Albany, New York 12205, but operating out of corporate headquarters located at 1222 Troy-Schenectady Road, Schenectady, New York 12309.

3) In August, 1990, after consulting with Mr. Sharkey and receiving his go ahead, the respondents instituted a sales promotion known as the "Gold Rush Program" (the program). The purpose of the program, which was copied from and or similar to programs instituted by other brokers in New York and other states, was to stimulate business in the depressed real estate market by increasing promotional activity with regards to participating properties.

Under the program, persons who entered into agency agreements with the respondents for the sale of their homes were asked to enter into supplementary agreements under which they would pay to the respondents, upon the closing of the sales of their houses, \$250.00 in addition to the agreed upon commission. The fact that the houses were participating in the program would be noted on the for sale signs posted at the houses and on the listings of property both maintained in the respondents' offices and distributed to cooperating members of the multiple listing service. After forty nine participating homes had been sold the respondents would hold a cocktail party at which there would be a drawing from the names of all of the salespersons and brokers who had brokered the sale of those homes (with one entry for each home sold), and the person whose name was picked would receive \$10,000.00, either entirely for his/herself or to be shared with the broker with whom that salesperson or selling broker was associated, according to their arrangement (the balance of the money collected, \$2,250.00, was used to pay for the party) (Comp. Ex. 3).

The respondents discontinued the program on July 17, 1991 after receiving a copy of a declaratory ruling which discussed the proposal of another broker to institute the same type of program and ruled that it would be unlawful (see infra) (Resp. Ex. A-D). By that time the respondents had in their possession either \$5,500.00 or \$5,750.00 for properties in the program on which there had been closings, and had conducted two drawings, at each of which they distributed \$10,000.00. In settlement discussions with the complainant they have expressed a willingness to return to their former clients the money which they still hold.

#### **OPINION**

I- As noted in the findings of fact, the issue of the type of program involved in this matter was previously addressed in Declaratory Ruling 91-2, Matter of Dentino, Cammarata & Byrnes, in which it was stated:

"When a real estate broker agrees to assist a homeowner in the sale of a house, the broker becomes the agent of the homeowner, Restatement (Second) of Agency, section 1, and the salespersons associated with that broker who assist the broker in achieving the purpose of the agency become the sub-agents of the homeowner. Restatement (Second) of Agency, sections 79(c) and 80(d).

The relationship between an agent or subagent and a principal is fiduciary. It is a relationship "...founded on trust or confidence reposed by one person in the integrity and fidelity of another." Mobil Oil Corp. v Rubinfeld, 72 Misc.2d 392, 339 N.Y.S.2d 623, 632 (Civil Ct., Queens County 1972), aff'd. 77 Misc.2d 962, 357 N.Y.S.2d 589 (App. Term 1974). The fundamental duties of a fiduciary are imposed upon real estate licensees. L.A. Grant Realty, Inc. v Cuomo, 58 A.D.2d 251, 396 N.Y.S.2d 524 (4th Dept. 1977). The object of this is to secure the fidelity of the agent to the principal, and to insure the transaction of the business of the agency to the best advantage of the principal. Department of State v Goldstein, 7 DOS 87, conf'd. sub nom Goldstein v Department of State, 144 A.D.2d 463, 533 N.Y.S.2d 1002 (Dept. 1988); Department of State v Donati, 17 DOS 90; Department of State v Granick, 49 DOS 89.

As a fiduciary, a real estate broker is required to act solely for the benefit of the principal in all matters connected with the agency. Restatement (Second) of Agency, section 387; Matter of First Security Financial Services, Inc., DOS Declaratory Ruling 90-22; Matter of Kane, Kessler, Proujansky, Tullman, Preiss & Nurnberg, P.C., DOS Declaratory Ruling 90-16.

"Agents are bound at all times to exercise the utmost good faith toward their principals. They must act in accordance with the highest and truest principles of morality." Elco Shoe Manufacturers v Sisk, 260 N.Y. 100, 103 (1932). An agent owes "single-eyed service to his principal, (and) must serve him with the utmost good faith and loyalty...." Polley v Daniels, 238 A.D. 181, 264 N.Y.S. 194, 197 (3rd Dept. 1933). "The object of the rule is to secure fidelity from the agent to the principal and to insure the transac-

tion of the business to the best advantage of the principal." Department of State v Goldstein, supra, at p. 5.

In light of the foregoing, it is evident that a real estate broker or salesperson has an obligation to devote his or her undiluted efforts towards the purpose of accomplishing the sale of his or her principal's property, and cannot devote a higher degree of effort towards the sale of one principal's property than to that of another principal's, particularly when the increased effort results from the prospect of higher compensation being received by the agent. A real estate broker or salesperson "owes undivided loyalty to his client, unhampered by obligations to any other employer" People v People's Trust Co., 180 A.D. 494, 167 N.Y.S. 767, 768 (2nd Dept. 1917), and a real estate broker or salesperson may not place his or her interests before those of his or her principal. Al-Co Properties v Department of State, 88 A.D.2d 88, 452 N.Y.S.2d 947 (4th Dept. 1982); Brabazon v Cuomo, 49 A.D.2d 430, 375 N.Y.S.2d 435 (3rd Dept. 1975); Edelstein v Department of State, 16 A.D.2d 764, 227 N.Y.S.2d 987 (1st Dept. 1962); 1962); Department of State v J. Vitale Real Estate, Inc., 106 DOS 82, conf'd. sub nom Otto J. Vitale Real Estate Inc. v. Department of State, 102 A.D.2d 892, 477 N.Y.S.2d 64 (2nd Dept. 1984); Department of State v Donati, supra; Department of State v Tony Phillips, 54 DOS 89.

This Department has previously held, in Matter of First Security Financial Services, Inc., supra, and Matter of Kane, Kessler, Proujansky, Tullman, Preiss & Nurnberg, P.C., supra, that business arrangements which can be expected to result in an agent placing his or her interest in a commission ahead of the interest of his or her principal are not to be tolerated. I see no reason to deviate from that holding in this matter.

In Gold v Lomenzo, 29 N.Y.2d 468, 329 N.Y.S.2d 805 (1972), the Court of Appeals said that "(b)rokers' fees must represent charges for actual services...." 329 N.Y.S.2d at 813. In accordance with that, it has been held that the fees charged by real estate brokers and their relevance to actual services performed by them are proper issues for consideration by the De-

partment of State in disciplinary proceedings. Nevada Realty Corp. v Paterson, 90 A.D.2d 485, 454 N.Y.S.2d 547 (2nd Dept. 1982); Gudinsky v Cuomo, 64 A.D.2d 899, 407 N.Y.S.2d 887 (2nd Dept. 1978); Department of State v Deitsch, 86 DOS 86. Since a broker or salesperson may not give special attention to the sale of a property for which the licensee will receive an enhanced commission, the proposed \$250.00 fee would be paid by the principal in return for a service to which that principal is otherwise entitled and for which the principal has already paid, and, therefore that fee would have no relevance to actual services performed by the broker or salesperson."

The only difference between the program discussed in the ruling and that of the respondents is that the respondents used some of the fees paid by their clients for a party for the eligible salespersons and brokers, while the program discussed in the ruling had no such provision. Other than that insignificant difference the programs appear to be identical.

II- The respondents assert that they are shielded from any liability for their conduct because before instituting the "Gold Rush" program they consulted with their attorney, Mr. Sharkey, who advised them that it was lawful.

In Flushing Kent Realty Corp. v Cuomo, 55 AD2d 646, 390 NYS2d 146 (1976), it was held that a respondent could not be held to have acted improperly where it undertook certain action (the commencement of a law suit) on the advice of its attorney, and where there was a reasonable basis for that attorney's advice. However, action which is clearly in violation of law is not excused by reliance on the advice of legal counsel, since it is the public policy of the State of New York "that each individual, by himself, shoulders the responsibility for obeying the law...." Butterly & Green Inc. v Lomenzo, 36 NY2d 250, 367 NYS2d 230, 235 (1975). That holding is particularly apt with regards to a violation of the Law of Agency, of which a real estate broker is required to have "a general and fair understanding." Real Property Law (RPL) §441(1)(d). Nevertheless, reliance upon the advice of legal counsel can negate proof of intent, Division of Licensing Services v Guisto, 34 DOS 92; Department of State v Mole, 40 DOS 86, and may be considered in mitigation of the seriousness of a violation, as may a licensee's discontinuation of his conduct immediately upon being advised that it is or might be unlawful.

III- It cannot be said that the principal involved in this matter should immediately be evident to any real estate broker who considers the question. Commission rates between real estate brokers and their principals are fully negotiable, and are not fixed by law. Gold v Lomenzo, supra. A real estate broker could, albeit incorrectly,

consider the solicitation of the \$250.00 additional payment to be merely a negotiation or re-negotiation of a commission, and might not be aware of the full implications of the procedure. Therefore, while the institution of such a program would constitute incompetency, the seriousness of that incompetency is lessened by the degree of sophistication in the reasoning behind the holding in the declaratory ruling. Also mitigating is the fact that the respondents discontinued the program as soon as they learned of the declaratory ruling and that they have expressed a willingness to refund the money which they still hold.

IV- Where a broker or salesperson has received money to which he is not entitled, he may be required to return it, together with interest, as a condition of retention of his license. Kostika v Cuomo, 41 N.Y.2d 673, 394 N.Y.S.2d 862 (1977); Zelik v Secretary of State, 168 AD2d 215, 562 NYS2d 101 (1990); Edelstein v Department of State, 16 A.D.2d 764, 227 N.Y.S.2d 987 (1962). Such a condition may be imposed even when that money has already been paid by the licensee to another person. Mittleberg v Shaffer, 141 AD2d 643, 529 NYS2d 545 (1988).

#### **CONCLUSIONS OF LAW**

By soliciting and accepting additional payments from their clients with the implication that as a result of such payments those clients would receive better service than the clients who decline to make such payments, thereby seeking special payments for services to which the clients were otherwise entitled and which were, therefore, without relevance to actual services performed, the respondents demonstrated incompetency as real estate brokers.

#### **DETERMINATION**

**WHEREFORE, IT IS HEREBY DETERMINED THAT** Jeffrey G. Christiana and Manor Homes Blake Realty, Inc. have demonstrated incompetency as real estate brokers, and accordingly, pursuant to Real Property Law §441-c, they are reprimanded therefore, and

**IT IS FURTHER DETERMINED THAT** all real estate broker licenses issued to the respondents shall be suspended effective February 1, 1993 unless and until they shall have presented proof satisfactory to the Department of State that they have refunded to the payors the \$25,500.00 or \$25,750.00 received by the respondents as part of the "Gold Rush" program, without regard to whether those payments have been previously expended in the operation of the "Gold Rush" program or otherwise, together with interest at the legal rate for judgements from February 1, 1993.

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These are my findings of fact together with my opinion and conclusions of law. I recommend the approval of this determination.

Roger Schneier  
Administrative Law Judge

Concur and So Ordered on:

GAIL S. SHAFFER  
Secretary of State  
By:

James A. Coon  
Deputy Secretary of State