6 DOS 93

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-

CORNELL ASSOCIATES REALTY, LTD.,
PETER CORNELL, SARA LANDON SOCHA,
and MARY PINCKNEY,

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 June 3, June 9, July 14 and September 24, 1992 at the office of the Department of State located at 162 Washington Avenue, Albany, New York.

The respondents, Cornell Associates Realty, Ltd. (Cornell Realty) and Peter J. Cornell, of 5 South Church Street, Schnectady, New York 12305, Sara Landon Socha, of Blackman DeStefano Realty Estate Inc., 1750 Route 9, Clifton Park, New York 12065, and Mary Lourdes M. Pinckney, of Bob Howard, Inc., 145 Valley Road, Schnectady, New York 12309 were represented by Kevin A. Luibrand, Esq., Tobin and Dempf, 100 State Street, Albany New York 12207.

The complainant was represented by A. Marc Pelligrino, Esq.

THE COMPLAINT

The complaint in the matter alleges that Socha and Pinckney, while associated with Cornell Realty, negotiated the sale of a town house by Cornell Development Corp. (Cornell Development), a corporation of which Peter Cornell is a principal; that although the respondents were representing the seller, the purchaser thought that Socha and Pinckney were representing her; that representatives of Cornell Realty inserted mortgage contingency, price and down payment terms into the contract although the contracts utilized by the respondents were not approved by the local bar association and board of realtors and were not subject to the approval of the purchasers' attorneys; that the purchaser was advised by Socha and Pinckney that should she change her mind her deposit would be returned; that the purchaser entered into an agency

agreement with Cornell Realty and Pinckney for the sale of her house; that Cornell Development subsequently entered into a contract, brought about by the efforts of Socha and Pinckney, working on behalf of Cornell Realty, to sell the same town house to second purchasers; that the first purchaser was then asked by Socha and Pinckney to change her purchase to a different town house, and was again assured by Pinckney that her deposit would remain refundable; that no signed documents where exchanged between the first purchaser and Cornell Realty or Cornell Development regarding the change; that when the first purchaser was unable to sell her home she requested a refund of her deposit, but no refund has been forthcoming; that Peter Cornell has expressed his refusal to make such a refund; that the first purchaser's attorney never approved the change in town houses; that the second purchasers were also under the impression that they were being represented by Socha and Pinckney, and asked them to make the purchase contingent on the sale of their home; that no contingency clause was inserted in the contract, but a clause was inserted giving the seller the right to transfer the (second) purchasers to another property should they not have sold their home by a certain date; that the second purchasers entered into an agency agreement with Cornell Realty for the sale of their home; that because of the failure of their home to sell the second purchasers where unable to close on the town house and made a request of Peter Cornell and one of his employees for a refund of their deposit, which request was refused; that the second purchasers were able to obtain the refund of their deposit only after retaining an attorney and threatening legal action; and that, therefore, Socha and Pinckney engaged in fraudulent practices and/or engaged in acts of misrepresentation, failed to make clear for whom they were acting, engaged in the unauthorized practice of law, and demonstrated untrustworthiness and/or incompetency; that by affirmatively approving the acts of Socha and Pinckney and by retaining the deposit paid by the first purchaser, Peter Cornell engaged in fraudulent practices and demonstrated untrustworthiness and/or incompetency; and that Cornell Realty is vicariously liable for the foregoing alleged acts of misconduct and has thereby engaged in fraudulent practices, engaged in the unauthorized practice of law, and demonstrated untrustworthiness and/or incompetency.

FINDINGS OF FACT

1) Notices of hearing together with copies of the complaint, which was subsequently amended on the complainant's motion, were served on the respondents by certified mail (Comp. Ex. 1).

2) Peter J. Cornell is, and at all times hereinafter mentioned was, duly licensed as a real estate broker representing Cornell Realty (Comp. Ex. 3).

At all times hereinafter mentioned, Sara Landon Socha was duly licensed as a real estate broker associated with Cornell Realty and

later with Cheryl Orminsla Realty, Inc., and with Blackman DeStefano Real Estate, Inc., with which corporation she was associated at the time of the hearing (Comp. Ex. 4).[1]

At all times hereinafter mentioned, Mary Lourdes M. Pinckney was duly licensed as a real estate salesperson associated with Cornell Realty and later with Bob Howard, Inc., with which corporation she is currently associated (Comp. Ex. 2).

3) In 1988 Cornell Realty was engaged in the marketing of a town house project to be developed by Cornell Development, known as "Country Village" and located in the town of Guilderland, Albany County, New York. At the time, in addition to his position as representative broker of Cornell Realty, Peter Cornell was an officer and stockholder of both Cornell Realty and Cornell Development (Comp. Ex. 5). As part of the marketing effort, Cornell Realty maintained an on site sales office in which Pinckney and Socha worked.

4) Sometime in the Spring of 1988 Domenica Pelkey visited Country Village and met and spoke with a salesperson named Jim McGuirk. Shortly thereafter McGuirk decided to leave the real estate brokerage business, and he introduced Pelkey to Pinckney, who gave Pelkey a business card which stated that Pinckney was a "sales associate" with Cornell Realty, and which made no reference to Cornell Development. (Comp. Ex. 11).

Pelkey spoke with Pinckney about possibly buying a town house, and Pelkey perceived that Pinckney was acting as her agent in the projected transaction.[2] At the time, Pelkey was apparently unsure about whether she would sell or retain and rent out her current home, in part of which she already had a tenant. She looked at various locations in the development, which at the time was under construction in stages using factory built houses. The location which she preferred, 7500 Antoinette Court, was not yet ready for construction and, Pinckney told her, was going to be more expensive than Pelkey could afford.

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[1] That license was to expire on July 31, 1992. Socha testified that she was not currently active as a broker and had sent the license back to the Department of State. The computerized license records contain no indication as to Socha's current license status.

[2] While Pinckney testified, after a leading question which was objected to and then rephrased, that she told Pelkey that she was a sales agent representing Country Village, she later testified that she doesn't recall making such a statement to Pelkey and that she was introduced as an agent for Cornell Realty (trans., pp. 359 and 365). Pinckney claims that her regular practice was to tell persons visiting the sales office "who I'm with" (trans., p. 388), a procedure which would not necessarily tell that person who Pinckney was representing.

Pelkey decided that she wished to purchase a town house to be assembled on the lot at 7090 Suzanne Lane. She was assured by Pinckney that the deposit would be refundable if her contingencies were not met, and was presented by Pinckney with a proposed contract, with a purchase price of $124,900.00 and a mortgage contingency of $40,000, and providing for a closing of title on October 31, 1988, which Pelkey signed on June 24, 1988 (Resp. Ex. A). That contract had been prepared, on a Cornell Development form, by Socha, whose job it was to handle routine contracts. There is no evidence in the record of whom Pelkey believed Socha was representing.

The contract contained a form addendum making the contract subject to the approval of Pelkey's attorney, which was added after Socha asked Pelkey if she wished to have such a contingency added.[3]

Pelkey submitted the contract to her attorney, who, after consultations with Peter Cornell, crossed out several of the paragraphs, and the changes were initialled by the parties (Comp. Ex. 7 and Resp. Ex. B). Significantly, while no contingency regarding the sale of Pelkey's home was added, Pelkey's attorney did delete the clause which provided for the deposit to be retained by the seller as liquidated damages should Pelkey default on the purchase. I find that this supports both Pelkey's testimony that she was told that her deposit would be refundable if she couldn't go through with the purchase, and the conclusion that that promise was an essential inducement to get her to enter into the contract.

Pelkey made three payments, totaling $15,502.60, on the contract: $2,500.00 payable to "Country Village Townhouse Escrow Account" upon signing the contract; $3,012.50 payable to Cornell Development as a deposit on options to be added to the town house, paid on July 28, 1988; and $9,990.10 payable to Cornell Development as the final installment of the deposit on the basic house, paid on August 10, 1988 (Comp. Ex. 9A-C). Since the contract provided that the initial payment did not have to be held in escrow, it was not in fact deposited in that account, while the second and final payments were.

On July 21, 1988 Pelkey entered into an agreement with Pinckney, who was acting on behalf of Cornell Realty, pursuant to which Pinckney and Cornell Realty were to act as Pelkey's agents in the sale of her home located at 501 Acre Drive, Schenectady, New York (Comp. Ex. 8). While that created a double agency, with Pinckney and Cornell Realty representing buyers and sellers in mutually dependent transactions, the respondents did not explain the significance of and conflicts inherent in such a double agency. When that agreement expired at a time after Pinckney had discontinued her association with Cornell Realty, a new

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[3] Socha testified that she also asked Pelkey if she needed to make the purchase contingent on the sale of her current home, and that Pelkey responded in the negative, saying that she wasn't sure if she would need to sell that home in order to go through with the purchase.

agency agreement was entered into between Pelkey and Pinckney on February 1, 1989 , with Pinckney now acting on behalf of Bob Howard, Inc. (Comp. Ex. 10).

Approximately two months after she entered into the contract to purchase 7090 Suzanne Lane, Pelkey was contacted by Pinckney about the possibility of transferring her contract to the site which Pelkey had originally preferred, 7500 Antoinette Court (Resp. Ex. D and M). Pinckney told Pelkey that other persons had expressed interest in purchasing the Suzanne Lane house, and that Pelkey could transfer her contract without any increase in price. Since Pelkey had been unable to sell her house, on August 18, 1988, after inspecting the property and receiving assurances that if she couldn't complete the purchase she would still get her money back, Pelkey initialed a change on the contract of purchase providing that she would now be purchasing 7500 Antoinette Court (Resp. Ex. E).[4] The change was orally approved by Pelkey's attorney. According to Peter Cornell, the change was made as an accommodation to Pelkey in spite of the fact that there was no sales contingency in her contract, since property in the development was selling briskly and by making the change the seller could get a contract on an additional piece of property and Pelkey could get what she originally wanted. I find, however, that the evidence establishes that more than just a brisk market was involved, and that in fact potential purchasers named James and Janet Fisch had already expressed interest in purchasing 7090 Suzanne Lane.

Just over a month later, on September 6, 1988, Mr. and Mrs. Fisch entered into a contract to purchase 7090 Suzanne Lane, with closing of title scheduled for November 25, 1988. (Comp. Ex. 13 and 19). They also dealt with Pinckney and, just as with Pelkey, had the impression that Pinckney was representing them.[5] From her signature on the contract, the Fischs understood that Socha, who had again prepared the contract, represented the seller.

Before signing the contract the Fischs were asked if they wished to have an attorney's approval contingency attached, and they declined.

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[4] The respondents have failed to produce a copy of the contract with the change of address initialed by a representative of the seller, and when questioned by the Division of Licensing Services investigator assigned to the case Peter Cornell was unable to find any written record of the change. While Cornell claims that the unavailability of the record resulted from his records being in disarray because of their having been moved, he apparently was not able to subsequently produce anything to show that Cornell Development had entered into a legally binding agreement to change the address of the house being purchased by Pelkey.

[5] Unlike Pelkey, however, they believed that Pinckney was also representing Cornell Development at the same time as it was representing them.

They did, however, say that they wished to have the purchase contingent on the sale of their house located at 99 Maple Avenue, Voorheesville, New York[6]. They were told by both Pinckney and Socha that they could get their money back if their house didn't sell, and Socha said that such a contingency could be written into the contract. Socha, who is not an attorney at law, then wrote in the following: "Seller reserves right to transfer contract to 7504 Antoinette Court if purchaser has not sold home at 99 Maple Ave, Voorheesville by 10/15/88 at $126,900."[7] The contract did, however, contain a clause making the purchase contingent upon the Fischs obtaining a mortgage loan of $30,000.00 (the full purchase price was $126,900.00).

The Fischs' house had not sold by the date provided, and on October 17, 1988 the agency agreement was amended to reduce the asking price from the original $149,500.00 to $147,000.00 (Comp. Ex. 16). However the property still did not sell.

On March 14, 1988 Cornell Development sent the Fischs a letter stating that their town house at 7088 (sic) Suzanne Lane would be available for occupancy on May 15, 1989 and that they should make arrangements with their attorney and lender for a closing (Comp. Ex. 15). The Fischs contacted Peter Cornell and William Benton, President of Cornell Development and a shareholder of Cornell Realty, and were told to take a little more time to try to sell their house. However, by the late spring or early summer they realized that they would be unable to sell. They telephoned Pinckney and requested a refund. Pinckney said that she would see what she could do. When a refund was not forthcoming, the Fischs contacted their attorney, who had extensive correspondence over a period of months with Mr. Luibrand (who was acting as attorney for Cornell Development). Eventually, pursuant to a release dated October 6, 1989 (signed by Peter Cornell on behalf of Cornell Realty), they finally received a refund of their deposit (Comp. Ex. 17 and 24, Resp. Ex. L and O).

In the meantime, Pelkey had not sold her house. By the time that Pinckney finally told her that a potential buyer had appeared on the scene, Pelkey had suffered such financial and family problems that she

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[6] They had entered into an agency agreement for the sale of that house with Pinckney, who was acting on behalf of Cornell Realty, on September 5, 1988, the day before they entered into the agreement to purchase 7090 Suzanne Lane.

[7] I do not find convincing the respondents' testimony that all the Fischs wanted was an assurance that if they couldn't sell their house promptly they would be able to transfer to another property with no increase in cost, inasmuch as the language inserted by Socha into the contract only protects the interests of the seller, and does not give the Fischs any right to require such a transfer. In fact, Peter Cornell testified that at the point that the deal was dying the Fischs said that they only wanted the lot on Suzanne Lane.

could no longer go through with the purchase in Country Village even if she had sold her house. In June 1989 she made a request to William Benton for a refund. Benton refused to agree to that request since a house had been built on the Suzanne Lane lot[8], and he claimed to be unaware of any change to Antoinette Court. The contract in his file made no mention of the switch of locations.[9] He offered to refund only $7,500.00, and in discussions with the Division of Licensing Service's investigator, Peter Cornell repeated the refusal to make a full refund, claiming that there was a binding contract.

After the Fischs cancelled their contract the house on Suzanne Lane was leased to Omar and Lenore Snow with an option to purchase it.[10] However, in the fall of 1990 the house burned down and the Snows moved to 7500 Antoinette Court, which they bought on November 29, 1990 (Comp. Ex. 22).[11]

OPINION

I- 19 NYCRR 175.7 states that "(a) real estate broker shall make it clear for which party he is acting...."

> "The regulation places a heavy burden on the broker: 'to make it clear what the state of facts are. It is the broker's responsibility to be sure that the person with whom he or she is dealing understands...." Department of State v Almo, 24 DOS 87 at 3.

In confirming that determination, the Appellate Division wrote that the regulation "requires that real estate brokers clearly state for which party they are acting." Almo v Shaffer, 149 AD2d 417, 539 NYS2d 765 (1989).

The regulation applies to real estate salespersons as well as to brokers by reason of the agency relationship between the salespersons and the brokers with whom they are associated. The salesperson must make the same disclosures to a client as the law requires of the

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[8] The Antoinette Court lot remained vacant.

[9] This supports the conclusion that the purported switch had never actually been completed, in spite of Pelkey having initialed the change.

[10] The record does not indicate the date of that lease since in spite of their agreement to do so made at the hearing, the respondents failed to produce a copy of the lease.

[11] For some reason the deed was not recorded until January 11, 1991, but the date of the closing is clear from the date of the acknowledgement.

salesperson's broker, a duty arising out of the salesperson's fiduciary obligations of full and fair disclosure and of reasonable care, which require the use by an agent of his or her expertise and skills to protect the principal from, and limit the principal's exposure to, ascertainable harm and risks of loss. Division of Licensing Services v Calamari, 29 DOS 91.

Both Pelkey and the Fischs believed that Pinckney was representing them in their purchases from Cornell Development. Therefore, it is evident that Pinckney, in apparently following her usual practice upon being introduced to prospective purchasers, did not make it clear whom she was representing, and did not make certain that Pelkey and the Fischs understood. However, the conclusion with regards to Socha is different. There is no evidence in the record as to whom Pelkey thought Socha was representing, and the Fischs understood that Socha was representing Cornell Development.

II- Real Estate brokers are permitted to prepare purchase offer contracts subject to very definite limitations.

> "The line between such permitted acts by real estate brokers and the unauthorized practice of the law has been recognized as thin and difficult to define and, at time, to discern. Whether or not the services rendered are simple or complex may have had a bearing on the outcome, but it has not been controlling....
>
> The justification for granting to real estate brokers and agents the privilege to complete simple purchase and sale documents has been said to be the practical aspect of the matter, that is, the business need for expedition and the fact that the broker has a personal interest in the transaction. It should be noted in this regard, however, that the so-called 'simple' contract is in reality not simple....The personal interest of the broker in the transaction and the fact that he is employed by one of the opposing parties are further reasons to require that, insofar as the contract entails legal advice and draftsmanship, only a lawyer or lawyers be permitted to prepare the document, to ensure the deliberate consideration and protection of the interests and rights of the parties.
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> The law forbids anyone to practice law who has not been found duly qualified and licensed to do so....Thus, the privilege accorded to real estate brokers and agents must be circumscribed for the benefit of the public to ensure that such professionals do not exceed the bounds of their

> competence and, to the detriment of the innocent public, prepare documents the execution of which requires a lawyer's scrutiny and expertise." Duncan & Hill Realty v Dept. of State, 62 AD2d 690, 405 NYS2d 339, 343-344 (1978) (citations omitted), appeal dismissed 45 NY2d 821, 409 NYS2d 210.

In preparing a purchase offer contract, real estate brokers and salespersons may not insert any provision which requires the exercise of legal expertise. They may not devise

> "legal terms beyond the general description of the subject property, the price and the mortgage to be assumed or given....(and) may readily protect (themselves) from a charge of unlawful practice of law by inserting in the document that it is subject to the approval of the respective attorneys for the parties. Moreover, a real estate broker or agent who uses (a purchase offer form) recommended by a joint committee of the bar association and realtors association of his local county, who refrains from inserting provisions requiring legal expertise and who adheres to the guidelines agreed upon by the American Bar Association and the National Association of Real Estate Brokers...has no need to worry about the propriety of his conduct in such transactions." Duncan & Hill Realty v Dept. of State, supra, 405 NYS2d at 345.

In this case there are questions regarding two such contracts. All that Socha inserted in the Pelkey contract were the descriptive terms permitted by Duncan & Hill. Therefore, with regards to that contract she took no action requiring legal expertise. In the instance of the Fisch contract, however, the conclusion is quite different. She drafted and inserted language in that contract which purported to provide the seller with the right to transfer the Fischs to a different lot. According to Socha, the purpose of that clause was to protect the Fischs. However, as discussed in the findings of fact, it only protected Cornell Development. This is, therefore, a perfect demonstration of why the rule against the insertion in contract of such matters by real estate brokers and salespersons must be strictly enforced. It is no defense to say that the Fischs were offered the opportunity to have the contract made subject to the approval of their attorney. Under the holding in Duncan & Hill if the broker or salespersons is to be protected from a charge of unlawful practice of law it is not enough to just give a party such an option. Rather, there must be inserted, whether requested or not, a clause making the enforceability of the contract contingent upon the approval of the attorneys for both buyer and seller.

III- Pelkey was led by Pinckney to understand, incorrectly, that if she were unable to complete the purchase of the town house she would receive a full refund of her deposit. That representation served as an essential inducement to Pelkey to enter into the contract. The Fischs were told by Pinckney and Socha that their deposit would be refundable if they could not sell their house, although no sales contingency was inserted in the contract. Socha went so far as to first tell the Fischs that such a contingency could be written in and to then write in a clause protecting only Cornell Development by granting it the right to switch the Fischs to another lot.[12] The actions by Pinckney and Socha in this regard constituted fraudulent practices, which

> "...as used in relation to the regulation of commercial activity, is often broadly construed, but has generally been interpreted to include those acts which may be characterized as dishonest and misleading. Since the purpose of such restrictions on commercial activity is to afford the consuming public expanded protection from deceptive and misleading fraud, the application is ordinarily not limited to instances of intentional fraud in the traditional sense. Therefore, proof of an intent to defraud is not essential." Allstate Ins. Co. v Foschio, 93 A.D.2d 328, 464 N.Y.S.2d 44, 46-47 (1983) (citations omitted).

A single fraudulent practice may be the basis for the imposition of disciplinary sanctions. Division of Licensing Services v Linfoot, 60 DOS 88, conf'd. sub nom Harvey v Shaffer, 156 A.D.2d 1013, 549 N.Y.S.2d 296 (1989).

IV- As a fiduciary, a real estate broker or salesperson is prohibited from serving as a double agent representing parties with conflicting interests in the same transaction without the informed consent of the principals.[13] Department of State v McGill, 21 DOS 92; Department of State v Home Market Realty, 1 DOS 90; Department of State v Island Preferred Properties, 34 DOS 89. "If dual interests are to be served, the disclosure to be effective must lay bare the truth, without

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[12] In weighing the testimony regarding whether Pelkey and the Fischs were told that their purchases would be contingent upon their selling their existing houses, I have been influenced by the fairly low amounts of the mortgage contingencies in the purchase contracts, which indicate that Pelkey and the Fischs needed to obtain substantial amounts of cash in order to complete the transactions.

[13] The term "double agent" is used in preference to the more common "dual agent" as being more descriptive of the conflict of interests inherent in such status.

ambiguity or reservation, in all its stark significance." Wendt v Fischer, 243 NY 439, 443 (1926); Guidetti v Tuotti, 52 Misc. 657, 102 NYS 499 (Supreme Ct. App. Term, 1907).

> "Therefore, a real estate agent must prove that prior to undertaking to act either as a dual agent or for an adverse interest, the agent made full and complete disclosure to all parties as a predicate for obtaining the consent of the principals to proceed in the undertaking. Both the rule and the affirmative defense of full disclosure are well settled in law. This legal principle is amplified by the provisions of 19 NYCRR 175.7, which mandates that a real estate broker shall make it clear for which party the agent is acting, and prohibits the agent from receiving compensation from more than one party except with the full knowledge and consent of all parties to the transaction." Department of State v Short Term Housing, supra, at p. 6.

The prohibition on double agency without proper disclosure does not apply only to the situation where the agent represents both the seller and the buyer in their negotiations with each other. It extends to situations in which the agent represents the parties in separate, but interrelated, transactions, such as representation of the seller of property at the same time that the agent is also representing the buyer in the sale of the buyer's property, particularly when the proceeds of that sale are to be used in the purchase. As agent of the seller, the licensee has the duty of taking those actions which are required to further the sale of the property in the most expeditious manner possible. Department of State v Home Market Realty Corp., supra. As agent of the buyer in the sale of the buyer's property, the licensee has the duty of obtaining the best price and terms possible. Cf., Department of State v Zelik, 61 DOS 87, conf'd. sub nom Zelik v Secretary of State, 168 AD2d 215, 562 NYS2d 101 (1990). The licensee's obligations will clash when, as can be expected, the interest of the buyer in selling his or her property for the best price and terms may delay the sale of that property and thereby delay the purchase of the other property. Cf., Department of State v McGill, supra.

It is not necessary that there be a showing of injury to the principals for there to be a finding that the double agent acted improperly. New York Central Insurance Company v National Protection Insurance Company, 14 NY 84 (1856). Nor is it necessary for there to be a finding that the double agent is guilty of actual fraud. Carr v National Bank & Loan Co., 167 NY 375 (1901), aff'd. 189 US 426, 23 S.Ct. 513. See, also, Hasbrouck v Rymkevitch, 25 AD2d 187, 268 NYS2d 604 (1966). "This rule is not affected by the existence of the usage or custom of an agent to act for both parties to a particular transaction unless it is shown that the principal has knowledge of it." 3 NY Jur2d Agency, §201.

Pinckney, while acting as the seller's agent and on behalf of Cornell Realty, entered into agreements to act as the agent of Pelkey and the Fischs in the sales of their houses, transactions which were directly related to, and necessary for, their purchases of town houses, in which transactions she and Cornell Realty were agents for Cornell Development. In the case of the Fischs the conflict was particularly egregious since it had been represented to them that, based on their instructions, their purchase would be made contingent upon the sale of their house, and they understood that such a contingency existed as a result of the addition which Socha made to the contract. Later, while still representing Cornell Development, Pinckney renewed the agency agreement with Pelkey on behalf of Bob Howard, Inc. The respondents have offered no evidence to show that full disclosure of, and informed consent to those double agencies was obtained from the various principals, and, therefore, have not established the required affirmative defense.

V- Pursuant to RPL §441(1)(d) real estate brokers are required to demonstrate their competency to transact the business of real estate broker in such a manner as to safeguard the interests of the public. Included in that demonstration must be a showing that the broker has a fair understanding of the general legal effect of contracts of sale.

It is an essential of contract law that a contract for the sale of real property

> "is void unless the contract or some note or memorandum thereof, expressing the consideration, is in writing and subscribed by the party to be charged therewith, or by his lawfully authorized agent." General Obligations Law §5-703.

On August 18, 1988 Pelkey initialed a change to her contract purporting to transfer her purchase to a new location. It is reasonable to conclude from the respondents' failure to produce a copy of that contract bearing an indication of the acceptance of the change by Cornell Development that no such copy exists, and that Pelkey was allowed to be misled into believing that she had a binding agreement for the purchase of 7500 Antoinette Court. The only other written memorandum of the change produced by the respondents were copies of the letter dated August 16, 1988 from Socha to Pelkey purporting to confirm the change (Resp. Ex. D and M). Socha, however, is not the signatory on the contract, which was originally signed by Peter Cornell, and there is nothing in the record which would indicate that she was authorized to bind Cornell Development by agreeing to contract amendments.

VI- Peter Cornell was told about Pinckney's conduct in the Pelkey transaction in his conversations with the Division of Licensing Service's investigator, but has continued to retain the deposit paid by Pelkey. He was placed on notice about Socha's improper actions with regards to the Fisch contract by that contract itself, and of

Pinckney's and Socha's misleading promises regarding the refundability of the Fischs' deposit by the Fischs' request for a refund, yet he failed to refund that deposit until the Fischs' attorney intervened. Therefore, both he and Cornell Realty may be held responsible for that conduct. Roberts Real Estate v Department of State, 80 NY2d 116, 589 NYS2d 392 (1992); RPL §442-c.

VII- Where a broker or salesperson has received money to which he, she or it is not entitled, the broker may be required to return that money, with interest, as a condition of retention of the broker's 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), and so a refund certainly may be required when that money is being held by a corporation controlled by a respondent (Peter Cornell) who is representative broker of one of the other respondents (Cornell Realty). That is particularly so where, as herein, the two corporations, Cornell Realty and Cornell Development, operated with a unity of interest and in a manner which leads to the conclusion that, at least for the purposes of Country Village, they were not truly separate entities. See, Matter of Sbarro Holding, Inc., 91 AD2d 613, 456 NYS2d 416 (1982); A.W. Firu Co., Inc. v Ataka & Co., Ltd., 71 AD2d 370, 422 NYS2d 419 (1979); Astrocom Electronics v Lafayette Radio Electronics Corporation, 63 AD2d 765, 404 NYS2d 742 (1978). As counsel to the complainant points out in his post-hearing brief, this disregard for the separateness of the corporations is highlighted by the fact that the release pursuant to which the Fischs received the refund of their deposit was executed by Peter Cornell not on behalf of Cornell Development, the purported seller, but on behalf of Cornell Realty (Comp. Ex. 17).

Peter Cornell claims that the deposit paid by Pelkey has been earned because of costs in excess of $40,000.00 incurred by Cornell Development in carrying the houses for which she contracted. That claim is faulty. In the case of the first house, the contract called for a closing on October 31, 1988. Prior to that date Cornell Development entered into a contract to sell the same house to the Fischs, with a closing date of November 25, 1988. Since Pelkey cannot be held responsible for the Fischs' failure to close, she could at most be held responsible for less than a one month delay in the closing. However, there is no evidence that she was ever asked to close, and it is evident from the Fisch contract that Cornell Development did not expect her to close on that house. As for the second house, it appears that Cornell Development never entered into a binding contract with Pelkey. It would be extremely inequitable to permit the retention of Pelkey's money in a situation in which Cornell Development was not legally bound to perform. In any case, no substantial evidence has been produced to establish the actual amount of the claimed expenses and, therefore, to support what is an affirmative defense.

CONCLUSIONS OF LAW

1) By failing to make clear to Pelkey and to the Fischs for which party she was acting, Pinckney, and, by reason of their knowledge of her actions and retention of the benefits derived therefrom, Peter Cornell and Cornell Realty, violated 19 NYCRR 175.7 and demonstrated untrustworthiness and incompetency as a real estate salesperson and as real estate brokers.

2) By inserting into the Fisch contract a clause requiring a lawyer's scrutiny and expertise when that contract was not subject to the approval of the attorneys for the parties, Socha, and, by reason of their knowledge of her actions and retention of the benefits derived therefrom, Peter Cornell and Cornell Realty, engaged in the unauthorized practice of law and demonstrated untrustworthiness and incompetency as real estate brokers.

3) By misleading Pelkey and the Fischs as to the refundability of their deposits, Pinckney, and, by reason of their knowledge of her actions and retention of the benefits derived therefrom, Peter Cornell and Cornell Realty, engaged in fraudulent practices and demonstrated untrustworthiness and incompetency as a real estate salesperson and as real estate brokers.

4) By misleading the Fischs as to the refundability of their deposit, Socha, and, by reason of their knowledge of her actions and retention of the benefits derived therefrom, Peter Cornell and Cornell Realty, engaged in a fraudulent practice and demonstrated untrustworthiness and incompetency as real estate brokers.

5) By acting as double agents in the Pelkey and Fisch transactions without the required disclosure, and, therefore, without the fully informed consent of their principals, Pinckney, and, by reason of their knowledge of her actions and retention of the benefits derived therefrom, Peter Cornell and Cornell Realty, demonstrated untrustworthiness and incompetency as a real estate salesperson and as real estate brokers.

6) By insisting on holding Pelkey liable on a change to her contract of purchase which was never executed on behalf of Cornell Development, and which, therefore, never became effective, Peter Cornell demonstrated incompetency with regards to the law of contracts, and demonstrated untrustworthiness.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Mary Pinckney has engaged in fraudulent practices and has demonstrated untrustworthiness and incompetency, and accordingly, pursuant to Real Property Law §441-c, her license as a real estate salesperson is revoked, effective immediately, and

IT IS FURTHER DETERMINED THAT Sara Landon Socha has engaged in a fraudulent practice and has demonstrated untrustworthiness and incompe-

tency, and accordingly, pursuant to Real Property Law §441-c, her license as a real estate broker is, if it has been renewed, suspended for a period of one year, commencing on March 1, 1993 and terminating on February 28, 1994, or, if it has not been renewed, it shall upon its renewal be suspended for a period of one year, and

IT IS FURTHER DETERMINED THAT Peter Cornell and Cornell Associates Realty Ltd. have engaged in fraudulent practices and have demonstrated untrustworthiness and incompetency, and accordingly, pursuant to Real Property Law §441-c, their licenses as real estate brokers are revoked, effective immediately. Should they ever reapply for licensure, such applications shall not be considered until they have presented proof acceptable to the Department of State that they have refunded the sum of $15,502.60, together with interest at the legal rate for judgements (currently nine percent) from July 1, 1989 to Domenica Pelkey.

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 N. Baldwin
Executive Deputy Secretary of State