

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-

**TOULA CUCCI, REPRESENTING DAWNS
HORIZON REALTY INC.,**

Respondent,

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This matter came on for hearing before the undersigned, Roger Schneier, on April 18, 1995 at the office of the Department of State located at 270 Broadway, New York, New York.

The respondent, of 225 Main Street, Northport, New York 11768, was represented by James Jay Byrne, Esq., 36 North New York Avenue, Huntington, New York 11743.

The complainant was represented by Compliance Officer William Schmitz.

COMPLAINTS

The complaints allege that the respondent changed her principal business address without giving notice in writing in the prescribed manner and form; employed a salesperson to represent her firm without first having applied for and obtained an appropriate license for the salesperson; received a commission fee by check payable to herself as an individual while doing business only representing a corporation; failed to provide a disclosure form to tenants, and failed to obtain their signature to such a form; failed to make inquiry of the proper source to determine the legal use of premises which she was renting; and did business with a sign in her window giving an unlicensed trade name, and thereby demonstrated untrustworthiness and incompetency.

FINDINGS OF FACT

1) Notice of hearing together copies of the complaints were served on the respondent by certified mail (State's Ex. 1).

2) The respondent is, and at all times hereinafter mentioned was, duly licensed as a real estate broker representing Dawns Horizon Realty Inc. (hereinafter "Dawns Horizon") (State's Ex. 2).

3) In late August or early September, 1992 the respondent relocated the office of Dawns Horizon from 694 Fort Salonga Road, Northport, New York, the address then appearing on her and its license, to its current location at 225 Main Street, Northport. She did not notify the Department of State of that move until sometime later.

4) For approximately two and one half months in early 1993 the respondent was in Florida caring for a sick aunt, and Dawns Horizon did not conduct any brokerage business. However, during that time Olesia Lico, a friend of the respondent who was then licensed as a real estate salesperson in association with another broker, and who is now licensed as a salesperson in association with both that broker and Dawns Horizon (State's Ex. 3), attended the Dawns Horizon office and answered the telephone. She was not paid for her services.

5) On or about June 5, 1992 the respondent accepted from Elizabeth R. Regina, and deposited, a check for \$800.00, payable to the respondent personally, in payment of the commission for the rental of an apartment by Ms. Regina and Andrew Iucci (State's Ex. 4 and 5). The check had been written by Ms. Regina in advance of the meeting at which she delivered it to the respondent.

6) The respondent, who personally acted as agent for the seller in the rental to Ms. Regina and Mr. Iucci, never gave them an agency disclosure form and, therefore, never obtained their signatures to such a form. She did provide such a form to, and obtain the signature of her principal, the landlord (State's Ex. 6).

7) The above noted rental was of an "accessory apartment" which had been recently added to a one family house by the landlord, who had told the respondent that he planned to apply for a permit for the apartment (Resp. Ex. A). At the time of the rental, however, the permit had not been issued.

OPINION

I- As the party which initiated the hearing, the burden is on the complainant to prove, by substantial evidence, the truth of the charges. State Administrative Procedure Act (SAPA), §306[1]. Substantial evidence is that which a reasonable mind could accept as supporting a conclusion or ultimate fact. Gray v Adduci, 73 N.Y.2d 741, 536 N.Y.S.2d 40 (1988). "The question...is whether a conclusion or ultimate fact may be extracted reasonably--probatively and logically." City of Utica Board of Water Supply v New

York State Health Department, 96 A.D.2d 710, 465 N.Y.S.2d 365, 366 (1983)(citations omitted).

II- A license as a real estate broker is issued in response to an application on which the applicant is required to state the address at which the business is to be conducted. Real Property Law (RPL) §441[1][b]. Absent the filing of a change of address notification pursuant to RPL §441-a[5], the operation of a real estate brokerage business at an address other than that which was stated on the application is a violation of RPL §441[1][b]. Division of Licensing Services v Romano, 50 DOS 95; Division of Licensing Services v Pilato, 94 DOS 94.

The respondent relocated her office from 694 Fort Salonga Road, Northport, to 225 Main Street, Northport, without filing a change of address notification. In doing that she violated RPL §441-a[5].

III- Pursuant to RPL §442-b, when a real estate salesperson enters into association with a real estate broker the broker must file a change of association notification with the Department of State, with the result that the salesperson becomes licensed in association with the broker. Division of Licensing Services v Lawson, 42 DOS 93. The respondent did not file such a notification for Ms. Lico prior to the time that the respondent went to Florida and left Ms. Lico to answer her telephone. However, inasmuch as the mere receiving of telephone calls in a brokerage office does not require licensure, Division of Licensing Services v Reiback, 72 DOS 93, there was no need for the respondent to file a change of association notification at that time.

IV- A real estate broker may conduct brokerage business only under the name appearing on her license. RPL §441[1][a]; Division of Licensing Services v Morse, 12 DOS 95. The receipt and deposit by a broker of commission checks bearing an unlicensed name is a violation of the statute. Division of Licensing Services v Wolf, 10 DOS 89.

The respondent accepted and deposited a commission check made payable to her personally, although she was only licensed as representative of Dawns Horizon. I have considered in mitigation her testimony that the check had been drawn that way by Ms. Regina on her own initiative, although the proper procedure would have been for the respondent to direct Ms. Regina to issue a new check.¹

¹ This was not a matter of the respondent needing to receive the check before Ms. Regina took possession of the apartment, as Ms. Regina had moved into the apartment five days earlier (Resp. Ex. A).

V- Pursuant to RPL §443 a real estate broker must give an agency disclosure form to a prospective tenant at the time of the first substantive contact with that tenant, and either must obtain a signed acknowledgement of receipt from the tenant or, if the tenant refuses to sign, must prepare and keep in her files a written declaration of the facts of the refusal. The respondent failed to give a disclosure form to Ms. Regina and Mr. Iucci, and, it follows, failed to either obtain the signed acknowledgement or prepare the written declaration.

The respondent's testimony that she was unaware of the requirement as it relates to tenants does not excuse her nonfeasance. This is not a case where she was confused by the language of the mandated disclosure form, which at the time referred only to buyers and sellers², Division of Licensing Services v Demasi, 96 DOS 94, as demonstrated by the fact that the respondent gave a disclosure form to the landlord and obtained his signature. Rather, I find, the respondent acted negligently and, therefore, incompetently. Trivelas v Paterson, 91 AD2d 1000, 457 NYS2d 864 (1983).

That real estate brokers and salespersons make complete disclosure of their agency status to the parties in real property transactions is of prime concern. Such disclosure is essential to the preservation of the integrity of the fiduciary relationship existing between a real estate licensee and her principals. Wendt v Fischer, 243 NY 439 (1926). It is fundamental to the fair conduct of the transactions, and to the protection of the public, that the parties know whom the licensee is representing. Otherwise, they will be unprepared to assure that their interests are properly protected. Accordingly, a violation of the disclosure requirements warrants the imposition of a severe penalty.

VI- Conduct by a licensed real estate broker which has the effect of violating or which encourages violation of local zoning and occupancy regulations has, on several occasions, been held to be a demonstration of untrustworthiness and incompetency. Department of State v Delza B. Smith, 150 DOS 80, conf'd. sub nom Smith v Paterson, 88 A.D.2d 917, 450 N.Y.S.2d 577 (1982); Division of Licensing Services v Jacob, 121 DOS 93; Division of Licensing Services v Rabizadeh, 27 DOS 92; Division of Licensing Services v J.R. Valino Your Realty Co., Inc., 19 DOS 90; Division of Licensing Services v Frank Dell'Accio, Jr., 15 DOS 88. However, in order to support a charge of such misconduct the complainant must establish that the broker knew or should have known of the illegality of the occupancy Division of Licensing Services v Zuckerman, 151 DOS 92, or at least acted without making necessary inquiries in a situation

² The statute has always included lessees and lessors in the definitions of sellers and buyers. RPL §443[1][b] and [g].

in which he or she should have suspected that the occupancy might be unlawful. Division of Licensing Services v Parenti, 94 DOS 93.

The respondent knew that the landlord in the rental to Ms. Regina and Mr. Iucci which she negotiated intended to apply for an occupancy permit for the apartment. She was aware, therefore, that such a permit was required. In spite of that knowledge she incompetently arranged an occupancy commencing prior to the issuance of the permit.

VII- Where a broker has received money to which she is not entitled, she may be required to return it, together with interest, as a condition of retention of her license. Donati v Shaffer, 83 NY2d 828, 611 NYS2d 495 (1994); 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). The respondent improperly received an \$800.00 commission in her individual name after having failed to comply with the statutory disclosure requirements and as the result of a rental in which she assisted in the violation of local occupancy regulations. It would be improper to allow her to benefit from her misconduct through the retention of that commission.

VIII- In setting the penalty to be imposed for the respondent's violation, I have considered the fact that prior to the scheduling of the hearing she was offered the opportunity to resolve the matter through the payment of a fine (State's Ex. 1). Where such an offer of settlement has not been accepted and the respondent has subsequently been found guilty, it is proper to impose a more severe penalty. Vito v Jorling, 197 AD2d 822, 603 NYS2d 64 (1993).

CONCLUSIONS OF LAW

1) By failing to file a change of address notification with the Department of State immediately upon relocating her brokerage office the respondent violated RPL §441-a[5] and demonstrated incompetency as a real estate broker.

2) The respondent did not violate RPL §442-b by failing to file a change of association form for Ms. Lico prior to Ms. Lico's commencing to take telephone messages for her.

3) By accepting and cashing a commission check payable to her in her unlicensed individual name the respondent violated RPL §441[1][a] and demonstrated incompetency as a real estate broker.

4) By failing to give Ms. Regina and Mr. Iucci an agency disclosure form the respondent violated RPL §443 and demonstrated incompetency as a real estate broker. Her failure to obtain their acknowledgement of receipt was not a violation, as such an

acknowledgement is only required where the disclosure form has been delivered.

5) By arranging the rental of an apartment for which she knew that a certificate of occupancy had not yet been obtained the respondent demonstrated incompetency as a real estate broker.

6) The respondent should be required to refund to Ms. Regina the \$800.00 commission which was received by her in a transaction in which she violated several statutes and acted incompetently.

7) The complainant presented no evidence regarding, and therefore has failed to prove by substantial evidence, the charge that the respondent did business with a sign in her window giving an unlicensed trade name. That charge should, therefore, be dismissed.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Toula Cucci has violated Real Property Law §§441-a[5], 442-b, and 443, and has demonstrated incompetency as a real estate broker, and accordingly, pursuant to Real Property Law §441-c, her license as a real estate broker is suspended for a period of two months commencing on July 1, 1995 and terminating on August 31, 1995, both dates inclusive. Upon termination of the suspension the respondent's license shall be further suspended until such time as she shall produce proof satisfactory to the Department of State that she has refunded \$800.00, together with interest at the legal rate for judgements from July 1, 1995, to Elizabeth R. Regina.

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:

ALEXANDER F. TREADWELL
Secretary of State
By:

Michael E. Stafford, Esq.
Chief Counsel