

STATE OF NEW YORK  
DEPARTMENT OF STATE

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In the Matter of the Complaints of

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

Complainant,

**DECISION**

-against-

**DANIEL DAVID, REAL ESTATE SALESPERSON,  
and EMERITO BENITEZ, JERRY SYMS, and  
DANUTA BRODZINSKA, REPRESENTATIVE REAL  
ESTATE BROKERS OF ZLOTO REALTY INC. d/b/a  
CENTURY 21 AMERICAN REALTY**

Respondents.

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The above noted matter came on for a consolidated hearing before the undersigned, Roger Schneier, on March 22, 1996 at the office of the Department of State located at 270 Broadway, New York, New York, New York.

Daniel David, of Century 21 Best Inc., 76-26 Broadway, Elmhurst, New York 11372, and Emerito Benitez, Jerry Syms, and Danuta Brodzinska, of Zloto Realty Inc. d/b/a Century 21 American Realty (hereinafter "Zloto"), 705 Seneca Avenue, Ridgewood, New York 11385, having been advised of their right to be represented by an attorney, appeared *pro se*.

The complainant was represented by Supervising License Investigator Bernard Friend.

**COMPLAINT**

The complaints allege that David, acting in his capacity as a real estate salesperson associated with Zloto, solicited a listing of a residential home for sale from a homeowner whose name and address appears on the cease and desist list for Queens County, in violation of 19 NYCRR 175.17; that the other respondents, all representative brokers of Zloto, are also guilty of violating the cease and desist ruled and failed to properly supervise David, in violation of 19 NYCRR 175.21[a]; and that by reason therefore the respondents have demonstrated untrustworthiness and incompetency.

**FINDINGS OF FACT**

1) Notices of hearing together with copies of the complaint were served on the respondents by certified mail (State's Ex. 1, 2, and 3).

2) Daniel David is duly licensed as a real estate salesperson in association with Century 21 Best Inc., 76-26 Broadway, Elmhurst, New York 11373 (State's Ex. 7). At all times hereinafter mentioned he was licensed as a real estate salesperson in association with Zloto.

3) Emerito Benitez, Jr., Jerry Syms, and Danuta Brodzinska are, and at all times hereinafter mentioned were, duly licensed as real estate broker representing Zloto (State's Ex. 4, 5, and 6).

4) On June 27, 1995 Vito F. Maranzano received in the mail at his two family house located at 71-52 67th Place, Glendale, Queens, New York, a flyer containing the following text (State's Ex. 8):

**"Century 21 AMERICANA REALTY  
&  
Daniel David  
HAVE DONE IT AGAIN!!!  
Just Sold  
YOUR NEIGHBOR'S HOUSE AT:  
58-04 78th Ave  
Glendale  
WE CAN HELP YOU *SELL* YOURS TOO!!!  
Call Daniel Now!!!  
At CENTURY 21 AMERICANA  
'The Realtor with Proven Results'  
718-417-1155  
705 SENECA AVE, RIDGEWOOD 11385"**

5) Maranzano's name and address were at the time listed on a Cease and Desist list dated May 10, 1995 (State's Ex. 9), a copy of which was in the possession of David, and had been listed on previously issued lists for a number of years.

6) Prior to the event in question all of the salespersons associated with Zloto, including David, had been instructed that they were required to avoid soliciting persons whose names and addresses appeared on the cease and desist list. That requirement was restated at periodic staff meetings.

**OPINION**

I- Pursuant to Real Property Law (RPL) §442-h[3]: the Secretary of State may establish cease and desist zones; the owners of residential property within those zones may request that their

names and addresses be included on a cease and desist list; and once such a list has been complied, real estate brokers and salesperson may not solicit agency agreements for the sale of the listed properties. 19 NYCRR 175.17[b]1 prohibits the solicitation by real estate brokers and salespersons of listings for sale after they have received a copy of the cease and desist list, and 19 NYCRR 175.17[d][1] provides that

"solicitation shall mean an attempt to...obtain a listing of property for sale....Solicitation shall include but not be limited to use of the telephone, mails, delivery services, personal contact or otherwise causing any solicitation, oral or written, direct or by agent: (i) to be delivered or presented to the owner or anyone else at the owner's home address...."

The flyer which David sent to Maranzano was clearly a proscribed solicitation, a fact not disputed by any of the respondents.

David claims that he would not have sent the flyer if Maranzano had not been added to his prospect list sometime previously when, while making "cold calls", he had telephoned the Maranzano home and had spoken with a woman who told him that although she was not then interested in selling the house she might be in the future. That explanation, even if believed, does not excuse his conduct, as at the time of the alleged cold call Maranzano was already included on a cease and desist list.

There is no evidence that would lead to the conclusion that David acted wilfully. Rather, it appears that his conduct was the result of a failure to properly consult the cease and desist list, which is an act of incompetence. *Division of Licensing Services v Mauro*, 128 DOS 92.

II- A real estate broker is obligated to supervise the real estate brokerage activities of the salespersons association with him or her. RPL §441(1)(d). That supervision must consist of

"regular, frequent and consistent personal guidance, instruction, oversight and superintendence by the real estate broker with respect to the general real estate brokerage business conducted by the broker, and all matters relating thereto." 19 NYCRR 175.21[a].

That duty has been affirmed judicially, *Division of Licensing Services v Giuttari*, 37A DOS 87, conf'd. 535 NYS2d 284 (AD 1st Dept. 1988); *Friedman v Paterson*, 453 NYS2d 819 (1982), aff'd. 58

NY2d 727, 458 NYS2d 546, and has been restated in numerous determinations of the Department of State. *Division of Licensing Services v Misk*, 64 DOS 92; *Division of Licensing Services v Gelinis*, 38 DOS 92; *Division of Licensing Services v Levenson*, 52 DOS 91; *Division of Licensing Services v Capetanakis*, 42 DOS 90; *Division of Licensing Services v Shulkin*, 4 DOS 90. Where, however, the broker has not failed to properly instruct the salesperson, and has no reason to be aware that the salesperson is engaging in any improper conduct, it cannot be said that the broker failed to meet his or her supervisory obligations.

The respondent brokers distributed the cease and desist list to their salespersons, including David, and, on several occasions, instructed them on its required use. There is nothing in the record which would establish that they were aware of David's failure to use the list properly. A broker is not obliged to look at every envelope which his or her salesperson mails or to listen to every telephone conversation which the salesperson has. Thus, in this case, the respondent brokers acted reasonably, and fulfilled their supervisory obligations.

III- In setting the penalty to be imposed for David's violation, I have considered the fact that prior to the scheduling of the hearing he was offered the opportunity to resolve the matter through the payment of a fine of \$300.00 (State's Ex. 1). Where such an offer of settlement has been refused and the respondent has subsequently been found guilty, it may be proper to impose a fine higher than that which was asked for in the settlement offer. *Vito v Jorling*, 197 AD2d 822, 603 NYS2d 64 (1993) (finding that it was proper to impose a fine of \$22,825.00 after an offer to settle for a \$500.00 penalty was rejected). However, where the respondent appears honestly to believe that he did nothing wrong, he should not be penalized for exercising his right to a hearing, and the fine should not be increased.

#### **CONCLUSIONS OF LAW**

1) By soliciting a listing for sale from the owner of a house which was listed on a currently effective cease and desist list, David violated 19 NYCRR 175.17[c][1], and thereby demonstrated incompetency as a real estate salesperson.

2) The complainant has failed to establish by substantial evidence that Benitez, Syms, and Brodzinska failed to properly supervise David or are otherwise responsible for his violation, and, therefore, the complaints against them must be dismissed. State Administrative Procedure Act §306[1].

**DETERMINATION**

**WHEREFORE, IT IS HEREBY DETERMINED THAT** Daniel David has demonstrated incompetency, and accordingly, pursuant to Real Property Law §441-c, he shall pay a fine of \$300.00 to the Department of State on or before May 31, 1996, and should he fail to pay the fine by that date his license as a real estate salesperson shall be suspended for a period of one month, commencing on June 1, 1996 and terminating on June 30, 1996. He is directed to send the fine, or in the alternative his license certificates, to Thomas F. McGrath, Revenue Unit, Department of State, Division of Licensing Services, 84 Holland Avenue, Albany, New York 12208.

**IT IS FURTHER DETERMINED THAT** the charges herein against Emerito Benitez, Jerry Syms, and Danuta Brodzinska are dismissed.

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