

17 DOS 90 AMENDED  
(50 DOS 94)

STATE OF NEW YORK  
DEPARTMENT OF STATE

-----X

In the Matter of the Complaint of

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

Complainant,

ORDER

-against-

**GIANFRANCO DONATI, DANIEL ODATO and  
PALMA CARULLO,**

Respondents.

-----X

Pursuant to the designation duly made by the Hon. Gail S. Shaffer, Secretary of State, the above matter came on for hearing before the undersigned, Roger Schneier, on September 14, October 2, and November 27, 1989 and January 22, 1990 at the office of the Department of State located at 270 Broadway, New York, New York.

Gianfranco Donati was represented by Peter M. Redmond, Esq., 213-05 39th Avenue, Bayside, New York 11361.

Palma Carullo was represented by Frank DuVal, Esq., 263 Forest Road, Douglaston, New York 11363.

Daniel Odato was represented by Lensey H. Jones, Esq. of 2090 Adam Clayton Powell, Jr. Boulevard, New York, New York 10027 on October 2, 1989, appeared pro se on November 27, 1989, and was not present or represented at the other sessions.

The complainant was represented by David Horowitz, Esq.

**THE ADMINISTRATIVE DECISION**

A decision issued on May 22, 1990 held as follows:

"1) By referring the Collinses to the attorney whom he knew was being used by the Ferraras and by not telling the Joneses of the dual representation, Odato violated his fiduciary duty to the Joneses, demonstrated untrustworthiness and incompetency, and forfeited any right that he had to a commission paid by them.

2) By failing to advise the Collinses of the fact that the attorney to whom Odati had referred them was also representing the Ferraras, Donati violated his fiduciary duty to the Joneses, demonstrated untrustworthiness and incompetency, and forfeited any right that he had to a commission paid by them, which commission arose out of the wrongful conduct in which Odati engaged while acting as Donati's agent.

3) This tribunal lacks jurisdiction to consider the commission dispute between O'Reilly, Stravello, and Donati.

4) By purchasing an interest in the Barker house without first making disclosure to the Barkers of his participation as a purchaser, Donati violated 19 NYCRR 175.4 and his fiduciary duty to the Barkers, and demonstrated untrustworthiness, and he should be required to divest himself of any benefits arising out of the transaction.

5) Donati did not fail to disclose to the Joneses that he was participating as a purchaser of their house, and, therefore, did not violate 19 NYCRR 175.4 in that transaction.

6) By permitting Carullo to act as a real estate salesperson when not so licensed, and by paying her therefore (sic), Donati violated RPL section 440-a and demonstrated untrustworthiness and incompetency, and forfeited any right to the commission which was paid in the transaction.

7) By acting as a real estate salesperson when not so licensed, Carullo demonstrated untrustworthiness and incompetency. In imposing a penalty on her I have considered the recommendation of the complainant, which had consented to the entry of the plea of no contest with an agreed fine prior to the opening of the hearing, which agreement is deemed to be a pre-hearing settlement over which the Administrative Law Judge has not control, and which agreement made no allowance for the return of the commission received by Carullo."

As a result, Donati's license as a real estate broker was ordered suspended for a period of three months and then indefinitely until the presentation of proof that he had refunded the subject commissions, together with interest.

**THE APPEAL AND REMAND**

On June 11, 1990, by service of a petition and order to show cause, Donati commenced a proceeding to review the decision pursuant to CPLR Article 78, and the enforcement of the penalties of license suspension and restitution with interest imposed in the decision was stayed. The Appellate Division, Second Department subsequently granted the petition only to the extent of annulling the findings that Donati violated RPL §440-a by permitting Carullo to act as a real estate salesperson when not so licensed, and by paying her therefor<sup>1</sup>, and that he be required to pay interest on the refunds. The Court also found that the administrative finding that Donati must return to the Barkers the sum of \$15,000 was in error, inasmuch as his share of that commission was only \$11,250, and it remanded the matter for the imposition of a new penalty. Donati v Shaffer, 187 AD2d 426, 589 NYS2d 552 (1992).

The Department of State sought review by the Court of Appeals only on the question of payment of interest, which review resulted in a decision holding that the Secretary of State may require the payment of interest on restitution and reinstating that part of the administrative decision that ordered Donati to pay such interest. NYLJ 3/28/94, p. 25, col. 4.

**THE LICENSE SURRENDER**

By letter dated August 3, 1993 the respondent tendered the resignation of his license as a real estate broker. I take official notice of the records of the Department of State that the surrender was accepted by the complainant, and the records of the Department of State were marked to indicate that the license was cancelled, on August 6, 1993.

**THE ADMINISTRATIVE ACTION**

By order dated March 25, 1994 counsel to Donati was directed to file with the tribunal and serve on counsel to the complainant, by no later than April 29, 1994, written argument with regards to the question of penalty. Such argument was submitted by letter dated August 28, 1994, and the complainant has replied by way of a letter dated May 6, 1994 signed by Associate Litigation Counsel A. Marc Pellegrino, Esq.<sup>2</sup>

---

<sup>1</sup> The Court confirmed the finding that Donati demonstrated untrustworthiness and incompetency by his conduct with regards to Carullo .

<sup>2</sup> David Horowitz, who represented the complainant at the hearing, has retired.

**DISCUSSION**

While the Appellate Division found that by permitting Carullo to act as a real estate salesperson, and by paying her therefor, Donati did not violate RPL § 440-a, it confirmed that his conduct was a demonstration of untrustworthiness and incompetency. That finding in no way lessens the seriousness of Donati's improper conduct. The mere fact that he did not violate a particular section of the licensing law does not mean that his conduct was any less wrong. Nowhere in RPL Article 12-A is there any language which would indicate that it is not the essential nature of a violation which is important or that the penalty for untrustworthy and incompetent conduct should be any less than that for specific statutory violations. I find, therefore, that the Court's technical modification of the administrative decision does not require a reduction in the three month license suspension originally imposed. On the other hand, Counsel to the complainant has offered no argument which supports his request for the imposition of a six month suspension.

Counsel to Donati argues that, in light of the August, 1993 surrender of his client's license, in the interests of justice no fixed period of suspension should be imposed. If the records of the Department of State did not indicate that the surrender had been accepted and Donati's license cancelled that argument would be misplaced, inasmuch as there is no statutory right to surrender a license as a real estate broker under these circumstances. Cf. Senise v Corcoran, 146 Misc.2d 598, 552 NYS2d 483 (Supreme Ct. NY County, 1989); Division of Licensing Services v DeLessio, 11 DOS 94. However, since the surrender was accepted and the license was cancelled Donati has been without a license for well over the three month period of suspension previously imposed and then stayed. Accordingly, no additional fixed period of suspension should be imposed.

In accordance with the decision of the Appellate Division, a modification is required with regards to the amount of restitution which Donati was directed to make to Eugene and Lois Barker. The Court found that the correct amount is \$11,250.00, and the decision must be amended to conform to that finding. Counsel to Donati's argument that restitution should not be made to the Barkers because the commission was the obligation of Nicholas Martinelli (sic) is not convincing. While according to the contract of sale Nicholas Marinelli, the disclosed purchaser and Donati's partner in the transaction, was to pay the commission, there is every reason to believe that had the Barkers been responsible for payment they would have increased their selling price by an equivalent amount. Thus, regardless of the technical provisions made for payment, the Barkers were out of pocket the amount of money credited to Donati as commission. In any case, in its decision the Appellate Division spoke only of a reduction of the restitution to be made to the Barkers, and not of possible payment to a third party. Therefore, if counsel raised this argument in his Article 78 proceeding it has been rejected, and if he did not it is not proper for him to do so at this late stage.

**WHEREFORE**, the determination of this tribunal dated May 22, 1990, only insofar as it relates to Donati, is amended as follows:

Gianfranco Donati has demonstrated untrustworthiness and incompetency as a real estate broker, and accordingly, pursuant to Real Property Law §441-c, his license as a real estate broker is deemed to have been suspended for a period of three months, commencing with its surrender on August 6, 1993 and terminating on November 5, 1993, and his license is further suspended, and no new license shall be issued to him, until such time as he shall produce satisfactory proof that he has: refunded to Mr. and Mrs. Peter Collins the sum of \$4,006.67 (the amount of the commission paid by them and retained by him), together with interest at the rate for judgements (currently 9%) from December 23, 1986 (the date of the closing); paid to Eugene and Lois Barker the sum of \$11,250.00 (his portion of the commission paid on the sale of their house), together with interest at the legal rate for judgements from April 16, 1987 (the date of the closing); and paid to Margaret Postiglione the sum of \$3,512.50 (the amount of the commission paid by her and retained by him), together with interest at the legal rate for judgements from June 27, 1986 (the date of the closing).

**SO ORDERED,**

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