

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-

**ELLEN FELD, INDIVIDUALLY AND AS
REPRESENTATIVE BROKER OF HAMPTON MANOR
REALTY LTD.**

Respondent.

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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 December 14, 1993 at the office of the Department of State located at 270 Broadway, New York, New York.

The respondent, of One Fifth Avenue, Pelham, New York 10803, having been advised of her right to be represented by an attorney, appeared pro se.

The complainant was represented by Timothy J. Mahar, Esq.

COMPLAINT

The complaint in the matter alleges that the respondent entered into an agreement to split a real estate brokerage commission with an unlicensed entity in violation of Real Property Law (RPL) §442; permitted and authorized an unlicensed entity to engage in real estate activity in violation of RPL §440-a; engaged in real estate activities under an unlicensed name in violation of RPL §441; and failed to supervise the activities of a real estate salesperson associated with her agency, thereby demonstrating untrustworthiness and/or incompetency.

FINDINGS OF FACT

1) Notice of hearing together with a copy of the complaint was served on the respondent by certified mail (Comp. Ex. 1).

2) The respondent is, and at all times hereinafter mentioned was, duly licensed as a real estate broker representing Hampton Manor Realty Ltd. (Hampton) at One Fifth Avenue, Pelham, New York 10803, and representing Hudson Manor Realty Ltd. at 699 West 239th Street, Bronx, New York 10463 (Comp. Ex. 2).

3) In July, 1990 the respondent and Thomas F. Diskin, a real estate salesperson licensed in association with Hampton, incorporated The Real Estate Auction Center Inc. (Auction Center). The purpose of Auction Center, of which Diskin was president and the respondent was vice-president, was to market real property through the instrumentality of auctions in association with Hampton. Auction Center, which was never licensed as a real estate broker (Comp. Ex. 3), shared office space with the respondent and conducted business until the end of 1991. The corporation was dissolved on May 18, 1992. While it operated, Auction Center paid its own operating expenses, and paid one-half of the office rent for six months.

Prior to forming the corporation the respondent and Diskin took various steps to ascertain the legality of their plan: they twice spoke with a person in the office of the New York State Attorney General to whom they outlined their plan to sell cooperatives and condominiums, and were told that Hampton's license as a broker was all that they needed; they spoke twice with a representative of the complainant in its Albany office and asked if Auction Center needed a license, and were told that it did not¹; they spoke with the attorney for the Westchester County Board of Realtors (a private trade association), who told them that their plan sounded legal to him; they checked with the governments of the Westchester County and the Town of Pelham, and were told that they did not need an auctioneer's license; and they attended an auctioneers' association convention where they learned that it was the regular practice of auctioneers to sell real property by auction while relying on the licenses of cooperating brokers, a practice which was confirmed by various advertisements placed by auctioneers in the New York Times (Resp. Ex. B).

In operation, Auction Center, working in cooperation with Hampton, would obtain listings of homes for sale. It would then advertise the homes, mostly on cable television but also in newspapers, and would prepare and distribute brochures about the homes. All of the advertising was paid for by the home owners.

Persons telephoning the Auction Center in response to the advertisements would be shown the homes by either the respondent or

¹ The respondent has no records of the names of the persons with whom she spoke in the Attorney General's or complainant's offices.

Diskin. It was hoped that as a result of the showing potential buyers would register to bid on the properties, for which they would pay a \$35.00 fee, and would then either submit sealed bids or would participate in an open, on site auction. In fact, no one ever registered to bid, and there never were any auctions of the five properties for which listings were obtained. As a result, Auction Center lost money and never realized a profit. Had there been any sales, the sellers would have been obligated to pay Hampton a commission of 4% of the sales price, and Hampton would have paid 25% of that commission to Auction Center.

4) On July 11, 1991 Elise and Carl Kaltenbach entered into a contract with Auction Center pursuant to which it, in association with Hampton, would have an exclusive right to sell their Bronxville home at auction (Comp. Ex. 5). The Kaltenbachs paid Auction Center a total of \$2,000.00 (Comp. Ex. 6), which was used to defray the costs of marketing their property, which included the cable television advertising and advertisements in the New York Times (Comp. Ex. 7 and 8), and the preparation and distribution of a color brochure. In addition, Auction Center advertised the house for three weeks in the Westchester Gannett newspapers at its own expense. In spite of the fact that three open houses were held and there were two additional showings by appointment (Comp. Ex. 9), no one ever registered to bid on the property, and no auction was ever conducted.

On November 18, 1991 the Kaltenbach's brought suit against Auction Center in the Small Claims Court of the Town of Pelham, alleging breach of contract, misrepresentation, and operation without a license. By decision dated February 6, 1992 Town Justice Anthony Pasquantonio found for Auction Center and dismissed the complaint (Resp. Ex. A).

OPINION

I- RPL §442 provides that it is unlawful for a real estate broker to pay any part of a fee, commission or other compensation received by the broker to any person for any service, help or aid in selling real property unless that person is a duly licensed real estate salesperson regularly associated with the broker or is a duly licensed real estate broker. Division of Licensing Services v Eksteen, 49 DOS 88. The respondent contends that this provision does not relate to payments such as those anticipated by her agreement with Auction Center, since Auction Center was merely providing marketing services. While such a distinction clearly applies in some instances, such as in payments to an advertising agency for designing and placing advertisements, it does not apply where the unlicensed person, or in this case corporation, instigates and enters into an agency agreement with the owner of real property for the sale of that property, handles inquiries from potential purchasers about the property, arranges to show the

property to those potential purchasers, and is expected to conduct the actual sale.

II- RPL §440-a provides that no person, co-partnership or corporation may engage in the business of real estate broker without being so licensed. A "real estate broker" is a person, firm or corporation which, for another and for valuable consideration, among other things lists for sale, at auction or otherwise, or attempts to negotiate a sale, at auction or otherwise, real property (RPL §440[1]0).

Auction Center was clearly a "real estate broker," and, just as clearly, being unlicensed, was acting in violation of RPL §440-a when it listed homes for sale and attempted to obtain bids on those homes. The respondent cooperated with and permitted those unlicensed activities.

III- A real estate broker who wishes to conduct brokerage business under a name other than that on his license must apply for a license under that new name, Real Property Law (RPL) §441(1)(a), and the conducting of real estate brokerage business on behalf of an unlicensed corporation is a violation of RPL §440-a. Division of Licensing Services v Cruz, 8 DOS 93; Division of Licensing Services v Fishman, 153 DOS 92; Division of Licensing Services v Selkin, 47 DOS 92; Division of Licensing Services v Tripoli, 96 DOS 91; Department of State v Prater, 29 DOS 88; Department of State v Lombardo, 30 DOS 86.

IV- It is clear that the respondent did not intentionally violate the law. In fact, she made concerted efforts to determine whether her proposed method of doing business with Auction Center, which she had discovered was a method used by a number of other companies, was lawful. While the fact that she may have received faulty advice from employees of the government agencies which she claims to have contacted does not create an estoppel or shield the respondent from liability for her actions, Parkview Associates v City of New York, 71 NY2d 274, 525 NYS2d 176 (1988); State of New York v Ferro, ___AD2d___, 592 NYS2d 516 (1993), the respondent's apparently honest efforts to comply with the law certainly must be taken into consideration as a mitigating factor. It is also noted that the respondent received no financial benefits from the operation of Auction Center, all of the money paid by property owners having been used to promote the sale of those properties, and that there is no evidence that the respondent has been the subject of prior disciplinary proceedings. Accordingly, the appropriate sanction in this case is a fine, rather than revocation of the respondent's licenses.

CONCLUSIONS OF LAW

1) By agreeing to share Hampton's commissions with an unlicensed corporation in return for its assistance in the sale of real property, the respondent demonstrated incompetency as a real estate broker.

2) By cooperating with and permitting the unlicensed real estate brokerage activities of Auction Center in violation of RPL §440-a the respondent demonstrated incompetency as a real estate broker.

3) By showing real property to potential purchasers on behalf of Auction Center, and by serving as an officer of that corporation, the respondent engaged in real estate brokerage activities under an unlicensed name in violation of RPL §441.

4) The complainant has presented no proof that the respondent failed to supervise Diskin's activities as a real estate salesperson, and that charge should be dismissed.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Ellen Feld has violated Real Property Law §441 and has demonstrated incompetency, and accordingly, pursuant to Real Property Law §441-c, she shall pay a fine of \$500.00 to the Department of State on or before January 31, 1994, and should she fail to pay the fine then her licenses as a real estate broker shall be suspended for a period of one month, commencing on February 1, 1994 and terminating on February 28, 1994, both dates inclusive.

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