

STATE OF NEW YORK
DEPARTMENT OF STATE
OFFICE OF ADMINISTRATIVE HEARINGS

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In the Matter of the Complaint of

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

Complainant,

DECISION

-against-

VIOLA B. FIUMERA and DONALD T. OGDEN,

Respondents.

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on July 2 and September 24, 1997 at the New York State office building, 44 Hawley Street, Binghamton, New York.

Viola B. Fiumera of D.T. Ogden Real Estate, 233 Delaware Street, Walton, New York 13856 was represented by Terence P. O'Leary, Esq., O'Leary & Van Buren, 49 North Street, P.O. Box 177, Walton, New York 13856.

Donald T. Ogden, having agreed to a settlement of the charges against him prior to the opening of the hearing, was not present.

The complainant was represented by Assistant Litigation Counsel Scott L. NeJame, Esq.

COMPLAINT

The complaint in the matter, as it relates to Ms. Fiumera, the remaining respondent, alleges: That from at least January, 1992 until September 27, 1994 Ms. Fiumera acted and held herself out as a real estate broker associated with Mr. Ogden although not licensed in that capacity; that Ms. Fiumera falsely told the buyers of a home that radon test results were acceptable and favorable; that at the closing Ms. Fiumera failed to provided the buyers of the home with a copy of the radon test report; and that by reason thereof Ms. Fiumera engaged in fraud or a fraudulent practice, engaged in unlicensed activities in violation of Real Property Law (RPL) §441-c, and demonstrated untrustworthiness and/or incompetence.

FINDINGS OF FACT

1) Notice of hearing together with a copy of the complaint was served on Ms. Fiumera by certified mail delivered on May 23, 1997 (State's Ex. 1).

2) From at least January 31, 1990 until January 31, 1996 Ms. Fiumera was duly licensed as a real estate broker in her individual name. Commencing on September 27, 1994, when she learned of the legal requirement to do so, she also became licensed as a real estate broker in association with Donald T. Ogden. That association was changed to D.T. Ogden Real Estate on May 1, 1996, and the license reflecting that association is currently in effect with an expiration date of September 27, 1998 (State's Ex. 2). At all times, including when licensed in her individual name, she worked under the name of Ogden Real Estate.

3) In or about March, 1992 Mr. Jan Mielezsko, who was interested in purchasing a house, went to Mr. Ogden's real estate office and spoke with Ms. Fiumera. Acting on behalf of Mr. Ogden (State's Ex. 4), Ms. Fiumera showed Mr. Mielezsko several homes, and, eventually, he decided that he was interested in a house on Cemetery Road in the Village of Trout Creek, New York owned by Mr. and Mrs. Richard Seaman (hereinafter "the house"). He told her about his interest, and that any purchase would be contingent upon termite, water, and radon tests, which she said that she would have done.

The next day Mr. Mielezsko brought his wife to see the house, which she also liked. Ms. Fiumera was again informed that a radon test would need to be done.

4) On March 7, 1992 the Mielezskos and Mr. Seamon entered into a contract of purchase and sale for the house. Ms. Fiumera witnessed that contract on behalf of Mr. Ogden (State's Ex. 3). On May 26, 1992 a second contract, this time containing a clause providing that the sale was contingent upon satisfactory results of termite, radon, and water inspections or tests, was executed (Resp. Ex. A).

5) On June 5, 1992 the house was inspected for termites, and a radon test was conducted, by Victor Accurso of South Shore Pest Control Co. (State's Ex. 5). Mr. Accurso was recommended by Ms. Fiumera, who had no prior experience with radon testing. At the time of the inspection and test the Mielezskos were informed that there was no termite problem, and on June 10, 1992 a written radon testing report was issued by Radon Testing Corporation of America, the company to which Mr. Accurso apparently sent the test canisters. That report, which was mailed to Ms. Fiumera at "Ogden Realty" on June 13, 1992 (State's Ex. 7) and received and read by

her on June 15, 1992¹, indicated that the house contained a radon concentration of 4.3 pico Curies per liter, a level which, if existing within a livable area, called for consideration of further action (State's Ex. 6). The radon test had, however, been conducted in the cellar of the house, a non-living area containing the furnace and hot water heater.

6) Closing of title on the house occurred on Tuesday June 16, 1992. At that time Ms. Fiumera gave the Mieleszkos the results of the water test, but told them that she had misplaced the written report of the radon test, which she had received the previous day, and that she would mail it to them. In a telephone conversation on the previous Friday she had she indicated that she had not yet received the written report, but had been told by telephone that the results were acceptable. In fact, Ms. Fiumera had had a conversation with Mr. Accurson, and he had told her that the test indicated that there was a radon concentration of 4.3 pico Curies per liter which, he said, was an acceptable level.

7) Neither the Mieleszkos nor their attorney sought to cancel or delay the closing because of the absence of the written radon report.

8) The Mieleszkos did not receive the radon test report until they went to the respondents' office sometime in June, 1992. They then complained about the results to Ms. Fiumera. The respondents subsequently had workers go to the house and seal cracks in the cellar, had additional radon tests taken, which disclosed radon levels ranging from a low of 3.8 pico Curies per liter to a high of 17.3 pico Curies per liter (State's Ex. 11), and obtained an estimate of \$1,700 to have the situation fully mitigated, for which additional work the respondents offered to pay. They also offered to sell the house for the Mieleszkos without charging a commission.

Attached hereto and made a part hereof are the proposed findings of fact submitted by the parties with my rulings marked thereon.

OPINION

I- Real Property Law (RPL) §440-a requires that a real estate broker be licensed in the capacity under which she conducts business. *Division of Licensing Services v Lawson*, 42 DOS 93. Therefore, a person who is licensed as a real estate broker in her own name must obtain a license as a representative or associate broker before working under the name and auspices of a another

¹ Ms. Fiumera's contention that she did not read the report is not credible in light of the inconsistency of her testimony on the subject. Transcript pp. 190-191.

entity or broker. *Division of Licensing Services v Lewis*, 103 DOS 93; *Division of Licensing Services v Bijur*, 92 DOS 93. Accordingly, by engaging in the real estate brokerage business under the name of a brokerage firm with which she was not licensed, and by representing that firm, Ms. Fiumera violated RPL §440-a. *Division of Licensing Services v Svoboda*, 151 DOS 93. The fact that she was not aware of the requirement that she be licensed as an associate broker eliminates the element of willfulness in the violation and is a mitigating factor so far as any penalty is concerned, as is the fact that she obtained such a license as soon as she learned that she was in violation of the law. However, in light of her obligation to be have a knowledge of the provisions of RPL Article 12-A (RPL §441[d]), Ms. Fiumera's ignorance of the law does not excuse the violation, which was a demonstration of incompetency as a real estate broker.

This violation, does not, however, warrant that Ms. Fiumera be directed to return the share of the commission which she received in the subject transaction. While she was not licensed in the correct capacity, she was a licensed real estate broker to whom an additional license as an associate broker would have issued, and subsequently did issue, *pro forma* upon payment of the additional licensing fee. Such a licensing irregularity does not warrant denying Ms. Fiumera a commission. *Galbreath-Ruffin Corp. v 40th & 3rd Corp.*, 19 NY2d 354, 280 NYS2d 126 (1967).

II- As the party which initiated the hearing, the burden is on the complainant to prove, by substantial evidence, all of the elements of the charged violations. 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).

Ms. Fiumera is charged with having misrepresented and failed to accurately advise the Mielezskos of the findings in the radon report. In order to prove that charge it is essential to show that that the report indicated that there was excessive radon in the house, and that Ms. Fiumera was aware of that.

The complainant failed to show that prior to the events in question Ms. Fiumera had any knowledge of the standards pertinent to radon testing. In fact, it appears that with regards to radon testing she was a complete novice. Thus, when told by the person who conducted the test that the results were satisfactory, she had no reason or basis upon which not to accept that statement.

The day before the closing Ms. Fiumera received and read the written report of the radon test.² That report indicates that the level of radon detected was in excess of the level at which further action should be considered if that level existed within a livable area. The test, however, had been taken in a non-livable basement. Accordingly, there was no reason for Ms. Fiumera to believe that the oral advice she had received about the test several days earlier was incorrect. She was careless in not having the report with her, but that neglect, considering her belief that there was nothing negative in the report, was not so serious as to rise to the level of untrustworthiness or incompetency.

Ms. Fiumera told the Mielezskos that the results of the radon test were acceptable. In doing that she acted on information which she believed to be accurate. That later radon tests disclosed that there was a problem is irrelevant to her state of mind prior to the closing. Likewise, her offer, along with Mr. Ogden, to pay to ameliorate the situation was not an admission of wrongdoing, but, rather, an apparently good-faith offer of settlement.

CONCLUSIONS OF LAW

1) By acting as a real estate broker associated with Ogden Real Estate when she was not so licensed, Ms. Fiumera violated RPL §440-a and demonstrated incompetency as a real estate broker.

2) The complainant has failed to establish by substantial evidence that Ms. Fiumera misrepresented and/or failed to accurately apprise the Mielezskos of the findings contained in the radon report, engaged in fraud and/or a fraudulent practice, or failed to deal honestly, openly and fairly with a member of the public, and those charges should be, and are, dismissed.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Violet Fiumera has violated Real Property Law §440-a and has demonstrated incompetency, and accordingly, pursuant to Real Property Law §441-c, she shall pay a fine of \$250 to the Department of State on or before January 30, 1998, and should she fail to pay the fine her license as a real estate broker shall be suspended for a period commencing on February 1, 1998 and terminating two months after the

² Although in her testimony Ms. Fiumera denied having read the radon report prior to the closing, that testimony appears to be the result of a faulty memory. When her testimony on the issue of the handling of the written report is read in its entirety and in connection with an examination of her markings on that report, it is evident that she did, indeed, read the report prior to the closing.

receipt by the complainant of her license certificate and pocket card. She is directed to send the fine or her license certificate and pocket card to Diane Ramundo, Customer Service Unit, Department of State, Division of Licensing Services, 84 Holland Avenue, Albany, NY 12208.

Roger Schneier
Administrative Law Judge

Dated: January 5, 1998