

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-

JOAN HEARL d/b/a HEARL REAL ESTATE,

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 March 29, 1994 at the office of the Department of State located at 162 Washington Avenue, Albany, New York.

The respondent, of Route 206 W, RD #3, Box 22, Walton, New York 13856, having been advised of her right to be represented by an attorney, appeared pro se.

The complainant was represented by Scott NeJame, Esq.

COMPLAINT

The complaint alleges that the respondent, acting contrary to a listing agreement, withdrew from her escrow account, as payment of a commission and for other personal uses, money which had been paid as earnest money deposits; that during the period that the respondent held such deposits the balance in her escrow account periodically fell below the sum which she had received; and that she failed to maintain a separate, special bank account which was used exclusively for the deposit of her principals' money.

FINDINGS OF FACT

1) Notice of hearing together with a copy of the complaint was served on the respondent by certified mail received on January 7, 1994 (Comp. Ex. 1). An amended complaint was served on the respondent by certified mail received on January 18, 1994 (Comp. Ex. 2).

2) The respondent is duly licensed as a real estate broker d/b/a J. Hearl Real Estate. At all times hereinafter mentioned she was licensed as a real estate broker either under the trade name

or, until May 19, 1988, in her individual name (Comp. Ex. 3). Sometime after the service of the notice of hearing she sent her license to the complainant in an effort to surrender it. No evidence has been offered to show that the surrender was accepted.

3) In June, 1987, the respondent entered into several agency agreements with Thomas Capaldo for the sale of lots in various subdivisions owned by him (Comp. Ex. 4, 5, and 6). Pursuant to those agreements the respondent was employed to procure purchasers who were ready, willing, and able to purchase the properties at stated terms, or at other terms accepted by Capaldo, and accept deposits on such purchases. Upon procuring such purchasers she was to be paid commissions of 10% of the purchase prices.

4) Pursuant to the agency agreements the respondent negotiated the following contracts of sale and accepted and deposited in her escrow accounts the following deposits¹:

6/17/88. Purchase by Ann Fusaro. Deposit of \$500.00 placed in the respondent's escrow account on 6/21/88, and additional deposit of \$120 received 7 to 10 days later and placed in the respondent's escrow account within one or two days thereafter (Comp. Ex. 7).

7/10/88. Purchase by James Kurz. Deposit of \$500.00 by check dated 7/9/88 was placed in the respondent's escrow account on 7/13/88 (Comp. Ex. 15, 16 and 19).

7/22/88. Purchase by Walter and Betty Tompkins. Deposit of \$500.00 by check dated 7/31/88 was placed in the respondent's escrow account on 8/9/88 (Comp. Ex. 8, 9 and 19).

8/7/88. Purchase by Robert and Connie Dunphy. Deposit of \$500.00 was placed in the respondent's escrow account on 8/12/88 (Comp. Ex. 12 and 13).

10/2/88. Purchase by Roger and Marion Dean. Deposit of \$500.00 was placed in the respondent's escrow account on 10/4/88 (Comp. Ex. 14 and 19).

3/14/89. Additional purchase by Robert and Connie Dunphy. Deposit of \$500.00 was placed in respondent's escrow account 3/20/89 (Comp. Ex. 12 and 13).

4/15/89. Purchase by Richard and Linda Walley. Deposit check for \$500.00 dated 4/9/89 was placed in respondent's escrow account on 4/18/89, and additional deposit check for \$390.00 dated 5/23/89

¹ Pursuant to the contracts, the respondent was to hold the deposits in her escrow account until either the date of transfer of title, the date of the proper cancellation of the contract, or until release was authorized by mutual consent. The deposits were to become non-refundable upon satisfaction of all contingencies, and upon default of either party 10% of the purchase price was to be liquidated damages.

was placed in respondent's escrow account on 5/30/89 (Comp. Ex. 10, 11, and 19).

5) On September 2, 1988, at a time that the respondent was holding deposits totalling \$2,120.00, the balance in her escrow account dropped to \$195.37. On September 12, 1988 it had an overdraft of \$106.45. The balance in the account did not equal or exceed the amount of deposits until October 17, 1988. As of December 31, 1988 the balance (\$932.26) was again below the amount of deposits being held by the respondent, returning to a sufficient amount on January 25, 1989. The balance again dropped below the amount of deposits on April 11, 1989 (\$3,089.74), again becoming sufficient on April 18, 1989. Again the balance dropped below a sufficient amount on May 17, 1989 (\$1,170.74), staying so for the rest of the period of time for which there is evidence in the record (Comp. Ex. 19).

6) According to the respondent, the Kurz transaction closed on December 10, 1989 or January 12, 1990, and she paid the salesperson involved a commission of \$2,375.00 (Comp. Ex 17). Presumably that money came from some other source, as the evidence does not indicate that such a payment was made from the escrow account, which at the time had a balance of less than \$50.00 (Comp. Ex. 19).

7) All of the deposits either have been, or are in the process of being returned to their rightful owners through bankruptcy proceedings.

OPINION

I- The respondent has sought to divest this tribunal of jurisdiction by tendering the resignation of her license as a real estate broker.

Real estate brokers are licensed pursuant to Real Property Law (RPL) Article 12-A, which contains no provision for the voluntary surrender of a license. That is not to say that a real estate broker's license may not be surrendered at a time that there are no charges or complaints outstanding against the broker. However, where a disciplinary hearing has been timely commenced, the Secretary of State is not divested of jurisdiction over the alleged misconduct of a real estate broker by that broker's unilateral attempt to surrender her license. 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.

II- So long as the issue has been fully litigated by the parties, and is closely enough related to the stated charges that there is no surprise or prejudice to the respondent, the pleadings may be amended to conform to the proof and encompass a charge which was not stated in the complaint. This may be done even without a formal motion being made by the complainant. Helman v Dixon, 71 Misc.2d 1057, 338 NYS2d 139 (Civil Ct. NY County, 1972). In ruling on the motion, the tribunal must determine that had the charge in question been stated in the complaint no additional evidence would

have been forthcoming. Tollin v Elleby, 77 Misc.2d 708, 354 NYS2d 856 (Civil Ct. NY County, 1974). What is essential is that the "matters were raised in the proof, were actually litigated by the parties and were within the broad framework of the original pleadings." Cooper v Morin, 91 Misc.2d 302, 398 NYS2d 36, 46 (Supreme Ct. Monroe County, 1977), mod. on other grnds. 64 AD2d 130, 409 NYS2d 30 (1978), aff'd. 49 NY2d 69, 424 NYS2d 168 (1979).

There is a discrepancy between the amount of deposits which the complaint alleges the respondent received from lot purchasers, and the amount which was established by the evidence. The essential issue, whether deposits were not properly kept in escrow, however, is unaffected by that discrepancy. Had the correct figure been stated in the complaint there would have been no additional evidence forthcoming. Accordingly, the complaint is amended to conform to the proof.

III- A real estate broker or salesperson has the fiduciary duty of handling his or its clients' funds with the utmost scrupulousness, and must take extreme care to assure that the rights of the lawful owners of those funds will not be jeopardized. Department of State v Mittleberg, 61 DOS 86, conf'd sub nom Mittleberg v Shaffer, 141 A.D.2d 645, 529 N.Y.S.2d 545 (1988); Division of Licensing Services v Pellittieri, 77 DOS 92; Division of Licensing Services v Tripoli, 96 DO 91. That duty is implemented through 19 NYCRR 175.1, which forbids the commingling of brokers' and clients' funds and requires that client funds be maintained in a special bank account. The purpose of that rule "is to assure that the rights of the lawful owners of escrow funds are not jeopardized by an agent's mismanagement of funds entrusted to the agent's care." Division of Licensing Services v Pozzanghera, 141 DOS 93, 7.

The use by a real estate broker or salesperson for his or its own purposes of money received from and belonging to other persons warrants the revocation of the broker's or salesperson's license. Lawrence Black, Inc. v Cuomo, 65 A.D.2d 845, 410 N.Y.S.2d 158 (1978), aff'd. 48 N.Y.2d 774, 423 N.Y.S.2d 920. "The imposition of any lesser penalty would unduly jeopardize the welfare of any persons who might do business with the respondents in the future." Division of Licensing Services v Pellittieri, supra at p. 3.

The fact that the balance in the respondent's escrow account routinely fell below, and frequently substantially below, the dollar amount of the deposits which she was holding, clearly establishes that she used those funds for purposes other than those for which they were intended. Not only was the respondent's conduct in violation of 19 NYCRR 175.1, it also constituted the tort of conversion. Clearview Assoc. v Clearview Gardens First Corp., 285 AD 969, 139 NYS2d 81 (1955). That the funds were not immediately available for refund when the transactions involved failed to close, and one or more of the purchasers have had to accept delayed payments in a bankruptcy proceeding, highlights the seriousness of the respondent's misconduct.

CONCLUSIONS OF LAW

1) The respondent's attempt to surrender her license as a real estate broker does not divest the Secretary of State of jurisdiction to hold this administrative hearing and to exercise her discretion to take the appropriate disciplinary action.

2) All of the issues having been fully litigated, and there being no reason to believe that had the charges been stated differently additional or different proof would have been forthcoming, the complaint should be amended to conform to the evidence.

3) By failing to maintain the balance in her escrow account at or above the dollar amount of the deposits received by her to be held in escrow, the respondent wrongfully converted monies belonging to other persons, breached her fiduciary duties as an escrow agent, violated 19 NYCRR 175.1, and has thereby demonstrated untrustworthiness and incompetency as a real estate broker.

4) The complainant failed to establish by substantial evidence that the respondent paid herself a commission from deposits paid in unrelated real estate transactions, or that she failed to maintain a separate, special bank account as required by 19 NYCRR 175.1, and those charges should be dismissed.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Joan Hearl has demonstrated untrustworthiness and incompetency, and accordingly, pursuant to Real Property Law §441-c, her license as a real estate broker is revoked, effective immediately.

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