

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-

**AGOSTINHA R. LANDO,**

Respondent.

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on May 20, 1999 at the New York State Office Building, 44 Hawley Street, Binghamton, New York.

The respondent, having been advised of her right to be represented by an attorney, chose to represent herself.

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

**COMPLAINT**

The complaint alleges that the respondent, a licensed real estate broker: Acting as a sub-agent for a listing broker procured prospective purchasers for real property; failed to collect the entire deposit specified in the contract of purchase and sale; failed to advise the listing broker or any representative of that broker that she had received only a partial deposit and was having difficulty contacting the purchasers; made misrepresentations to the listing broker and/or her representatives with regard to the status of the deposit; and failed to make disclosures to the listing broker or her representatives with regard to the status of the purchasers' mortgage application.

**FINDINGS OF FACT**

1) Notice of hearing together with a copy of the complaint was served on the respondent by certified mail delivered on February 22, 1999 (State's Ex. 1).

2) The respondent is, and at all times hereinafter mentioned was, duly licensed as a real estate broker d/b/a Century 21 Tina Lando Real Estate (State's Ex. 2).

3) On or about February 28, 1997 Thelma Mosher (hereinafter "the seller") entered into an exclusive right to sell agency agreement with John Boulas, a real estate salesperson associated with J. Ferrario Real Estate (hereinafter "Ferrario"), pursuant to which Ferrario would list for sale the sellers' real property located at 3252 South Main Street, Horseheads, New York (hereinafter "the property") and would distribute that listing to other brokers through the local multiple listing service, which brokers would act as Ferrario's sub-agents. (State's Ex. 7).

4) On or about June 16, 1997 Charles Hodge and Joyce Downey (hereinafter "the buyers") executed a contract pursuant to which they agreed to purchase the property for \$73,500.00. The contract provided for the buyers to deposit \$500.00 dollars with the respondent, the selling multiple listing service broker, and stated that a check for that amount was to be provided upon acceptance of the offer, which acceptance occurred on June 26, 1997 (State's Ex. 3).

5) The \$500.00 was not deposited with the respondent at the time of the acceptance of the contract, and it was not until August 14, 1997 that she received a partial payment of \$200.00 in cash from the buyers (State's Ex. 4). The balance of the deposit was never received, although the respondent and the seller's attorney, Steven W. Barnstead, Esq., made numerous attempts to obtain it.

6) Mr. Barnstead did not learn of the non-payment of the deposit until September 17, 1997. He then contacted Dawn Galup, the seller's daughter who held a power of attorney from the seller (State's Ex. 6) and who had signed the contract on behalf of the seller, and advised her of the situation.

7) During the ensuing months Mr. Barnstead contacted the respondent several times to demand that she pay over the full \$500.00 deposit. She sent him a check for the \$200.00 which she had received, and took the position that, having made several unsuccessful attempts to contact the buyers and collect the \$300.00 balance, she had done all that she was required to do (State's Ex. 5).

8) In addition to failing promptly to tell the seller, Ms. Galup, or Mr. Barnstead about the buyers' failure to pay the deposit, the respondent also did not promptly advise them that the buyers had not applied for a mortgage, a fact of which she was aware, although she did obtain Ms. Galup's agreement to an extension of the time granted to the buyers to obtain a mortgage and then led Ms. Galup to believe that the buyers were making efforts to obtain a mortgage. She also did not advise Ferrario or

Mr. Boulas of her failure to receive the deposit or of the buyers' failure to apply for a mortgage, although during a period of several weeks starting the day after the acceptance of the contract Mr. Boulas made numerous attempts to obtain a copy of the check which he assumed the respondent had received.

9) The sale to the buyers was never consummated, and the property was put back on the market (State's Ex. 8) and was eventually sold for \$3,000.00 less to another buyer (State's Ex. 9).

#### OPINION AND CONCLUSIONS OF LAW

When the respondent acted as selling broker of the property she entered into an agency relationship with the seller. She served as a subagent of the listing broker, while the seller was their principal. As a subagent she had the same duties to the seller as did the listing broker. Restatement of Agency 2nd, §5[1], comment d. The relationship of agent and principal is fiduciary in nature, "...founded on trust or confidence reposed by one person in the integrity and fidelity of another." *Mobil Oil Corp. v Rubenfeld*, 72 Misc.2d 392, 339 NYS2d 623, 632 (Civil Ct. Queens County, 1972). Included in the fundamental duties of such a fiduciary are good faith and undivided loyalty, and full and fair disclosure. Such duties are imposed upon real estate licensees by license law, rules and regulations, contract law, the principals of the law of agency, and tort law. *L.A. Grant Realty, Inc. v Cuomo*, 58 AD2d 251, 396 NYS2d 524 (1977). The object of these rigorous standards of performance is to secure fidelity from the agent to the principal and to insure the transaction of the business of the agency to the best advantage of the principal. *Department of State v Short Term Housing*, 31 DOS 90, conf'd. *sub nom Short Term Housing v Department of State*, 176 AD 2d 619, 575 NYS2d 61 (1991); *Department of State v Goldstein*, 7 DOS 87, conf'd. *Sub nom Goldstein v Department of State*, 144 AD2d 463, 533 NYS2d 1002 (1988).

The respondent was aware that the buyers had not fulfilled their contractual obligation to deposit \$500.00 with her, and that they had not applied for a mortgage. Yet she failed to disclose that information in a timely manner to the seller, the seller's attorney, the seller's attorney in fact, or the listing broker<sup>1</sup>, and led the listing broker's salesperson to believe that she was, in fact, in possession of the deposit. In addition she induced the seller's attorney in fact to grant an extension of the deadline for the buyers to obtain a mortgage without disclosing that the buyers

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<sup>1</sup> Even were the respondent's assertions that she told Mr. Boulas of the problem believed, that would not change the fact that she had a fiduciary duty to communicate directly with the seller, her attorney, or her attorney in fact.

had not even applied for a loan. Her conduct was in direct contravention of her fiduciary duty to use reasonable efforts to give the seller information which was relevant to the affairs entrusted to her, Restatement 2nd of Agency, §381, and was a demonstration of untrustworthiness and incompetency.

Although it is not clear that the respondent's conduct resulted in the seller receiving less for her property than might otherwise have been the case, there can be no doubt that had timely disclosure been made the property would have been put back on the market sooner and, quite possibly, sold sooner. So, to that extent the respondent's conduct may have resulted in economic harm to the seller.

**DETERMINATION**

**WHEREFORE, IT IS HEREBY DETERMINED THAT** Agostinha R. Lando has demonstrated untrustworthiness and incompetency as a real estate broker, and accordingly, pursuant to Real Property Law §441-c, her license as a real estate broker is suspended for a period commencing on September 1, 1999 and terminating three months after the receipt by the Department of State of her license certificate and pocket card. She is directed to send her license certificate and pocket card to Usha Barat, Customer Service Unit, Department of State, Division of Licensing Services, 84 Holland Avenue, Albany, NY 12208.

Roger Schneier  
Administrative Law Judge

Dated: July 19, 1999