

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-

**DENNIS G. MARTIN, DENMAR  
REALTY CORP.,**

Respondent.

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on April 15, 1997 at the office of the Department of State located at 270 Broadway, New York, New York.

The respondent, of 4342 White Plains Road, Bronx, New York 10466, did not appear.

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

**COMPLAINT**

The complaint in the matter alleges that the respondent: Failed to cooperate with the complainant's investigation into a rental transaction by refusing to provide requested documents and giving false and misleading information to the complainant's investigator; allowed an unlicensed person to operate as a salesperson; failed to disclose, to the landlord and the renter, for whom he was acting as agent; improperly accepted a commission from more than one party; and, after he had received payment from the Department of Social services, failed to reimburse the renter for money she had paid him.

**FINDINGS OF FACT**

1) Notice of hearing together with a copy of the complaint was mailed to the respondent on March 14, 1997 by certified mail addressed to him at 4342 White Plains Road, Bronx, New York 10466, his last known business address, and was returned by the United States Postal Service marked "Unclaimed". A notation on the

mailing envelope indicates that delivery was attempted at 4211 Bruner Avenue, the forwarding address filed by the respondent (State's Ex.1 and 7). A second notice was mailed to him at the White Plains Road address by regular first class mail on April 9, 1997 (State's Ex. 2). On April 11, 1997 License Investigator Carl Bartol went to that address, and ascertained that the respondent's office had been closed since November, 1996.

Investigator Bartol then went to the address listed on the complainant's records as the respondent's home, 3990 Bronx Boulevard, Apt. 3M, Bronx, New York, and was advised by the landlord that the respondent had not lived there since sometime in 1993. Next he went to the post office and obtained the forwarding address of 4211 Bruner Avenue, Bronx, New York (State's Ex. 7). He visited that address, and although the premises appeared to be abandoned, affixed a copy of the notice of hearing and complaint to the door and mailed a copy of it to the respondent at the same address (State's Ex. 6).

2) The respondent is, and at all times hereinafter mentioned was, duly licensed as a real estate broker representing Denmar Realty Corp. (hereinafter "Denmar") (State's Ex. 3).

3) Sometime in February, 1994 Sophia McLeod went to the respondent's office seeking to rent an apartment and spoke with him and his wife, Thelma, who is licensed neither as a real estate salesperson nor as a real estate broker. They showed her approximately four apartments, and eventually, after Mrs. Martin negotiated for her with the landlord, she agreed to rent one located at 815 Penfield Street, Bronx, New York. York.

The respondent and Mrs. Martin told Ms. McLeod that although she was receiving public assistance she would have to give them cash in order to secure the apartment, and she gave him \$2,500.00 for rent and security totalling \$1700.00 (which was then given to the landlord), and for the respondent's commission of \$850.00. At or about the same time the respondent received a check for \$850.00 for his commission from the New York City Department of Social Services (hereinafter "DSS"), which check was cashed on June 12, 1995 (State's Ex. 4 and 9).

Upon learning that the respondent had been paid by DSS, Ms. McLeod went to him and asked for a refund of the commission which she had paid. The respondent refused.

At no time did the respondent or Mrs. Martin tell Ms. McLeod or the landlord whom they were representing.

4) On November 11, 1995 Investigator Bartol met with the respondent. The respondent informed him that all records relating to the transaction had been misplaced. However, he acknowledged the receipt of the commission from Ms. McLeod and that, although he

represented the landlord, he never disclosed that relationship to Ms. McLeod. He denied having received the money from DSS, but promised to make a refund should he receive such a payment (State's Ex. 5).

On December 22, 1995 Investigator Bartol spoke with the respondent on the telephone. He told the respondent that he had learned that the DSS check had been cashed at a Golden Krust Caribbean Bakery store by a person named Guy. The respondent stated that he knew that Guy had received and negotiated the check, but refused to provide any information as to Guy's whereabouts. He said that while he would not give a refund to Ms. McLeod, he would make a refund directly to DSS, but that he would not provide any evidence of such a payment to the complainant.

### OPINION

I- Pursuant to Real Property Law (RPL) §44-e[2], before the Department of State revokes or suspends the license of, or imposes a fine on, a real estate broker, it must serve written notice of hearing on the broker personally, by mailing it to the broker by certified mail addressed to the broker's last known business address, or by any method authorized by the CPLR. In this case, the notice of hearing was mailed to the respondent by certified mail addressed to him at his last known business address. That notice was forwarded by the United States Postal Service to the forwarding address which it had on file, but it remained unclaimed by the respondent. While that by itself would have satisfied the statutory requirements, the complainant made further attempts to contact the respondent, both by sending the notice by regular first class mail and by sending an investigator to attempt to find the respondent. Accordingly, it was proper for the hearing to proceed *ex parte*.

II- Real Property Law (RPL) §442-e[5] states:

"The secretary of state shall have the power to enforce the provisions of this article and upon complaint of any person, or on his own initiative, to investigate any violation thereof or to investigate the business, business practices and business methods of any person, firm or corporation applying for or holding a license as a real estate broker or salesman, if in the opinion of the secretary of state such investigation is warranted. Each such applicant or licensee shall be obliged, on request of the secretary of state, to supply such information as may be required concerning his or its business, business practices or business methods, or proposed business practices or methods."

Pursuant to RPL §442-j the Secretary of State has the authority to delegate to employees of the Department of State the above powers to compel a licensee to supply information.

The respondent is charged with failing to cooperate with an investigation by refusing to provide requested documents. The evidence, however, only establishes that the documents were not provided because, the respondent said, they had been misplaced. There is no evidence to refute the respondent's claim, and, therefore, to establish the alleged refusal. The evidence does, however, support the charge that the respondent gave false and misleading information to Investigator, inasmuch as he falsely told him that he had not received the check from DSS.

III- A real estate broker who or which has an unlicensed salesperson associated with him or it is guilty of a misdemeanor, RPL §442-c, and of demonstrating incompetency. *Doherty v Cuomo*, 64 AD2d 847, 407 NYS2d 337 (1978), app. dismiss. 45 NY2d 960, 411 NYS2d 566; *Division of Licensing Services v Fishman*, 153 DOS 92. Such an association is also a violation of RPL §440-a. A real estate salesperson is a person associated with a real estate broker with the purpose of, among other things, renting or placing for rent any real property. RPL §440[3].

In assisting Ms. McLeod, while acting on behalf of the respondent, to locate and rent an apartment, Mrs. Martin acted as an unlicensed real estate salesperson. *Division of Licensing Services v Ardelean*, 96 DOS 93.

IV- Pursuant to RPL §443, a real estate broker must, under certain circumstances, make various disclosures regarding agency relationships. That statute applies, however, only in transactions involving one to four family dwellings. RPL §§443[1][f] and 443[2]. There is no evidence in the record which states the size of the dwelling in which Ms. McLeod rented an apartment, other than a reference in Investigator Bartol's report (State's Ex. 8) to a "multiple dwelling." Accordingly, the complainant has not established that the respondent violated RPL §443.

V- 19 NYCRR 175.7 states that "(a) real estate broker shall make it clear for which party he is acting...."

"The regulation places a heavy burden on the broker: 'to make it clear what the state of facts are. It is the broker's responsibility to be sure that the person with whom he or she is dealing understands...." *Department of State v Almo*, 24 DOS 87 at 3.

In confirming that decision, the Appellate Division wrote that the regulation "requires that real estate brokers clearly state for

which party they are acting." *Almo v Shaffer*, 149 AD2d 417, 539 NYS2d 765 (1989).

In violation of the regulation, the respondent never told either Ms. McLeod or the landlord whom he was representing.

VI- The complaint alleges that respondent accepted a commission from more than one party, in violation of 19 NYCRR 175.7. That regulation, in addition to its agency disclosure requirement, provides that a broker may not accept compensation from more than one party without the full knowledge and consent of all parties.

The respondent received compensation from both Ms. McLeod and DSS. However, of the two only Ms. McLeod was a party to the rental transaction. The function of DSS in the transaction was only to provide funds to assist Ms. McLeod in the rental.

VII- A real estate broker acts improperly when he or she retains an unearned commission. *Department of State v Medina*, 73 DOS 86; *Department of State v Lincoln*, 32 DOS 86. That proposition clearly derives from Real Property Law (RPL) §442-c, which allows for the imposition upon a broker of liability for acts of which the broker was not aware at the time of their commission, so long as the broker retains the financial benefits of those acts after becoming aware of them. It is supported by the holdings of the courts that where a broker or salesperson has received money to which he or she is not entitled, the broker may be required to return the money, together with interest, as a condition of retention of his or her license. *Donati v Shaffer*, 83 NY2d 828, 611 NYS2d 495 (1994); *Kostika v Cuomo*, 41 N.Y.2d 673, 394 N.Y.S.2d 862 (1977); *Zelik v Secretary of State*, 168 AD2d 215, 562 NYS2d 101 (1990); *Edelstein v Department of State*, 16 A.D.2d 764, 227 N.Y.S.2d 987 (1962).

Although he was told that DSS would be paying his commission, the respondent insisted upon receiving it from Ms. McLeod. Then, after receiving a payment for the same expense from DSS, he first denied that the check had been received and then, having acknowledged receipt, refused to refund the money to Ms. McLeod. Further, while he claimed that he would return the money to DSS he refused to provide any proof of such action. Accordingly, based on the record before the tribunal, he clearly retained an unearned commission. In addition, because the commission was received as the result of the unlicensed activities of Mrs. Martin, and because the entire transaction was permeated with violations, the respondent should be required to refund not only the commission received by Ms. McLeod, but also the commission received from DSS.

CONCLUSIONS OF LAW

1) Notice of hearing having been properly served, it was permissible to conduct an *ex parte* hearing. RPL §441-e[2].

2) By giving false and misleading information to the complainant's investigator the respondent violated RPL §442-e[5].

3) By permitting his wife to act as a real estate salesperson when not so licensed the respondent violated RPL §442-c.

4) The respondent did not violate RPL §443, and that charge should be, and is, dismissed.

5) By failing to disclose to Ms. McLeod and the landlord whom he was representing, the respondent violated 19 NYCRR 175.7, thereby demonstrating untrustworthiness.

6) The respondent did not violate 19 NYCRR 175.7 by accepting a commission from both Ms. McLeod and DSS and, therefore, the charge that he violated that regulation by accepting a commission from more than one party should be, and is, dismissed.

7) By retaining an unearned commission the respondent demonstrated untrustworthiness as a real estate broker.

**DETERMINATION**

**WHEREFORE, IT IS HEREBY DETERMINED THAT** Dennis G. Martin has violated Real Property Law §§442-c and 442-e[5] and has demonstrated untrustworthiness, and accordingly, pursuant to Real Property Law §441-c, his license as a real estate broker shall be suspended for a period commencing on June 1, 1997 and terminating four months after the receipt by the complainant of a properly completed change of address form and/or a renewal application containing his current business address along with his license certificate and pocket card. The respondent's license shall be further suspended until such time as he shall have submitted proof satisfactory to the Department of State that he has refunded the sum of \$850, together with interest at the legal rate for judgements (currently 9%) from June 12, 1995, to Sophia McLeod, as well as such proof that he has made a refund of the same amount, with interest calculated the same way, to the New York City Department of Social Services. He is directed to send his license and pocket card to Thomas F. McGrath, Revenue Unit, Department of State, Division of Licensing Services, 84 Holland Avenue, Albany, NY 12208.

Roger Schneier  
Administrative Law Judge

Dated: May 21, 1997