

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-

**ROGER MOORE and MOORE & MOORE REALTY
OF ROCKLAND CO., INC.,**

Respondents.

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on March 17 and October 1, 1998 at the office of the Department of State located at 270 Broadway, New York, New York.

The respondents were represented by Wayne A. Gavioli, Esq., 101 North Middletown Road, Nanuet, New York 10954.

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

COMPLAINT

The complaint alleges that: The sellers of a home (hereinafter "the property") entered into an agency agreement for the sale of the property with a real estate broker other than the respondents; during the period of the listing Mr. Moore was assisting John and Susan Satriale in procuring a home to purchase; at the same time Mr. Moore was also assisting Peter and Kathleen Jackelow in their search for a home to purchase; Mr. Moore failed to make clear to the Jackelows whom he represented, and never presented them with, or obtained their signatures on, a Real Property Law (RPL) §443 disclosure form; the Jackelows learned of the availability of the property from a broker other than the respondents, viewed the property, and authorized that broker to submit an offer; on the day that he viewed the property Mr. Jackelow met with Mr. Moore, requested that he perform an appraisal on the property, and confided in him that he was submitting an offer on the property through the other broker and was determined to purchase it; Mr. Moore first learned of the property when asked to perform the

appraisal, which he agreed to do; Mr. Moore failed to inform or make clear to Mr. Jackelow that he was not the Jackelows' agent or that he was the sellers' agent, and failed to inform Mr. Jackelow of the risks and possible consequences in confiding information about the property to him; Mr. Moore did not appraise the property, but, instead, showed the property to the Satriales and obtained their interest in purchasing it; the Jackelows, through the broker with whom they were working, submitted a full price (\$259,900.00) offer to purchase the property with the closing date to be negotiated, and, on the same day, Mr. Moore, acting for the Satriales, submitted an offer for \$252,500.00 with a closing date of April 1, 1993; the closing date was an essential term of the contract because the sellers' parents needed time to locate another residence; after Moore learned of the Jackelow offer the Satriales increased their offer to \$260,000.00 with a 30 day closing with a holdover possibility for the sellers' parents; Mr. Moore's actions were an attempt to create a bidding war and to obtain a commission on the sale of the property at all costs; the listing broker presented the Jackelow, Satriale, and two other offers to the sellers, who did not at that time accept any of them; the Jackelows then, through the listing broker, submitted a new offer of \$265,000.00 with a closing date of September 1, 1993; at no time did Mr. Moore discuss with the sellers the risks, implications, and possible liability in accepting or failing to accept any of the offers; on March 16, 1993 Mr. Moore sent a letter to one of the sellers wrongfully demanding a commission and threatening a lawsuit; the sellers accepted the Jackelows' \$265,000.00 offer, but, because of Mr. Moore's threats, required them to hold them harmless from any claims made by the respondents or the Satriales; in or about May, 1993 Mr. Moore procured another property for the Satriales and received a commission on its sale; in or about September, 1993 the Jackelows and the sellers closed on the property, and Mr. Moore subsequently commenced an improper lawsuit against the sellers for a commission; Mr. Moore's complaint was dismissed after a bench trial, and the dismissal was affirmed on appeal; by his actions Mr. Moore placed his interests above those of his principal and/or created a risk of litigation to his principal in an effort to obtain a commission on the property; the Jackelows suffered pecuniary and other damages as a result of Mr. Moore's conduct and representations; and that by reason of the foregoing the respondents breached their fiduciary duties to the Jackelows and/or the Satriales, engaged in misrepresentation, fraud, and/or a fraudulent practice, violated 19 NYCRR 175.7 and RPL §443, failed to deal honestly, fairly, and openly with members of the public, engaged in self dealing and/or acted as a dual agent without full and proper disclosure, demanded an unearned commission, and demonstrated untrustworthiness and/or incompetency.

FINDINGS OF FACT

1) Notice of hearing dated January 27, 1998 together with a copy of the complaint dated October 30, 1997 was served on the respondents (State's Ex. 1).

2) From at least October 31, 1987 through September 30, 1994, and from January 18, 1995 through September 30, 1998 Roger Moore was duly licensed as a real estate broker representing Moore & Moore Realty of Rockland Co., Inc. at 299 Route 303, Orangeburg, New York 10962 (State's Ex. 2). I take official notice of the records of the Department of State that the license has been renewed with an expiration date of September 30, 2000.

3) In the late Summer or early Fall of 1992 Peter and Kathleen Jackelow inquired of Mr. Moore regarding a house which they had seen advertised. He showed them between 12 and 15 homes, but never gave give them an RPL §443 disclosure form (State's Ex. 4, pp. 6a and 10a, and pp 74-75 of transcript of trial). He did, however, represent to them orally that he would be representing them as buyers.

4) On December 16, 1992 Catherine Aloï and Peter Yaniga, acting as trustees (hereinafter "the trustees"), granted an exclusive right to sell agency for property located in Pearl River, New York (hereinafter "the property"), to Weichert Realtors (hereinafter "Weichert"). Pursuant to the agency agreement the trustees would be required to pay a commission of 6% "on any agreed sales price" (State's Ex. 4, pp. 6a, 289, and 290). The listing contained an asking price of \$259,900.00 and provided for immediate possession (State's Ex. 4, p. 289), and on or about December 17, 1992 was distributed to the members of the Rockland County Multiple Listing Service (hereinafter "MLS") for the purpose of co-brokerage. It provided that the commission would be paid to any broker who was the "procuring cause, having introduced the Buyer and negotiated the sale" (State's Ex. 4, p. 292), a condition of which the respondents were aware.

5) The Jackelows had been in contact with several brokers in addition to the respondents in their house search. One of those brokers, Naomi Teleky of Damiani Realtors (hereinafter "Damiani"), contacted them on January 4, 1993 and advised them that the property was for sale, and on January 9, 1993 she showed it to them (State's Ex. 4, p. 6a).

6) On January 9, 1993, after viewing the property, the Jackelows contacted Mr. Moore and told him that they had found a house which they wished to buy. They told him that they would like him to appraise the property, and asked him whether they could take him into their confidence and if he only use what they would tell him for the purposes of an appraisal. Mr. Moore said that they could trust him, and agreed to perform the appraisal, which he said would cost between \$350.00 and \$400.00, but never did so.

7) On or about January 16, 1993 the Jackelows, acting through Damiani, made an offer to purchase the property for \$259,900.00 with the closing date subject to negotiation (State's Ex. 4, p. 293).

8) On January 10, 1993 Mr. Moore, who had, but had failed to notice, the MLS listing for the property until his January 9, 1993 meeting with the Jackelows, had shown the exterior of the property to John and Susan Satriale, and on January 11 and 13, 1993 he showed them the interior. The Satriales made an oral offer of \$235,000.00, which they later raised to \$252,500.00 and made in writing. The offer included a closing date of April 1, 1993, and was faxed to Weichert on January 16, 1993. After they learned that there was a "full price" offer, i.e. the Jackelows' offer of \$259,900.00, the Satriale's increased their offer to \$260,000.00, with a 30 day closing and a "holdover possibility for present occupants," and Ms. Veraldi of Weichert, who was notified of the increased offer by Mr. Moore on January 17, 1994, made those changes on the earlier purchase agreement (State's Ex. 3 and Ex. 4, pp. 7a and 294). According to Mr. Moore, a subsequent written offer not in evidence herein again stated a purchase price of \$260,000.00 and stated that the closing date was "to be determined by parties," and such a date was never agreed upon (State's Ex. 4, transcript pp. 91 to 92).

8) On January 17, 1993 Ms. Veraldi submitted four offers, including the Satriales' and the Jackelows', to the trustees (State's Ex. 4, p. 7a).

9) The trustees did not accept any of the offers (State's Ex. 4, p. 7a). Contrary to assertions previously made by Mr. Moore, at no time did his discuss the terms of the Satriales' offer with the trustees' attorney, and that attorney never indicated to him that the offer would be accepted (Transcript, pp. 40-41).

10) On January 27, 1993 Mr. Jackelow went to Weichert's office, spoke with Ms. Veraldi, and executed a purchase agreement offering \$265,000.00 for the property with a September 1993 "or before" closing date (State's Ex. 4, pp. 7a and 296).

11) The closing date was an important factor to the trustees, whose elderly parents lived at the property and needed time to relocate. Therefore, a short closing date, such as that contained in the Satriale offer, was not acceptable to them.

12) On or about February 17, 1993, the trustees accepted the Jackelows' offer (State's Ex. 4, p. 298). A contract of purchase and sale providing for a September 1, 1993 closing and for the Jackelows to hold the trustees harmless from any claims made by the respondents or the Satriales, was signed on March 29, 1993 (State's Ex. 4, pp. 283-286 and 299). There was a closing of title in the Fall of 1993, and the sales commission was paid to Weichert, which

shared it with a forwarding agent from Westchester County. After Damiani threatened to sue, Weichert shared its commission with that broker (State's Ex. 4, p. 8a).

13) At no time was a purchase agreement or contract with the Satriales signed by the trustees (State's Ex. 4, p. 8a). At some point the respondents brokered the sale of another house to them.

14) On or about February 18, 1993 the respondents commenced suit against the trustees seeking a commission of \$15,600.00, alleging that they had fulfilled the terms of the agency agreement (State's Ex. 4, pp. 16a to 21), and, pursuant to the hold harmless agreement, the Jackelows intervened (State. Ex. 4, pp. 25a to 32a). In spite of the fact that he had known of the Jackelows' full price offer before he conveyed the Satriales' \$260,000.00 offer, and that after he voiced his claim to a commission he was shown documentation which established that the Jackelows had submitted a full price offer for the property on January 16, 1994, the day before he had submitted the Satriales' offer of \$260,000.00, Mr. Moore insisted on proceeding with the law suit.

A Bench trial was held in Supreme Court, County of Rockland, and on January 15, 1995 the Hon. Howard Miller, J.S.C., issued a decision dismissing the respondent's complaint (State's Ex. 4, pp. 6a to 10a). Judgement was entered and the respondents appealed, and on December 5, 1996 the Supreme Court, Appellate Division, Third Judicial Department, affirmed the judgement (State's Ex. 3).

15) In his decision, Justice Miller found that there had been no meeting of the minds between the trustees and the Satriales regarding a closing date, an essential term of the transaction, and that although Mr. Moore contended that one of the trustees had agreed to the sale he never contended that they both did. Justice Miller also found that the respondents offered no evidence to establish that the Satriales were financially able to complete the transaction, and that, contrary to the terms of the agency agreement listing the property for sale, there was no evidence that the respondents ever negotiated a sale of the property. Accordingly, he found that the respondents had not earned a commission.

In affirming Justice Miller's decision, the Appellate Division noted that the closing date "was clearly a subject for negotiation since the listing agreement makes no mention of a closing date." It went on to say

"Our review of the record discloses that there was no meeting of the minds between defendants and the Satriales on this issue as there is no proof that the Satriales agreed to defendants' request that the closing be deferred for a considerable period of time. Instead, the

evidence establishes that they left this issue open for further negotiation. There is also no credible evidence that the defendants took steps to frustrate an agreement on this issue. Thus, having failed to establish an agreement on this essential term and in the absence of bad faith on defendants' part, plaintiff is not entitled to a brokerage commission" (State's Ex. 3).

OPINION

I- As the party which initiated the hearing, the burden is on the complainant to prove, by substantial evidence, the truth of the charges encompassed in the complaint. 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).

II- Pursuant to RPL §443 a real estate broker, whether acting as seller's agent or buyer's agent, must provide a real estate agency relationship disclosure form to the prospective buyer of residential real property either, in the case of a seller's agent, at the time of the first substantive contact with the buyer, or, in the case of a buyer's agent, upon entering into an agreement to act in that capacity. It is undisputed, and was so found in Supreme Court, that the respondents never provided such a form to the Jackelows. The failure to provide such a form was not only a violation of the statute, but also a demonstration of untrustworthiness and incompetence.

A related requirement is encompassed in 19 NYCRR 175.7, which provides that a real estate broker must 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).

Mr. Moore told the Jackelows that he would be representing them in their search for a home and in appraising the property, and they believed him, and, for that reason, placed their trust in him. He has since testified, however, that he was representing the sellers, and, in the case of the subject property, the trustees. Thus, it is evident that he failed to make clear to the Jackelows for which party he was acting. In so doing he again demonstrated untrustworthiness and incompetency.

III- When Mr. Moore agreed to assist the Jackelows in locating a home, and again when he agreed to perform an appraisal for them, he became their agent, and they become his principals. 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).

Mr. Moore breached his fiduciary duties to the Jackelows in several ways. First, he failed to perform the appraisal after agreeing to do so. Second, having been made aware of the listing of the property by the Jackelows he tried to consummate a sale of that property to the Satriales, and, in so doing, caused the Jackelows to have to pay substantially more than they might otherwise have had to. Third, after the trustees agreed to sell the property to the Jackelows, he demanded a commission, with the result that the Jackelows had to indemnify the trustees and incurred the expense of legal representation to defend them in the respondents' law suit. Mr. Moore's conduct in this regard was a gross demonstration of untrustworthiness.

Even were there no agency relationship between the respondents and the Jackelows, Mr. Moore's conduct would still have been improper. Real estate brokers have a fundamental duty to deal honestly with the public. *Division of Licensing Services v John Linfoot*, 60 DOS 88, conf'd. *sub nom Harvey v Shaffer*, 156 AD2d 103, 549 NYS2d 296 (1989). Mr. Moore's conduct was a clear breach of that duty, and demonstrated untrustworthiness.

IV- The respondents brought suit against the trustees for a commission to which they were not entitled. Mr. Moore knew that the Jackelows had submitted a full price offer before he submitted one on behalf of the Satriales. He also knew that he had not obtained the trustees' signature on the Satriales' offer, and does not even claim to have obtained the oral agreement of both of the trustees (State's Ex. 4, transcript p. 102). Further, his claim that he obtained the oral agreement of even one of the trustees is made suspect and not believable by the inconsistency of his testimony, in which he variously claimed both that the trustees' attorney had told him that there was a deal and that had not told him that.

It is clear from Mr. Moore's testimony in the law suit that when it comes to claiming a commission on an MLS listing he doesn't believe that he has to play by the rules. The following exchange occurred in his cross examination by the Jackelows' attorney (State's Ex. 4, pp. 104 to 105):

"Q. And you're familiar with the language in that listing agreement which says, in substance, in Paragraph 4, 'Payment shall be made to the selling agent provided such agent is a participating member of the Rockland County M.L.S.' -- that refers to the Rockland county Multiple Listing System, correct?

A. That's correct.

Q. -- 'who is the procuring cause having introduced the buyer and negotiated the sale.' Are you familiar with that language?

A. I am.

Q. And in order for you to earn a commission you have to negotiate a sale, correct?

MR. GAVIOLI: Objection.

THE COURT: Overruled.

A. *I have a little problem with that.*

Q. Well, isn't that what it says?

A. It says that.

Q. And that listing agreement is the employment agreement between you as a member of the Multiple Listing System and the owners, correct?

A. Correct.

Q. And that employment agreement tells us and you when you earn a commission?

A. Right.

Q. And that agreement says that you earn a commission when you have negotiated a sale, correct?

A. Correct.

MR. GAVIOLI: Objection.

THE COURT: Overruled." (emphasis added).

The claiming and bringing suit for an unearned commission is a demonstration of untrustworthiness. *Division of Licensing Services v Loffredo*, 83 DOS 95, conf'd. *sub nom Loffredo v Treadwell*, 235 AD2d 541, 653 NYS2d 33 (1977). In a case such as this, where the respondent clearly knew that he was not entitled to the commission and acted in the face of a contract the terms of which he had not fulfilled, such untrustworthiness is particularly egregious.

V- Fraudulent practices "...as used in relation to the regulation of commercial activity, is often broadly construed, but has generally been interpreted to include those acts which may be characterized as dishonest and misleading. Since the purpose of such restrictions on commercial activity is to afford the consuming public expanded protection from deceptive and misleading fraud, the application is ordinarily not limited to instances of intentional fraud in the traditional sense. Therefore, proof of an intent to defraud is not essential." *Allstate Ins. Co. v Foschio*, 93 A.D.2d 328, 464 N.Y.S.2d 44, 46-47 (1983) (citations omitted). A single fraudulent practice may be the basis for the imposition of disciplinary sanctions. *Division of Licensing Services v Linfoot*, 60 DOS 88, conf'd. *sub nom Harvey v Shaffer*, 156 A.D.2d 1013, 549 N.Y.S.2d 296 (1989).

The respondent was alerted to the availability of the property by promising the Jackelows that they could trust him, which promise induced them to disclose the address of the property. He agreed to appraise the property for them, but failed to do so. Then, misusing the information he had obtained when he became the Jackelows' agent for the purpose of the appraising the property, he showed the property to other prospective buyers for whom he submitted offers to purchase in direct competition with the Jackelows. That conduct constituted a fraudulent practice.

VI- A real estate broker is strictly limited in his or her ability to act as a dual agent: As a fiduciary, a real estate broker is prohibited from serving as a dual agent representing parties with conflicting interests in the same transaction without the informed consent of the principals. *Division of Licensing*

Services v Werner, 160 DOS 96, conf'd. 3 DOS APP 96; *Department of State v McGill*, 21 DOS 92; *Department of State v Home Market Realty*, 1 DOS 90; *Department of State v Island Preferred Properties*, 34 DOS 89. "If dual interests are to be served, the disclosure to be effective must lay bare the truth, without ambiguity or reservation, in all its stark significance." *Wendt v Fischer*, 243 NY 439, 443 (1926); *Guidetti v Tuotti*, 52 Misc. 657, 102 NYS 499 (Supreme Ct. App. Term, 1907).

"Therefore, a real estate agent must prove that prior to undertaking to act either as a dual agent or for an adverse interest, the agent made full and complete disclosure to all parties as a predicate for obtaining the consent of the principals to proceed in the undertaking. Both the rule and the affirmative defence of full disclosure are well settled in law." *Division of Licensing Services v Short Term Housing*, 31 DOS 90 at p. 6., conf'd. 176 AD2d 619, 575 NYS2d 61 (1991).

It is not necessary that there be a showing of injury to the principals for there to be a finding that the dual agent acted improperly. *New York Central Insurance Company v National Protection Insurance Company*, 14 NY 84 (1856). Nor is it necessary for there to be a finding that the dual agent is guilty of actual fraud. *Carr v National Bank & Loan Co.*, 167 NY 375 (1901), aff'd. 189 US 426, 23 S.Ct. 513. See, also, *Hasbrouck v Rymkevitch*, 25 AD2d 187, 268 NYS2d 604 (1966). "This rule is not affected by the existence of the usage or custom of an agent to act for both parties to a particular transaction unless it is shown that the principal has knowledge of it." 3 NY Jur2d, Agency §201.

Mr. Moore acted as a dual agent when, having agreed to act at the agent of the Jackelows for the purpose of appraising the property, he then attempted to broker the sale of the house to the Satriales. He has offered not a scintilla of evidence to show that he made the required disclosures to anyone, be it the Jackelows, the Satriales, or the trustees. By acting as a dual agent in these circumstances he demonstrated untrustworthiness and incompetency.

VII- Being an artificial entity created by law, Moore and Moore can only act through its officers, agents, and employees, and it is, therefore, bound by the knowledge acquired by and is responsible for the acts committed by its representative broker, Mr. Moore, within the actual or apparent scope of his authority. *Roberts Real Estate, Inc. v Department of State*, 80 NY2d 116, 589 NYS2d 392 (1992); *A-1 Realty Corporation v State Division of Human Rights*, 35 A.D.2d 843, 318 N.Y.S.2d 120 (1970); *Division of Licensing Services v First Atlantic Realty Inc.*, 64 DOS 88; RPL § 442-c.

VIII- The complaint alleges that the respondents acted improperly when they did not advise the trustees of the risks, implications, and possible liability in accepting or failing to accept any of the offers. There is, however, no evidence that he, as opposed to the listing broker, had the opportunity to do so. Accordingly, that allegation should be, and is, dismissed.

CONCLUSIONS OF LAW

The complainant has established by substantial evidence that:

1) Mr. Moore, and by reason of its vicarious liability for his conduct, the corporate respondent, have violated RPL §443 and 19 NYCRR 175.7, and have thereby demonstrated untrustworthiness and incompetency.

2) By breaching his fiduciary duties to the Jackelows Mr. Moore, and by reason of its vicarious liability for his conduct, the corporate respondent, have demonstrated untrustworthiness.

3) By failing to deal honestly with the public Mr. Moore, and by reason of its vicarious liability for his conduct, the corporate respondent, have demonstrated untrustworthiness.

4) By claiming and bring suit for an unearned commission Mr. Moore, and by reason of its vicarious liability for his conduct, the corporate respondent, have demonstrated untrustworthiness.

5) By obtaining information about the property from the Jackelows and then misusing it in contravention of his fiduciary duties Mr. Moore, and by reason of its vicarious liability for his conduct, the corporate respondent, have demonstrated untrustworthiness.

6) By acting as an undisclosed dual agent Mr. Moore, and by reason of its vicarious liability for his conduct, the corporate respondent, have demonstrated untrustworthiness and incompetency.

DETERMINATION

WHEREFORE IT IS HEREBY DETERMINED THAT Roger Moore and Moor & Moore Realty of Rockland County Inc. have violated Property Law §443, have engaged in a fraudulent practice, and have demonstrated untrustworthiness as real estate broker. Accordingly, pursuant to Real Property Law §441-c, their license as a real estate broker is

revoked, effective immediately. They are directed to send such license certificate(s) and pocket card(s) 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 12, 1999