14 DOS 95

STATE OF NEW YORK
DEPARTMENT OF STATE

----------X

In the Matter of the Complaint of

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

Complainant, **DECISION**

-against-

TREVOR C. MYERS and RICHLAND REALTY RESOURCES, INC.,

Respondents.

----------X

This matter came on for hearing before the undersigned, Roger Schneier, on January 5, 1995 at the office of the Department of State located at 270 Broadway, New York, New York.

The respondents, of 70 Ellwood Avenue, Mount Vernon, New York 10550 and 8 John Walsh Boulevard, Peekskill, New York 10566 (last known corporate address) did not appear.

The complainant was represented by Scott L. NeJame, Esq.

COMPLAINT

The complaint alleges that:

1) Myers, a licensed real estate broker in his own name and as representative of Richland Realty Resources, Inc. (Richland), showed Senda Smith real property which was available for sale, and he and Richland became her agents;

2) Smith gave Myers $8,000 cash as a deposit on the property. Myers failed to deposit it in escrow, depositing it instead in the operating account of Beaver Realty Resources, Inc. (Beaver), a corporation owned by him;

3) Myers arranged a loan for Smith so that she could pay the first installment on the down payment on the property pursuant to a contract of sale which had been executed, and then deposited the $6,075.00 proceeds of the loan in the Beaver operating account;

4) Myers received an additional down payment installment of $13,450.00 in cash from Smith but did not deposit it in escrow, and instead deposited $8,000.00 in the Beaver operating account, the balance in which subsequently fell and remained below $8,000.00;

5) Myers failed to forward the second installment of the down payment to the sellers' attorney, resulting in Smith being held in default;

6) Smith, as a result of Myers' actions, was forced to pay the sellers' expenses of $1,800.00 as a condition of receiving a refund of the balance of the first installment of the down payment, which Myers had conveyed to the sellers' attorney;

7) Myers has failed to make a full refund to Smith;

8) Myers, while acting as agent for the owner, showed real property to potential purchasers Winston Fearon and Angela Sewell Fearon and, although no purchase and sale contract had been executed, accepted a $30,784.53 deposit from them to be forwarded to the owner;

9) Myers failed to either forward the deposit to the owners or to deposit it in an escrow account, depositing it instead in Richland's operating account, the balance of which subsequently fell below $30,784.53;

10) Due to Myers' failure to forward the deposit to the owner the property was sold to a third party;

11) Myers told the Fearons that he had lent their money to someone else, but would repay it to them;

12) Myers tendered four checks to the Fearons, all of which were returned by the bank for insufficient funds, and Myers knew or should have known at the time that he tendered the checks that his accounts did not contain sufficient funds;

13) Myers has refunded on $3,500.00 to the Fearons, and, by reason of the foregoing;

14) The respondents have violated 19 NYCRR 175.1, have wrongfully converted monies belonging to other persons, have breached their fiduciary duties as escrow agent, have committed acts which constitute the crime of grand larceny, have engaged in fraud and/or a fraudulent practice, have retained an unearned commission, and have demonstrated untrustworthiness and/or incompetence.

FINDINGS OF FACT

1) Notice of hearing together with a copy of the complaint was served on the respondents at Myers' residence by substituted service pursuant to CPLR §308 [4] after the complainant's investigator had visited Myers' residence five times on two separate days (State's Ex. 3). I take official notice of the records of the Department of State that, prior to the service, attempts were made to serve the respondents by certified mail at their licensed business address of 8 John Walsh Boulevard, Peekskill, New York, but the notices and complaints were returned marked "moved left no address," and that a notice and complaint which was mailed to the respondent by certified mail on November 23, 1994 at his residence was not accepted and was returned by the United States Postal Service after the date of the hearing marked "unclaimed."

2) At all time hereinafter mentioned Myers was duly licensed as a real estate broker both in his individual capacity, with a business address of 70 Ellwood Avenue, Mt. Vernon, New York, his residence, and as representative of Richland (Comp. Ex. 2). I take official notice of the records of the Department of State that the corporate license was renewed on April 7, 1994, with an expiration date of March 18, 1996.

3) On March 5, 1990 Senda Smith gave Myers, who was doing business under the (unlicensed) name of "Beaver Realty," $8,000.00 as part of the initial deposit on the purchase of a house located at 542 South Eleventh Street, Mount Vernon, New York (State's Ex. 11). On March 13, 1990 the money was deposited in Beaver's operating account, along with unrelated funds already on deposit (State's Ex. 20). At no time was any of Smith's money deposited in an escrow account, and at all times after March 13, 1990 the balance in the Beaver account remained below the amount advanced to Myers by or on behalf of Smith.

On March 8, 1990 a contract, naming Richland as the broker which brought about the transaction, was executed by Smith and the sellers (State's Ex. 12). Pursuant to the contract, Smith was to make an initial deposit of $13,450 upon signing, and an additional deposit in the same amount on March 22, 1990. In order to raise the balance of the initial deposit, Smith allowed Myers to arrange for a $6,075.00 mortgage to placed on property which she owned (State's Ex. 14), with $5,400.00 to be applied to the down payment and Myers to receive the balance of $625.00 as a commission. $4,700.00 of the proceeds of that mortgage were deposited in the Beaver account (State's Ex. 20). No evidence was presented to show that happened to the balance of the money.

On or about March 9, 1990 Myers wrote and delivered to the attorneys for the sellers two checks drawn on the Beaver operating account, one for $5,450.00, and a second for $8,000.00 (State's Ex. 13). Those checks were negotiated by the attorneys, and cleared the Beaver account on March 13 and 14, 1990 (State's Ex. 20).

Sometime thereafter Smith gave Myers an additional $13,450.00, in cash, to be sent to the sellers' attorneys in payment of the second installment of the deposit. On April 15, 1990 Myers drafted two more checks payable to the sellers' attorneys, again for $8,000.00 and $5,450.00 (State's Ex. 16), but those checks were never received by those attorneys (State's Ex. 15), and were never negotiated (State's Ex. 17).

Because the second installment of the deposit was never paid, Smith was held in default on the contract, and the sellers retained, as liquidated damages, $1,800.00 of the $13,450.00 which they had received (State's Ex. 21). Myers subsequently refunded to Smith all but $1,400.00 of the second $13,450.00 paid to him by her (State's Ex. 18 and 19).

4) In 1990 Angela Sewell was seeking to purchase a home. She was introduced to Myers by Derice Fearon, who worked for Myers and was the sister of Winston Fearon, the father of Sewell's child.

At the time Myers was acting as the broker for the builder of homes in St. Albans, Queens, and he showed Sewell a home located at 14-39 165th Street. She liked the house, and sometime in late summer 1990 she made an offer to purchase the house $250,000.00, and gave Myers $4,000.00 in third party checks as a binder.

A closing was set for September, 1990. On the weekend prior to the scheduled closing Sewell gave Myers a bank check, payable to her and Winston Fearon, for $30,784.53 (State's Ex. 4). $20,000 was to be used for the down payment, and the balance was to be returned to Sewell.

The check was deposited in Richland's operating account on September 20, 1990. On September 21, 1990 the balance in the account dropped below $30,784.53, and it continued to decrease for the rest of the month (State's. Ex. 22).

Sewell never saw Myers again, and any subsequent communications which she had with him were through Derice Fearon. There was no closing, and Sewell was advised that Myers had lent her money to someone else. In fact, as Myers admitted to the complainant's investigator, he had used the money for his own operating expenses.

Eventually, Myers agreed to refund Sewell's money to her. On October 9, 1990 he wrote two checks payable to her and Winston Fearon, one for $20,000.00 and the second for $10,000.00. However, after the checks were deposited they were returned by the bank due to insufficient funds (State's Ex. 8 and 9). On January 25, 1991 Myers gave Sewell $11,200 in cash, checks drawn on the account of Eastbay Equities, Inc. payable to her and Winston Fearon for $2,000.00 and $5,000.00, and two third party checks payable to East Bay Equities, each for $900.00 (State's Ex. 5, 6 and 7). Myers asked Sewell not to deposit the $900.00 checks, and she complied.

When she deposited the $2,000.00 and $5,000.00 checks they were rejected by the payor bank with no reason given.[1] Finally, in November, 1991 Myers gave Sewell four bank money orders payable to her and Winston Fearon totalling $3,500.00 (State's Ex. 10). However, because Myers had placed the legend "Payee (sic) acknowledge that they received $20,000.00, February 19, 1991" in the endorsement section of each of the checks, and because no such payment had been received, Sewell refused to cash the money orders.[2]

OPINION

I- As the party which initiated the hearing, the burden is on the complainant to prove, by substantial evidence, the truth of the allegations 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- The complaint alleges that in their respective transactions the respondents acted as the agents of Smith and Sewell. With regards to Smith, the evidence establishes that Myers assisted her in obtaining the money for the down payment and retained part of the proceeds of the mortgage loan which it secured as a commission for that assistance. By those actions he became her agent. Restatement (Second) of Agency, §1, comment b; Cerp Construction Co. v J.J. Cleary, Inc., 59 Misc2d 489, 299 NYS2d 560 (1968), aff'd. 31 AD2d 784, 298 NYS2d 469 (1969).

With respect to the Sewell transaction, the evidence establishes that Myers was the agent of the seller. Sewell testified that Myers represented the builder of the homes, and there was nothing in his actions in accepting deposit money from Sewell which was inconsistent with such representation.

III- 19 NYCRR 175.1 states:

---

[1] There is no evidence on the record to support the allegation that Myers knew or should have known that, when he tendered the refund checks, he did not have sufficient funds in his accounts.

[2] In a letter to Senior Investigator Scott Amaral dated November 12, 1991, Myers claimed that he gave Sewell a total of $20,000.00 in February, 1991. However, the "receipt" which he attached to the letter, and which purports to show that such payments were made, is signed only by Myers and Derice Fearon (State's Ex. 23).

> "A real estate broker shall not commingle the money or other property of his principal with his own and shall at all times maintain a separate, special bank account to be used exclusively for the deposit of said monies and which deposit shall be made as promptly as practicable."

As discussed above, Myers was Smith's agent. She, therefore, was his principal, and he had the obligation to place the down payment monies received from her in a separate, special escrow account. Instead, he deposited the money, along with other money already on deposit, in the operating account of one of his businesses, a violation of 19 NYCRR 175.1 and a demonstration of untrustworthiness. Lawrence Black, Inc. v Cuomo, 65 AD2d 845, 410 NYS2d 158 (1978), aff'd. 48 NY2d 774, 423 NYS 2d 920; Division of Licensing Services v Ratan, 102 DOS 91.

Myers was not Sewell's agent and, therefore, she was not his principal. Accordingly, 19 NYCRR 175.1 did not require that the money which she delivered to him, and which remained hers even after such delivery, be deposited in an escrow account.

IV- Myers received Smith's and Sewell's money for the sole purpose of conveying the funds to the respective sellers. He was, therefore, acting in a fiduciary capacity. Mobil Oil Corporation v Rubenfeld, 72 Misc2d 392, 339 NYS2d 623 (1972). By depositing that money in his business operating accounts and failing to transmit it to the sellers he converted monies belonging to other persons, Britton v Ferrin, 171 NY 235 (1902); Clearview Assoc. v Clearview Gardens First Corp., 285 AD 969, 139 NYS2d 81 (1955), thereby demonstrating untrustworthiness as a real estate broker. Lawrence Black, Inc. v Cuomo, supra.; Division of Licensing Services v Eagle Financial Services, Inc., 6 DOS 94.

Myers' conduct was a fundamental breach of his fiduciary duties, which 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). Such a breach, even without the concomitant tort of conversion and violation of 19 NYCRR 175.1, is a further demonstration of untrustworthiness.

V- The complaint alleges that the respondents' acts constitute the crime of grand larceny. In order to establish the commission of that crime, the complainant must prove that the respondents obtained or withheld the money with the intent to deprive Smith and Sewell of it. Penal Law §155.05[1]. It must be proved that the respondent intended to permanently deprive Smith and Sewell of the money, and not just to temporarily withhold it. People v Hoyt, 92 AD2d 1079, 461 NYS2d 569 (1983); People v Guzman, 68 AD2d 58, 416 NYS2d 23 (1979). Great care must be taken

> "to ensure that mere suspicion is not elevated into a finding of larcenous intent. Instead, a finding of larcenous intent may be made only where that determination flows naturally and reasonably for the facts in evidence and must exclude to a moral certainty any implication that the defendant has committed a mere civil wrong." People v Luongo, 47 NY2d 418, 418 NYS2d 365, 369 (1979)(citations omitted).

The complainant presented no proof on the issue of intent, and to conclude that he did not intend just to use it for his own purposes temporarily would require undue reliance on suspicion.

VI- The respondents are also charged with having engaged in fraud and/or a fraudulent practice. In order to establish the commission of fraud, the complainant must establish that the respondents made an untrue representation of fact with knowledge that it was untrue or under circumstances that it was recklessly made, with the intent to deceive and purpose of inducing the other party to act on it, and that it was relied on to the injury or damage of the other party. 60 NY Jur 2d, Fraud and Deceit, §11. In this case the complainant was failed to establish the first element: that the respondents knew when they accepted the money from Smith and Sewell that they would not or could not convey the money to the sellers or their attorneys.

Fraudulent practices, on the other hand, "...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).

Myers accepted money from Smith and from Sewell with the stated purpose of forwarding it to the sellers or their attorneys. He then deposited the money in his operating accounts and, with the exception of one payment to the sellers' attorneys in the Smith transaction, did not use it as intended. Further, it was conclusively established that he used Sewell's money for his own business

expenses.[3] Accordingly, Myers has been shown to have engaged in fraudulent business practices. Division of Licensing Services v Eagle Financial Services, Inc., supra.

VII- The respondents are also charged with retaining an unearned commission. The only commission paid in the subject matter was that which was paid to Myers out of the proceeds of the mortgage loan which he obtained for Smith. There was no evidence offered to show that the commission was unearned.

VIII- As a corporation, Richland can be held liable for, and may have its license suspended or revoked because of, the actions of its officers in conducting its brokerage business. Roberts Real Estate v Department of State, 80 NY2d 116, 589 NYS2d 392 (1992). According to the contract of sale, Richland was the broker in the Smith transaction. The money received from Sewell was deposited in the Richland operating account. As representative broker of Richland Myers must have been an officer of the corporation. RPL §441-b[2]. Accordingly, any misconduct by Myers in the transactions is properly chargeable to Richland.

IX- Where a broker or salesperson has received money to which he or it is not entitled, the return of the money be required, together with interest, as a condition of retention or issuance of a 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).

Myers, while acting as representative broker of Richland, failed to account of $1,400.00 received from Smith. They should, therefore, be required to refund that sum, plus interest, to her. Since the exact date that the money was delivered to Myers is not clear, the interest should be calculated from April 15, 1990, the date on which Myers drafted the checks for the second installment of the down payment which he then failed to deliver to the sellers' attorneys.

Myers has also failed to account for $23,584.53 of the $34,784.53 received from Sewell and Winston Fearon. The respondents should be required to refund that sum, plus interest, to them. Interest should be calculated from September 20, 1990, the date the money was deposited.

---

[3] There is no direct evidence on how Smith's money was used. However, since the balance in his operating account decreased after the deposit of the money, it would be reasonable to infer that the money was used either in the operation of Myers' businesses or for his personal expenses.

CONCLUSIONS OF LAW

1) By failing to deposit Smith's money in an escrow account, and by depositing it in his business operating account, Myers, and through him Richland, violated 19 NYCRR 175.1 and demonstrated untrustworthiness.

2) Inasmuch as Sewell was not Myers' principal, his failure to deposit her money in an escrow account, and his deposit of that money in his business operating account, was not a violation of 19 NYCRR 175.1.

3) By depositing Smith's money in his business operating account and failing to transmit all of it to the sellers' attorneys Myers, and through him Richland, converted that money, breached their fiduciary duties as an escrow agent, and demonstrated untrustworthiness.

4) By depositing Sewell's money in his business operating account and failing to transmit it to the sellers' attorneys Myers, and through him Richland, converted that money, breached their fiduciary duties as an escrow agent, and demonstrated untrustworthiness.

5) The complainant failed to prove that the respondents committed acts which constitute the crime of grand larceny.

6) The complainant failed to prove that the respondents engaged in fraud.

7) Through his misuse of Smith's money Myers, and through him Richland, engaged in a fraudulent act.

8) Through his misuse of Sewell's money Myers, and through him Richland, engaged in a fraudulent act.

9) The complainant failed to prove that the respondents retained an unearned commission.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Trevor C. Myers and Richland Realty have demonstrated untrustworthiness and have engaged in fraudulent practices, and accordingly, pursuant to Real Property Law §441-c, their licenses as real estate brokers are revoked, effective immediately. Should they ever apply for a new license as a real estate broker or, in Myers' case, as real estate salesperson, no action shall be taken on the applications until they shall have produced proof satisfactory to the Department of State that they have refunded the sums of $1,400.00, together with interest at the legal rate for judgements (currently 9% per year)

from April 15, 1990 to Senda Smith, and $23,584.53, together with interest at the legal rate for judgements from September 20, 1990, to Angela Sewell and Winston Fearon.

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:

ALEXANDER F. TREADWELL
Secretary of State
By:

Phillip M. Sparkes
Special Deputy Secretary of State