

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-

**DOLORES R. PERRY, REAL ESTATE BROKER
REPRESENTING DELANDKIS,**

Respondent.

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This matter came on for hearing before the undersigned, Roger Schneier, on April 4, 1995 at the office of the Department of State located at 270 Broadway, New York, New York.

The respondent, of 82 Sixth Avenue, Second Floor Front, Brooklyn, New York 11217, did not appear.

The complainant was represented by Scott NeJame, Esq., Department of State, 162 Washington Avenue, Albany, New York 12231.

COMPLAINT

The complaint alleges that the respondent used a client's credit card information to make a purchase without the knowledge or authorization of the client, and that she engaged in the real estate brokerage business under unlicensed names, and thereby engaged in fraud or a fraudulent practice; committed acts which constitute the crime of petite larceny; violated Real Property Law (RPL) §§440-a and 441; and demonstrated untrustworthiness or incompetency.

FINDINGS OF FACT

1) Notice of hearing together with a copy of the complaint was served on the respondent by certified mail on February 9, 1995 (State's Ex. 1).

2) The respondent is, and at all times hereinafter mentioned was, duly licensed as a real estate broker only under the trade name "Delandkis" (State's Ex. 2).

3) On September 15, 1990 Merline Jean (now Merline Jean-Casimer) went to the respondent's office to apply to rent an apartment (State's Ex. 3). The respondent showed Ms. Jean several apartments, one of which, located at 66 6th Avenue, Brooklyn, New York, Ms. Jean applied to rent.

As part of the rental procedure Ms. Jean was required to complete a form authorizing the respondent to conduct a credit check. Ms. Jean listed the details of her Citibank Visa credit account, including the number on the card, on the form.

Ms. Jean was accepted as a tenant and took possession of the apartment on or about October 1, 1990. She was accompanied to the apartment by the respondent, who had the keys to both the apartment and the mailbox.

Several months later, without Ms. Jean's knowledge or approval, a fax machine and paper were purchased in her name and on her Visa account from Fidelity Products Co. (hereinafter "Fidelity"), a company with which she had never done business. The items were shipped, as directed by the person placing the order, to the respondent's office address, and were signed for by the respondent (State's Ex. 6).

When she learned of the unauthorized purchase Ms. Jean asked Citibank to cancel the charge, which it did. As a result, she began to receive dunning letters from Fidelity (State's Ex. 4). Those letters, although addressed to her at the respondent's office address, were found by Ms. Jean in her locked mailbox at home. Eventually, after Ms. Jean supplied them with a copy of a police report, Fidelity stopped bothering her.

Based on the foregoing, and on the fact that when she visited the respondent's office Elizabeth Vincent, the complainant's investigator, observed that the respondent had what appeared to be a new fax machine, I find that it was the respondent who ordered, received, and kept the fax machine and paper.

4) Although licensed only under the trade name Delandkis, the respondent engaged in the real estate brokerage business under the names "Delandkis Realty Company" and "Delandkis Realtors" (State's Ex. 3 and 8).

OPINION

I- The respondent is charged with having engaged in fraud or fraudulent practice. To support a finding of fraud, the complainant must have established that the respondent made a representation of fact knowing that it was false and with the intent to deceive, that the representation was relied upon, and that the representation resulted in injury. Seneca Wire & Mfg. Co. v A. B. Leach &

Co., 247 NY 1 (1928); Reno v Bull, 226 NY 546 (1919); Oches v Woods, 221 NY 335 (1917); Arthur v Griswold, 55 NY 400 (1874).

The evidence clearly establishes: that the respondent, using Ms. Jean's credit card information and falsely indicating that she was Ms. Jean, purchased and had delivered to her office a fax machine and supplies; that the respondent acted without the knowledge and consent of Ms. Jean; that the respondent intended to deceive Fidelity; that Fidelity shipped the merchandise in reliance on the respondent's representations; and that as a result Fidelity suffered injuries to the extent of the value of the unpaid for fax machine and supplies. The respondent is, therefore, guilty of having engaged in fraud.

II- The respondent's misuse of Ms. Jean's credit card information was not only an act of fraud. It also constituted the crime of petit larceny, which occurs whenever a person steals property. Penal Law §115.25. A person steals property when, with the intent to appropriate it to herself she wrongfully obtains it from the owner. Penal Law §155.05. That the respondent intended to appropriate the fax machine and paper to herself is established by her ordering and retaining them. Cf. People v Reed, 124 AD2d 836, 508 NYS2d 555 (1986), appeal denied 69 NY2d 749, 512 NYS2d 1053. That her act was wrongful must follow from the fact that she did not have authorization to use the Visa account.

III- A real estate broker who wishes to conduct brokerage business under a name other than that on her license must apply for a license under that new name. Real Property Law (RPL) §441[1][a]. Division of Licensing Services v Morse, 12 DOS 95; Division of Licensing Services v Scala, 38 DOS 94; Division of Licensing Services v Feld, 147 DOS 93; Division of Licensing Services v Cruz, 8 DOS 93; Division of Licensing Services v Fishman, 153 DOS 92; Division of Licensing Services v Selkin, 47 DOS 92; Division of Licensing Services v Tripoli, 96 DOS 91; Department of State v Prater, 29 DOS 88; Department of State v Lombardo, 30 DOS 86. The respondent was licensed only under the trade name "Delandkis." By doing using the names "Delandkis Realty Company" and "Delandkis Realtors" in her brokerage business she violated that statute.

IV- The respondent obtained Ms. Perry's Visa information while acting in a fiduciary capacity. A fiduciary relationship is "...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 respondent breached Ms. Perry's trust by using the Visa information for her own benefit and to the detriment of both Ms. Perry and Fidelity. The degree of her deviousness is emphasized by the placing in Ms. Perry's locked mailbox of letters from Fidelity addressed to her at the respondent's office. The respondent, who had a key to that mailbox, must have thought that by putting those letters in it she was somehow preventing the discovery of her theft.

The Secretary of State has great discretion in determining what should be deemed untrustworthy conduct. Untrustworthiness is clearly established where, as in this case, there has been

"such factual presentation concerning acts or conduct by the licensee ... as would warrant a conclusion of unreliability, and which establishes that any confidence or reasonable expectation of fair dealing to the general public would be misplaced." Chiano v Lomenzo, 26 AD2d 469, 275 NYS2d 658 (1966).

The respondent's conduct is inexcusable. To allow her to retain her license would be contrary to the Department of State's duty to carry out the purposes of RPL Article 12A, which include the protection of the public from dishonest persons who would perpetrate frauds on them. Dodge v Richmond, 5 AD2d 593, 173 NYS2d 786 (1958).

CONCLUSIONS OF LAW

1) By using Jean's Visa account to order the fax machine and paper without Jean's knowledge and consent the respondent engaged in an act of fraud and demonstrated untrustworthiness as a real estate broker.

2) By using Jean's Visa account to order the fax machine and paper without Jean's knowledge and consent the respondent committed the crime of petit larceny, and thereby demonstrated untrustworthiness as a real estate broker.

3) By using names for which she did not have a license to operate her real estate brokerage business the respondent violated RPL §441[1][a].

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Dolores R. Perry has engaged in an act of fraud, has violated Real Property Law §441[1][a], and has demonstrated untrustworthiness, 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:

ALEXANDER F. TREADWELL
Secretary of State
By:

Michael E. Stafford, Esq.
Chief Counsel