

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-

GARY RESIL,

Respondent.

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on May 7, 1998 at the office of the Department of State located at 270 Broadway, New York, New York.

The respondent, with a last known business address of Suffolk Associates Inc. d/b/a Re Max West, 510 Hempstead Turnpike, West Hempstead, New York 11552, did not appear.

The complainant was represented by Litigation Counsel Laurence Soronen, Esq.

COMPLAINT

The complaint alleges that the respondent, a licensed real estate salesperson, accepted a deposit on the purchase of a house which he failed to place in escrow and refused to return the deposit after the sale failed to go to contract or closing, having converted it to his own use, and accepted a deposit for the rental of an apartment which he failed to place in escrow and failed to return despite demand and entry of a judgement against him, and that he thereby violated 19 NYCRR 175.1, 175.2, and 175.3[b], engaged in fraudulent business practices, and demonstrated untrustworthiness and incompetence.

FINDINGS OF FACT

1) Notice of hearing together with a copy of the complaint was sent to the respondent at his last known business address by certified mail on March 17, 1998, and was returned by the Postal Service on March 26, 1998 marked "moved left no address" (State's Ex. 1 and 2).

2) The respondent is a duly licensed real estate salesperson pursuant to a license which will expire on September 27, 1998, but which is active inasmuch as he is not currently associated with a licensed real estate broker. From June 15, 1994 until May 21, 1996, when his association was terminated, he was licensed in association with Re Max Metro Real Estate Associates at 148-39 Hillside Avenue, Jamaica, New York 11435. The current license results from a renewal issued on September 27, 1996 (State's Ex. 1 and 8).

3) In our about February, 1996 Anil R. Beephan met with the respondent. Mr. Beephan was seeking to purchase a house in which to reside with his family. The respondent showed Mr. Beephan a house in Queen's County which Mr. Beephan expressed an interest in purchasing.

At the respondent's direction Mr. Beephan gave him \$200.00 in cash and two checks totaling \$8,000.00 (\$6,000.00 on March 28, 1996 and \$2,000 on May 11, 1996) on which the payee section was left blank. The respondent then wrote his own name in the payee section of the checks and cashed them (State's Ex. 3). The money was not placed in an escrow account.

When the closing of the sale (for which no contract was ever executed) did not take place Mr. Beephan spoke with the listing broker, who told him that the house was in contract with another party and that she was unaware of Mr. Beephan's interest. Mr. Beephan then contacted the respondent, who promised him a refund.

The respondent eventually gave Mr. Beephan a third party check for \$4,800. However, that check was dishonored by the bank (State's Ex. 3), and as of the date of the hearing none of Mr. Beephan's money, which the respondent had given to a third party, had been refunded to him.

4) On or about June 9, 1996 Rejendra Persad gave the respondent a \$550 deposit towards the purchase of a condominium apartment.¹ The money was not placed in an escrow account, and \$400 dollars of it was lent by the respondent to a third party. The sale was not consummated, and Mr. Persad asked for the return of his money. \$100 dollars was returned. The respondent agreed to return the balance, but failed to do so (State's Ex. 5, 6, 7, 8).

Mr. Persad sued the respondent in the Small Claims part of Nassau County District Court, and on January 31, 1997 was granted a default judgement for \$560.00 including costs and disbursements

¹ Although, inasmuch as he was not then associated with a licensed broker, the respondent was not properly licensed at the time of the Persad transaction, the complaint does not charge him with unlicensed activity.

(State's Ex. 1). The evidence is insufficient to support a conclusion as to whether that judgement has been satisfied.

OPINION AND CONCLUSIONS OF LAW

I- Pursuant to Real Property Law (RPL) §441-e, notice of hearing in a proceeding seeking to impose disciplinary sanctions on a real estate salesperson may be served by sending it by certified mail to the last known business address of the respondent. Thus, inasmuch as there is evidence that notice of the place, time and purpose of the hearing² was properly served, the holding of an ex parte quasi-judicial administrative hearing was permissible. *Patterson v Department of State*, 36 AD2d 616, 312 NYS2d 300 (1970); *Matter of the Application of Rose Ann Weis*, 118 DOS 93.

II- A real estate broker or salesperson has the fiduciary duty of handling his or its clients' or customers' funds with the utmost scrupulousness, and must take extreme care to assure that the rights of the lawful owners of those funds will not be jeopardized. *Department of State v Mittleberg*, 61 DOS 86, conf'd sub nom *Mittleberg v Shaffer*, 141 A.D.2d 645, 529 N.Y.S.2d 545 (1988); *Division of Licensing Services v Pellittieri*, 77 DOS 92; *Division of Licensing Services v Tripoli*, 96 DO 91. That duty is implemented through 19 NYCRR 175.1, which forbids the commingling of brokers' and clients' funds and requires that client funds be maintained in a special bank account, and 19 NYCRR 175.2, which requires that a broker account for trust funds, which regulations were violated by the respondent when he failed to place the funds received from Mr. Beephan and Mr. Persad in such an account.^{3,4} The purpose of those regulations "is to assure that the rights of the lawful owners of escrow funds are not jeopardized by an agent's

² Although the complaint describes the Persad transaction as involving a rental deposit, while the evidence establishes that it was a purchase deposit, the complaint, particularly when read in light of the respondent's written statement (State's Ex. 7), gives the respondent sufficient notice of the specific transaction and the violations charged.

³ The complaint also charges that the respondent violated 19 NYCRR 175.3. That regulation, however, refers to rentals, and is not, therefore, applicable here.

⁴ While 19 NYCRR 175.1 and 175.2 refer only to brokers, they also apply to real estate salespersons, who may accept deposits and other funds from clients and customers while engaged in the real estate brokerage business only when licensed in association with and acting as the surrogates of, real estate brokers, RPL §§440[3], 441[1-A][b], 441-d, 442-a, and 442-b, 19 NYCRR 175.13 and 175.21, and who are, therefore, obligated to handle and safeguard those funds in the same manner as are real estate brokers.

mismanagement of funds entrusted to the agent's care" *Division of Licensing Services v Pozzanghera*, 141 DOS 93, 7, and their violation is a demonstration of untrustworthiness and incompetency.

The use by a real estate broker or salesperson for his or its own purposes of money received from and belonging to other persons warrants the revocation of the broker's or salesperson's license. *Lawrence Black, Inc. v Cuomo*, 65 A.D.2d 845, 410 N.Y.S.2d 158 (1978), *aff'd.* 48 N.Y.2d 774, 423 N.Y.S.2d 920. "The imposition of any lesser penalty would unduly jeopardize the welfare of any persons who might do business with the respondents in the future." *Division of Licensing Services v Pellittieri*, *supra* at p. 3.

III- 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). By accepting money from Mr. Beephan and Mr. Persad under the pretext that it would be applied to the purchase of real property and then applying it differently, the respondent engaged in fraudulent practices and further demonstrated untrustworthiness.

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

V- "The failure to pay a judgement which has been lawfully obtained, without a showing that he is unable to do so, is a demonstration of untrustworthiness by a real estate broker. *Department of State v Feldman*, 113 DOS 80, *conf'd. sub nom Feldman v Department of State*, 81 AD2d 553, 440 NYS2d 541 (1981); *Division of Licensing Services v Shulkin*, 40 DOS 90; *Division of Licensing Services v Janus*, 33 DOS 89." *Division of Licensing Services v Harrington*, 123 DOS 93 at 4. However, the most recent evidence before the tribunal with regards to the Persad judgement is an

investigator's report dated August 20, 1997 (State's Ex. 8).⁵ That provides an insufficient basis to support a conclusion that as of a date more than eight months later the judgement still had not been satisfied. His future licensure may, however, be conditioned upon his submitting proof that the judgement has, in fact, been satisfied.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Gary Resil has demonstrated untrustworthiness and incompetency and has engaged in fraudulent practices, and accordingly, pursuant to Real Property Law §441-c, his license as a real estate salesperson is revoked, effective immediately. Should he ever re-apply for a license as a real estate salesperson, or apply for a license as a real estate broker, no action shall be taken on such application unless and until he shall produce proof satisfactory to the Department of State that he has fully satisfied the judgment in *Persad v Resil*, District Court of Nassau County Small Claims No. 2317, 1996, and has refunded the following sums to Anil R. Beephan: \$6,200 plus interest at the legal rate for judgements (currently 9%) from March 28, 1996, and \$2,000 plus interest at the legal rate for judgements from May 11, 1996. The respondent is directed to immediately send his license certificate and pocket card 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: May 8, 1998

⁵ Mr. Persad was not present to testify at the hearing.