

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-

**ALEXANDER REYES, INDIVIDUALLY, d/b/a  
ALEXANDER REYES REALTY, and as  
REPRESENTATIVE OF ALEXANDER ONE STOP  
REALTY, INC.,**

Respondent.

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on August 4 and 5 and November 18, 1997 at the office of the Department of State located at 270 Broadway, New York, New York.

The respondent, of 724 Main Street, Islip, New York 11751, and 399 Mayflower Avenue, Brentwood, New York 11717, having been advised of his right to be represented by an attorney chose to represent himself.

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

**COMPLAINT**

The complaint alleges that in acting as managing agent of an apartment building the respondent: Wrongfully closed the bank account which was to be used for the deposit of income and payment of expenses; commingled income with his personal and/or business accounts unrelated to the property; wrongfully failed to use insurance proceeds to have a fire damaged apartment repaired, and failed to account for those proceeds; paid himself management fees in excess of the agreed upon 5%; failed and refused to provide his principals with a complete accounting; failed to properly monitor the charges for oil assessed by the supplier which he retained; failed to account for, substantiate or justify the yearly amounts paid for oil and the unpaid balance claimed by the supplier; failed to have repairs made to the property and failed and refused to

provide proof that claimed repairs had been made; and failed to pay an insurance premium which he claimed to have paid and/or converted the monies for such payment, and failed and refused to reimburse his principals when they paid a judgement for that premium.

#### **FINDINGS OF FACT**

1) Notices of hearing together with copies of the complaint were served on the respondent by certified mail delivered on May 5, 1997 (State's Ex. 1).

2) The respondent is currently licensed as a real estate broker representing Alexander One Stop Realty, Inc., 724 Islip Avenue, Central Islip, New York 11751 (State's Ex. 2).

3) In or about October, 1985 the respondent, at the time acting as representative of Fifth Ave. Management Corp (hereinafter "Fifth Avenue"), entered into an oral agreement with John Pennachio, William Naddeo and James Reilly, doing business as 224 South Third Street Associates (hereinafter "Associates"), to manage a six-story building containing 33 apartments and 4 stores owned by Associates at 224-226 South Third Street, Brooklyn, New York (hereinafter "the building"). The agreement provided that in return for collecting the rents and seeing to the overall operation of the property the respondent was to receive a commission of 5% of the rents collected.

4) All rents received in the management of the building were to be deposited by the respondent in, and all expenses were to be paid from, an account established at Citibank by Associates with the respondent as an authorized signatory (State's Ex. 3). The respondent used that account for several months (State's Ex. 4 and 5), but then closed it out and began depositing the rents in and making management expenditures from Fifth Avenue's operating account, an account into which he also deposited money related to, and from which he made payments for, matters not related to his management of the building (State's Ex. 9, 16, and 17). According to the respondent, this was done with the knowledge of Associates because rent money orders were being received made payable to Fifth Avenue and had to be deposited in Fifth Avenue's account. When he had to wait for them to clear so that he could redeposit the money in the Citibank account cash flow problems developed. The respondent was aware that this procedure was improper and acknowledges that he could have opened a separate escrow account to handle the rent payments.

5) During the period of time that the respondent managed the building, which ended in or about August, 1989, he collected \$329,126.02 in rent, and paid himself \$28,048.00 in commissions (State's Ex. 6). Since 5% of the rent collected is \$16,456.30, the respondent paid himself commissions which exceeded the agreed upon amount by \$11,591.70.

6) After the respondent's management of the building ended, and at about the same time Associates was in the process of selling it, they contacted the respondent in an attempt to obtain the management records. On January 19, 1990 they had their attorney write to him with a list of the required documents (State's Ex. 7). In response, the respondent faxed a letter to the attorney claiming that he was owed money by Associates.

On January 23, 1990 Mr. Pennachio and Mr. Naddeo wrote to the Department of State to complain of the respondent's conduct (State's Ex. 8). The respondent was subsequently contacted the complainant's investigator, and records were then turned over. Those records do not, however, fully account for the expenditures which the respondent claims to have made for the maintenance and repair of the building.

7) Although the respondent claims to have expended large sums on repairs and maintenance of the building (State's Ex. 6), there were numerous complaints from tenants about the condition of their apartments (State's Ex. 10 and 11), and the building was not in good repair when its operation was turned over to the new owner.

8) Subsequent to their sale of the building the respondents received a demand from Edward T. Minor Company, Inc. (hereinafter "Minor"), the fuel oil supplier for the building, for \$33,000 which Minor claimed was owing on the oil bill. To secure the alleged debt Associates gave Minor a mortgage on other property which it owned (State's Ex. 12), but subsequently sued Minor on a claim of fraud, and is currently seeking an award of compensatory and punitive damages and to have the mortgage declared void (State's Ex. 13).

9) On August 23, 1990 Mr. Pennachio received a demand for a past due insurance premium of \$7,622.00, a sum which the respondent claimed to have paid out of the income of the building, and on January 25, 1991 a judgement in the amount of \$9,263.73 was entered against Mr. Pennachio on that claim in Civil Court, County of New York (State's Ex. 14).<sup>1</sup> Mr. Pennachio subsequently satisfied that judgement (State's Ex. 22).

10) During the time that the respondent was managing the building there was a fire in one of the apartments. The insurance proceeds of \$9,614.00 (State's Ex. 15) were turned over to the

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<sup>1</sup> The record does not indicate whether this judgement was entered after trial or after default. If there was a trial, there is no indication as to what evidence was presented in defense. The complainant has presented no evidence, or even argument, to refute the respondent's claim that the insurance premium was in fact paid by checks number 1813, 1877, 1911, and 2302, and that the cancelled checks were turned over to Associates.

respondent, but he did not have the apartment repaired. While the respondent claims that he used the money for the general operations of the building, and while that is reflected in the financial statements provided by him (State's Ex. 6), the poor condition of the building does not support that claim.

#### OPINION

I- A real estate broker has the fiduciary duty of handling his or its clients' 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, which regulation was violated by the respondent when he placed the rent received from tenants of the building in his operating account. The purpose of that regulation "is to assure that the rights of the lawful owners of escrow funds are not jeopardized by an agent's mismanagement of funds entrusted to the agent's care" *Division of Licensing Services v Pozzanghera*, 141 DOS 93, 7, and its violation is a demonstration of untrustworthiness and incompetency.

The respondent claims, and it may well be, that Associates, and in particular Mr. Pennachio, were aware of his use of his operating account. That, however, while perhaps mitigating the seriousness of this violation, does not excuse it. Nor is the violation excused by the claim that the use of his operating account was required in order to avoid a cash flow problem, since that problem could have been dealt with either by the opening by the respondent of a special account. In fact, the respondent has acknowledged the wrongfulness of the commingling.

II- In his management of the building, Reyes served in the capacity of agent for Associates, his principal. 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).

The respondent breached his fiduciary duties to Associates in several ways: He has failed to fully account for the insurance proceeds arising out of the apartment fire; he paid himself management fees which were well in excess of the amount which he had agreed to accept; and he has failed to fully account for claimed management expenditures.

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

IV- The complaint alleges that the respondent wrongfully closed the Citibank account opened by Associates for the management of the building. The evidence, however, is equivocal on the issue of whether Associates was aware of, and consented to, the closing of that account. Accordingly, that charge should be dismissed.

V- The complaint alleges that the respondent failed to properly monitor charges assessed for oil and failed to account for, substantiate or justify the yearly amounts paid for oil and the unpaid balance claimed by the supplier. The evidence presented on that issue is far from conclusive. The complainant argues that, based on the price of oil and the normal consumption of a building such as that involved herein, the amount of oil claimed to have been used is excessive. The respondent argues that based on the figures presented the claimed consumption was reasonable. Both arguments are reasonable. No evidence was presented to show that if the claim of an unpaid balance was improper the respondent was in any way responsible for that claim. It is not possible, therefore, for this tribunal to determine from the facts presented whether the expenditures for oil were, or were not, proper.

VI- The evidence is insufficient to lead to the conclusion that the respondent failed to pay the allegedly unpaid insurance premium. The fact that the insurance company claimed that the premium had not been paid is certainly not conclusive. Neither, absent any evidence of how the insurance company came to be granted a judgement for that premium, does the fact that Mr. Pennachio satisfied that judgment prove that the premium had not been paid. There is no evidence that the respondent was ever given a chance to refute the insurance company's claim before Mr. Pennachio made the

payment. Accordingly, the complainant has failed to meet its burden of proof on this issue.

VII- Where a broker has received money to which he is not entitled, or has failed to account for the proper use of money which he received in his capacity of agent, he may be required to properly account for or return that money together with interest, as a condition of retention 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).

#### CONCLUSIONS OF LAW

1) By depositing in his operating account, and not in a special account, rents received from tenants of the building which he was managing as agent for Associates, the respondent violated 19 NYCRR 175.1 and demonstrated untrustworthiness and incompetency as a real estate broker.

2) By failing to fully account for the insurance proceeds arising out of the apartment fire, paying himself management fees which were well in excess of the amount which he had agreed to accept, and failing to fully account for claimed management expenditures the respondent breached his fiduciary duties to Associates and demonstrated untrustworthiness and incompetency as a real estate broker.

3) The complainant failed to prove by substantial evidence that: The respondent wrongfully closed the Citibank account; failed to properly monitor charges assessed for oil; failed to account for, substantiate or justify the yearly amounts paid for oil and the unpaid balance claimed by the supplier; and failed to pay the allegedly unpaid insurance premium. Accordingly, those charges must be, and are, dismissed.

4) The respondent has retained excess commissions and has failed to fully account for money received while managing the building, and his license should be suspended pending a full accounting and repayment.

#### DETERMINATION

**WHEREFORE, IT IS HEREBY DETERMINED THAT** Alexander Reyes has demonstrated untrustworthiness and incompetency as a real estate broker, and accordingly, pursuant to Real Property Law §441-c, his license(s) as a real estate broker is/are suspended for a period commencing on January 1, 1998 and terminating six months after the receipt by the Department of State of his license certificate(s) and pocket card(s) and until such time as he has produced proof

satisfactory to the Department of State that he has refunded the sum of \$11,591.70 together with interest from January 1, 1998 at the legal rate for judgments (currently 9%) to 224 South Third Street Associates and that he has fully accounted for all money which he claims to have expended for the maintenance and repair, but not for the purchase of fuel oil, for the building known as 224-226 South Third Street, Brooklyn, New York. The respondent is directed to send his 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: November 20, 1997