

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-

**MARY ZULAWSKI, HARGESHEIMER AGENCY INC.
d/b/a REALTY WORLD REALTY CENTER,
ANN DUNNING, HUNT REAL ESTATE CORP. and
FRANK COMMISSO,**

Respondents.

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Pursuant to the designation duly made by the Hon. Gail S. Shaffer, Secretary of State, the above noted matter came on for hearing before the undersigned, Roger Schneier, on April 21, 1993 at the New York State Office Building located at 65 Court Street, Buffalo, New York.

Mary Zulawski, of Realty World Center, 182 Lake Street, Hamburg, New York 14075, was represented by Ann M. Boland, Esq., Yellen & Boland, 1640 Statler Towers, Buffalo, New York 14202-3016.

Hargesheimer Agency, Inc. (Hargesheimer), of 182 Lake Street, Hamburg, New York 14075, and Frank Commisso, of 1820 Northwood Drive, Williamsville, New York 14221, were represented by Michael T. Hagelin, Esq., Suite 200, Olympic Towers, 300 Pearl Street, Buffalo, New York 14202-2500.

Ann Dunning and Hunt Real Estate Corp. (Hunt), of 430 Dick Road, Depew, New York 14043, were represented by Harold M. Halpern, of Borins, Halpern & Stromberg, 415 Brisbane Building, 403 Main Street, Buffalo, New York 14203.

The complainant was represented by Timothy Mahar, Esq.

At the close of the complainant's case the respondents moved for dismissal of the charges on the grounds that the complainant had failed to establish a prima facie case.

COMPLAINT

The complaint alleges: that Zulawski and Commisso, at the time in question licensed respectively as an associate real estate broker and as a real estate salesperson associated with Hargesheimer, breached their duty to act with honesty, forthrightness and good faith toward all parties involved in a real estate transaction in that they told the sellers that the prospective buyers were pre-approved and pre-qualified for a mortgage loan, but failed to inform them that the pre-approval and pre-qualification were based on undocumented and unverified information and were, therefore, contingent, and in that Commisso misinformed the sellers and Dunning as to the income of one of the buyers; that Dunning, at the time licensed as a real estate salesperson associated with Hunt, breached her fiduciary obligations as an agent to exercise that care, skill and competency necessary to insure the transaction of the business of the agency to the best advantage of her principal, in that she failed to take any steps to ascertain the financial qualifications of contract buyers of her principal's property, or to verify that the pre-approval and pre-qualification of the prospective buyers by a mortgage lender were documented, verified, or in writing; that Hunt is liable for the conduct of Dunning; and that Hargesheimer is liable for the conduct Zulawski and Commisso.

FINDINGS OF FACT

1) Notices of hearing together with copies of the complaint were served on the respondents by certified mail (Comp. Ex. 1).

2) Mary Zulawski is duly licensed as an associate real estate broker associated with Realty World Realty 1, Inc. d/b/a Realty World Realty Center, 182 Lake Street, Hamburg, New York. At all times hereinafter mentioned she was licensed as an associate real estate broker associated with Hargesheimer (Comp. Ex. 3).

Hargesheimer is, and at all times hereinafter mentioned was, duly licensed as a real estate broker (Comp. Ex. 4).

Ann Dunning is duly licensed as an associate real estate broker associated with Hunt. At all times hereinafter mentioned she was licensed as a real estate salesperson associated with Hunt (Comp. Ex. 5).

Hunt is, and at all times hereinafter mentioned was, duly licensed as a real estate broker (Comp. Ex. 6).

From February 27, 1990 until April 12, 1990 Commisso was duly licensed as a real estate salesperson in association with Hargesheimer. On April 12, 1990 he changed his association to Kaeser Preferred Properties, Inc. He terminated that association on February 28, 1991, and did not enter into association with a new broker. His license expired on February 27, 1992 and has not been renewed (Comp. Ex. 2).

3) On March 3, 1990 Deborah Deiboldt entered into an agreement with Dunning, who was acting on behalf of Hunt, pursuant to which Hunt agreed to act as her agent in seeking a purchaser for her residence in Lancaster, New York (Comp. Ex. 7). A listing of the property was distributed through the local multiple listing service, and as a result Commisso, acting on behalf of Hargesheimer, showed the house to Michael Gimlin and Gena Moran.

On April 3, 1990 Commisso presented to Deiboldt and Dunning an offer by Gimlin and Moran to purchase the house for \$50,000.00, contingent upon their obtaining a mortgage loan in the amount of \$47,500.00. Deiboldt countered with an offer to sell the house for \$52,000.00, with a mortgage of \$48,500.00. Agreement was reached by the parties, and a contract was signed (Comp. Ex. 8).

In his discussions with Commisso prior to making the offer, Gimlin told Commisso that in the previous year he had an income of \$50,000.00 and that Moran, his fiancée, had an income of \$17,000.00. Commisso gave that information to Deiboldt and Dunning. Gimlin and Moran had also been prequalified by a mortgage lender, based on the same information that Gimlin had given Commisso, and Commisso gave Deiboldt and Dunning that information also. At no time was anyone told that Gimlin and Moran had been preapproved for a mortgage. All of the parties were aware that, although they believed that Gimlin and Moran would receive the mortgage loan, the prequalification was contingent and the loan might be denied.

Over the ensuing period of time there were several changes made in the contract: to adjust the downpayment (Comp. Ex. 9), to reduce the price to \$50,000.00 to accommodate a lender's appraisal in that amount (Resp. Ex. A), and to extend the deadline for the mortgage commitment (Comp. Ex. 11). Eventually, however, on June 1, 1990, the loan was denied for failure to establish sufficient income (Resp. Ex. B). That denial was the result of Gimlin's failure to give copies of his tax returns to the lender. Gimlin and Moran used the denial as grounds to get out of the contract, since by that time Gimlin's income had increased substantially and they felt that they wished to purchase a bigger house.

Deiboldt immediately put her house back on the market, with an offer to pay an extra \$1000.00 commission for a quick sale, and on June 9, 1990 entered into a contract to sell it to new buyers for \$50,000.00 (Comp. Ex. 10). That contract called for a closing on August 11, 1990, approximately two weeks later than the closing date set forth in the contract with Gimlin and Moran, and title did in fact close sometime in August.

OPINION

In order to establish a prima facie case there are several things which the complainant must prove:

1) That Commisso and Zulawski misled Deiboldt and Dunning about the significance of the mortgage prequalification and told them that the mortgage had been preapproved. First, the record is devoid of any evidence that Zulawski had any contact with Deiboldt and Dunning on that issue or that, beyond having told Commisso, who was a new salesperson, that it was important to have the buyers prequalified, she had anything to do with that prequalification. In any case, it is clear that both Deiboldt and Dunning, while expecting that the loan would be granted, understood that it was not guaranteed and that the sale was contingent on the granting of the loan. It is also clear that at no time was the term "preapproved" used by the respondents;

2) That Commisso knowingly misinformed Deiboldt and Dunning as to Gimlin's income. Gimlin testified that his income in the year preceding the offer was approximately \$50,000.00 and that that was what he told Commisso, and Commisso repeated that in his testimony. The only evidence to the contrary was the testimony of the complainant's investigator that Gimlin had told him, in 1990, that he (Gimlin) had told Commisso that his income had been approximately \$40,000.00. If that hearsay evidence is permitted to impeach Gimlin's testimony, then the only non-hearsay evidence on the issue is Commisso's testimony, which if credited resolves the issue in the respondents' favor. If Commisso's testimony is disregarded, then the record is devoid of any substantial proof on the issue;

3) That Dunning breached her fiduciary obligations to Deiboldt by failing to determine independently whether Gimlin and Moran were financially qualified to complete the purchase and were, in fact, prequalified. The complainant has failed to present any evidence that a real estate broker or salesperson has any obligation to make an independent investigation of a prospective buyer's claimed income and expenses, or that, contrary to the testimony of Dunning, it is the practice in the brokerage industry to do so. Absent such proof, there is no way in which this tribunal can impose such an obligation on Dunning; and

4) That Hargesheimer and Hunt are liable for the misconduct of Commisso, Zulawski, and Dunning. Inasmuch as the complainant has failed to establish any wrongdoing on the part of Commisso, Zulawski and Dunning, there can be no finding of such liability.

CONCLUSIONS OF LAW

The complainant has failed to prove the charges by substantial evidence and, accordingly, the respondents' motion should be granted and the complaint should be dismissed. State Administrative Procedure Act §306(1); 19 NYCRR 400.6.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT the charges herein against Mary Zulawski, Hargesheimer Agency Inc., Ann Dunning, Hunt Real Estate Corp. and Frank Commisso are dismissed.

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:

GAIL S. SHAFFER
Secretary of State
By:

James N. Baldwin
Executive Deputy Secretary of State