

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

Complaint No.: 2019-1448

-against-

LE-ANN VICQUERY,

Respondent.

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The above noted matter came on for a virtual hearing before the undersigned, John Kenny, on January 28, 2021 at the office of the Department of State (“Department”) located at 99 Washington Avenue, Albany, New York.

The respondent was represented by E. Christopher Murray, Esq., an attorney with the law firm of Ruskin Moscou Faltischek, P.C., with an office located at 1425 RXR Plaza, Uniondale, New York 11556.

The Division of Licensing Services (“DLS”) was represented by Matthew Wolf, Esq.

COMPLAINT

The complaint alleges that by engaging in unlawful discriminatory practices proscribed by federal, state or local law, the respondent has engaged in conduct demonstrating untrustworthiness and/or incompetency in violation of Real Property Law (RPL) §441-c and 19 NYCRR §175.17 (b). The DLS further alleges that the respondent engaged in the practice of racial steering and disparate treatment by the use of statements made to both the minority tester and the white tester. In a Post-Hearing Brief submitted by the DLS, it argues, in part, that an agency relationship was established between the respondent and a co-worker, and that the respondent is liable for the discriminatory acts engaged in by the co-worker through additional acts of racial steering.

FINDINGS OF FACT

1) The Notice of Hearing and Complaint was served by certified and regular mail on November 5, 2020 to the respondent at her last known business address as per the records of the DLS (State's Ex. 1). The respondent acknowledged receiving the Notice of Hearing and Complaint prior to the hearing (Transcript at 6).

2) The respondent was licensed as an associate broker, UID #103012113947, who was associated with VORO LLC, and whose license expired on November 3, 2020 (State's Ex. 2).

Newsday Article

3) On or about November 17, 2019, Newsday published an article and posted video on its website in connection with the report Long Island Divided. The purpose of the Newsday article was to expose the disparate treatment of minorities by real estate licensees on Long Island. A licensee featured in the article was respondent Le-Ann Vicquery who was associated with the real estate firm of Keller Williams.

4) The article was based, in large part, on tests conducted by actors or other individuals, who posed as prospective residential real estate buyers. The tests were conducted on behalf of Newsday to uncover discriminatory conduct. For each test, there was a minority and white tester, both of whom were equipped with hidden video cameras, and met with a real estate licensee at two different times.

5) The Newsday article identified the test involving the respondent as Test 96. The article alleges that during the time period from November 2016 through January 2017, respondent Vicquery steered Mr. Richard Helling, the white tester, away from Brentwood, New York, which is a minority community, while encouraging Mr. Kelvin Tune, the minority tester, to look at homes in Brentwood (see Newsday article at <https://projects.newsday.com/long-island/real-estate-agents-investigation/>). Newsday Test Video #96, dated November 18, 2016, is the video of Mr. Tune's meeting with the respondent at her office on November 18th (State's Ex. 3).

6) In reference to Test 96, the article indicates the respondent gave the minority tester 37 listings and the white tester 11 listings with the following statistical information:
A. Listings Given to Minority Tester – 37, Census Tracts: 31% White on Average
B. Listings Given to White Tester – 11, Census Tracts: 86% White on Average

Test 96

7) During an in office meeting at Keller Williams on November 18, 2016, Mr. Tune stated that he was "looking for homes in Brentwood" and within "a thirty minute radius" of Brentwood (Newsday video timestamp 2:50, 5:20). Mr. Tune told the respondent that "he currently lives in New York City near Union Square" (Newsday video timestamp 3:34). Mr. Tune indicated that "his price range for a home was \$400,000.00" (Newsday video timestamp 9:04) and that he didn't want the house to need "too much work" (Newsday video timestamp 9:15). During the

conversation, the respondent remarked to Mr. Tune, “I have to tell you, my clients in Brentwood are the nicest clients... I always tell everybody that every time I get a new listing in Brentwood, I get so excited because they are the nicest people.” (“Testing the Divide,” Newsday video timestamp 3:50). The respondent also suggested Deer Park for consideration (Newsday video timestamp 11:27). The respondent explained to Mr. Tune that she worked with a partner, Jean Gillin. She informed him that they worked on clients together and that Ms. Gillin would be available whenever she was not, and that Ms. Gillin would be copied on all communications so that they would each be up to date and able to serve the client. She indicated that her business card would have both names on them (Newsday video timestamp 13:34).

8) On December 6, 2016, Ms. Gillin sent an email to Mr. Tune stating, in part, “Here are a few homes with your criteria” (Resp. Ex. A). On December 8, 2016, Mr. Tune told respondent that he was most interested in the Nesconset and Brentwood homes. This particular correspondence continues through December 9, 2016 and discusses plans for visiting both properties. The last email correspondence between Mr. Tune and Ms. Gillin was December 14, 2016. In that email, Mr. Tune indicated he would reach out again, but did not (Resp. Ex. B).

9) During a meeting at an eatery on January 16, 2017, Mr. Helling told the respondent he is in Long Island for the day to visit his mother-in-law, who is in a nursing home in Brentwood, and that we “want to be close to that, within a half-hour drive” (Newsday video timestamp 11:00, 13:00). Mr. Helling stated to the respondent that he is “from Seattle and currently lives in New York City” (January 16, 2017, Newsday video timestamp 1:04). Mr. Helling stated that “his price range for a home was \$400,000” (Newsday video timestamp – 25:40). Mr. Helling told the respondent that he was looking for a home with “not too much work, a little cosmetic is ok, not a total fixer upper” (Newsday video timestamp 17:37). The respondent did not make any positive comments or mention any positive experiences involving her clients in Brentwood during her meeting with Mr. Helling.

10) Subsequent to their initial meeting, the respondent took Mr. Helling to a property located in Ronkonkoma (Transcript at 122, 136). Mr. Helling indicated, again, that he was interested in Brentwood homes and told the respondent he found two listings in Brentwood. The respondent offered to look into the listings for him (Transcript at 134).

11) On the same day as the Ronkonkoma visit, the respondent sent Mr. Helling a text warning him to look into gang killings in Brentwood (Transcript at 137). The respondent did not send the same warning to Mr. Tune.

Department’s Investigation

12) Investigator Francia Justinvil was assigned to investigate Newsday’s claims against the respondent. Her testimony was limited to her recollection of her interview of the respondent and her recollection of the contents of the Newsday article, which she previously read. Although she testified that she would typically interview witnesses as part of an investigation (Transcript at 17, 18), in the present case, she did not interview Mr. Tune or Mr. Helling; she interviewed no one but the respondent (Transcript at 60, 61).

13) Investigator Justinvil did not receive or examine any of the listings referenced in the Newsday article or in the complaint in this matter. Regarding the listings, she testified only to what she read in the Newsday article and to her interview of the respondent.

14) Under oath, the investigator answered, during repeated questioning on direct examination, she could not “recall exactly” the respondent’s statements on the number of listings but that she believed the respondent told her she gave twenty-seven listings to Mr. Tune and zero to Mr. Helling (Transcript at 42). At one point, the hearing presenter asked, “what if anything did Ms. Vicquery say about twenty-seven listings in Brentwood she gave to the minority tester?” In response, the investigator answered, “I’m sorry. I don’t understand your question.” Ultimately, after the leading question was rephrased and posed multiple times with only minor variations, Investigator Justinvil testified that the respondent had “confirmed” the claim that she gave twenty-seven Brentwood listings to the minority tester (Transcript at 42).

15) Overall, the investigator appeared to struggle with her recollection of the details of her conversation with the respondent. In consideration of the content of her testimony and the manner in which she testified, I find her testimony regarding the statements the respondent made during the interview are not credible.

Respondent’s Testimony

16) The respondent testified that she told Mr. Tune that her clients in Brentwood “were the nicest people” because that has been her experience (Transcript at 108). No testimony was elicited or offered on direct or cross examination to explain why she did not make similar statements to Mr. Helling.

17) The respondent testified that after the initial appointment with Mr. Tune on November 18, 2016, she never had any additional contact with him except that she was copied on the email exchanges between Ms. Gillin and Mr. Tune. The respondent testified that she did not have copies of the emails with the listings because the listings were generated from the Multiple Listing Service and that the link for those listings expires two weeks after they are generated (Transcript at 133). She testified that she never directly provided any listings to Mr. Tune and that she never showed him any homes (Transcript at 114, 132, 159, 160; State’s Ex. 6).

18) When questioned about two Brentwood listings Mr. Helling gave to her, the respondent testified that she did not show him the homes because they were no longer available (Transcript at 134, 139).

19) The respondent testified that she gave Mr. Helling listings, but she did not recall how many. When asked if it was more than ten listings, she said she did not remember. When questioned whether the number could have been zero, the respondent testified, “It could be possibly because a lot of them need a lot – need a lot of work and he was looking for something that was totally updated, and that’s – something within that price range is unrealistic.” (Transcript at 132).

20) Regarding the text the respondent sent to Mr. Helling, she testified that she had seen a gang-related news report the same day she took him see a home in Ronkonkoma. She testified she thought to text Mr. Helling, in part, because he indicated that he was from Seattle and not familiar with Long Island. She also testified that they had established a business relationship, citing the listings she gave to him and the personal nature of some of their conversation at the first meeting (Transcript at 122, 123, 137, 138). She explained she had not texted Mr. Tune because there was no communication with Mr. Tune since December 14, 2016 and because she personally had not had any direct contact with Mr. Tune since the very first visit on November 18, 2016 (Transcript at 114, 120).

OPINION

I- As the party that initiated the hearing, the burden is on the complainant to prove, by substantial evidence, the truth of the charges set forth in the complaint. State Administrative Procedure Act §306(1). Substantial evidence “means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact... More than seeming or imaginary, it is less than a preponderance of the evidence, overwhelming evidence or evidence beyond a reasonable doubt (citations omitted).” 300 *Gramatan Avenue Associates v. State Div. of Human Rights*, 45 NY2d 176, 408 NYS2d 54, 56-57 (1978); *Tutuianu v. new York State*, 22 AD3d 503, 802 NYS2d 465 (2nd Dept. 2005). “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 AD2d 719, 465 NYS2d 365, 366 (1983), quoting 300 *Gramatan Avenue Associates, supra*, 408 NYS2d at 57.

II- The Department of State retains jurisdiction to conduct this proceeding even though the respondent’s license has expired. The respondent was a licensed real estate associate broker on November 18, 2016 and January 16, 2017 when she met with the testers. *Albert Mendel & Sons, Inc. v. NYS Department of Agriculture and Markets*, 90 AD2d 567, 455 NYS2d 867 (3rd Dept. 1982); *Maine Sugar of Montezuma, Inc. v. Wickham*, 37 AD2d 381, 325 NYS2d 858 (3rd Dept. 1971).

III- To qualify for a real estate agent’s license, the respondent must be both trustworthy and competent in order “to safeguard the interests of the public.” See Real Property Law § 441 (b) (emphasis supplied). Section 441-c of the Real Property Law (“Powers of the department”) provides in pertinent part: “The Department of State may revoke the license of a real estate broker or salesperson or suspend the same, for such period as the department may deem proper, or in lieu thereof may impose a fine not exceeding one thousand dollars payable to the Department of State, or a reprimand...if such licensee... *has demonstrated untrustworthiness or incompetency to act as a real estate broker or salesperson...*” Real Property Law §441-c (1)(a) (emphasis supplied).

IV- 19 NYCRR §175.17 (b) provides that “No broker or salesperson shall engage in an unlawful discriminatory practice, as proscribed by any Federal, State, or local law applicable to the activities of real estate licensees in New York State. A finding by any Federal, State, or local agency or court of competent jurisdiction that a real estate broker or salesperson has engaged in unlawful discriminatory practice in the performance of licensed real estate activities shall be presumptive evidence of untrustworthiness and will subject such licensee to discipline, including

a proceeding for revocation. Nothing herein shall limit or restrict the department from otherwise exercising its authority pursuant to section 441-c of the Real Property Law.”

The basis of the evidence submitted by the DLS stems primarily from the Newsday article and the videos. It is well established that hearsay evidence is permitted in an administrative proceeding and, under certain circumstances, may constitute an agency’s entire case. *Posner v. Division of Licensing Services*, 37 DOS APP 09 (2009); *Today’s Lounge of Oneonta, Inc. v. New York State Liq. Auth.*, 103 A.D.3d 1082, 1083 (3d Dep’t 2013). Both unsworn and oral statements may be sufficient. *Diehsner v. Schenectady City School Distr.*, 152 A.D.2d 796, 797 (3d Dep’t 1989). However, an administrative determination may be based entirely on hearsay evidence only if it is “sufficiently relevant and probative” or “sufficiently reliable” and is not otherwise “seriously controverted.” *Doctor v. NYS Office of Alcoholism and Substance Abuse Services*, 112 A.D.3d 1020, 1022 (3d Dep’t 2017); see also *Division of Licensing Services v. Sottile*, 19 DOS 91 (1991) (to be admissible in an administrative hearing, the hearsay evidence must be “reliable, relevant, and probative”); *Sowa v. Looney*, 23 N.Y.2d 329, 333 (1968) (“All relevant, material, and reliable evidence which will contribute to an informed result should be admissible in a disciplinary proceeding”). In determining whether the evidence presented constitutes substantial evidence, [t]he question is whether the hearsay introduced is the kind of evidence on which responsible persons are accustomed to rely on.” *Diehsner*, 152 A.D.2d at 797 (internal questions omitted). While hearsay is permissible in an administrative hearing, the hearsay evidence must be relevant, probative, and reliable. The article contains hearsay statements claiming the respondent and Ms. Gillin provided particular listings to the testers. However, the listings themselves were never introduced and the testers, who have actual knowledge of the listings, were not called to testify. The testers were also not interviewed as part of Ms. Justinvil’s investigation. The Newsday article is relevant, but its probative value is limited, and it is not sufficiently reliable.

The respondent testified credibly that she did not directly give Mr. Tune any listings, could not recall the number of listings she provided to Mr. Helling and that she no longer had access to the listings. In contrast, her testimony that she had difficulty finding Brentwood listings for Mr. Helling because he wanted a house that was “completely updated” was not credible and not supported by the video evidence. She also made a thin argument that the testers gave different criteria in that Mr. Helling said he wanted to be 30 minutes “within” Brentwood while Mr. Tune stated he wanted to be both “in” Brentwood and within a 30 minute radius of Brentwood. However, she later admitted she understood Mr. Helling’s language to include Brentwood itself. Although some of the respondent’s statements were clearly self-serving and misleading, without listings or additional listing-related testimony, the complainant fails to prove the respondent or Ms. Gillin disseminated listings to the testers in such a way as to engage in racial steering. Therefore, the Tribunal does not reach the question of whether the respondent is liable for Ms. Gillin’s actions.

The video evidence of the respondent praising her Brentwood clients also falls short of substantial evidence. While it is notable that she offered no explanation for omitting the positive descriptions in her meeting with Mr. Helling, she was not questioned on that point on either direct or cross examination. Without further testimony or context for the statement other than the respondent’s limited testimony that she meant what she said, the Tribunal cannot infer that failure to repeat the statement a month later to Mr. Helling is an act of discrimination.

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The evidence is also insufficient to establish the respondent acted in a discriminatory manner when she warned Mr. Helling about gang activity, via text, sometime after their initial meeting. The respondent testified credibly that she took Mr. Helling to see a property, saw a news report on gang-related activity in Brentwood several hours later, and sent him a text that same evening. It had been a month since Mr. Tune's last email, in which he indicated he would reach out again when he was ready. He did not reach out. The Tribunal credits the respondent's testimony that she did not reach out to Mr. Tune because, unlike Mr. Helling, he had no comparable business relationship with her. The evidence supports that there were significant differences in the interactions between the respondent and the testers, including the circumstances under which those relationships ended.

CONCLUSION OF LAW

The Tribunal finds the complainant has not proven by substantial evidence that the respondent demonstrated untrustworthiness and/or incompetency through engagement in unlawful discriminatory conduct.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT the complaint against Le-Ann Vicquery is dismissed.

/s/
John E. Kenny
Administrative Law Judge

Dated: August 30, 2021