54 DOS 95

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-

SILVANA BOSCO, SILVANA BOSCO REALTY INC. d/b/a BOSCO REALTY, ANNA BASILE, and RITA LEE,

Respondents.

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This matter came on for hearing before the undersigned, Roger Schneier, on September 13 and December 7, 1994 and March 15, 1995 at the office of the Department of State located at 270 Broadway, New York, New York.

The respondents, of 833 Hempstead Turnpike, Franklin Square, New York 11010, were represented by Joel E. Wilensky, Esq., of counsel to Nathan, Devack & Memmoli, 820 Hempstead Turnpike, Franklin Square, New York 11010.

The complainant was represented by A. Marc Pellegrino, Esq., 162 Washington Avenue, Albany, New York 12231-0001.

COMPLAINT

The complaint alleges that Lee and Basile affirmatively misrepresented to and/or withheld information from black persons requesting to see real property, and/or steered black persons away from a predominantly white neighborhood and into a substantially more integrated neighborhood while at the same time providing to white persons an opportunity to see property in the predominantly white neighborhood; that Lee and Basile have refused to make housing available to black persons because of their race and/or color; and that by allowing and approving the actions of real estate salespersons Lee and Basile, brokers Bosco and Silvana Bosco Realty Inc. engaged in unlawful business practices; and that by reason thereof the respondents have violated Executive Law §296[5][c][1] and have demonstrated untrustworthiness and/or incompetence.

FINDINGS OF FACT

1) Notices of hearing together with copies of the complaint were served on the respondents by certified mail on May 24, 1994 (State's Ex. 1).

2) Silvana Bosco is, and at all times hereinafter mentioned was, duly licensed as a real estate broker representing Silvana Bosco Realty Inc. (hereinafter "Bosco Realty") located at 833 Hempstead Turnpike, Franklin Square, New York (State's Ex. 2).

Anna Basile is, and at all times hereinafter mentioned was, duly licensed as a real estate salesperson in association with Bosco Realty (State's Ex. 3).

I take official notice of the records of the Department of State that at all times hereinafter mentioned Rita Lee was duly licensed as a real estate salesperson in association with Bosco Realty, and that she is currently licensed as an associate broker in association with Bosco Realty.

3) On May 14 and 25, 1993 a classified advertisement containing the following language appeared in the newspaper "Newsday": "FRANKLIN SQ Exclus Great Starter 5 rm, 1 1/2c gar, lo taxes SD#17. $152,000 BOSCO REALTY 516/352-6420." (State's Ex. 4 and 8). The advertised house, consisting of two bedrooms, a bathroom, a kitchen, a dining room, a living room, an unfinished basement, an unfinished attic, and a detached single-car garage, was vacant and located at 51 Rintin Street, Franklin Square, New York.

4) On May 14, 1993 John Frederick, a white employee of the Department of State, telephoned the respondents' office and made an appointment to visit the office on May 16, 1993. The appointment was made as a part of a test to determine if the respondents were engaged in unlawful activities. Frederick and his testing partner, Department of State employee Katie Meuwissen, who is also white, arrived at the office at 10:45 A.M. and met with real estate salesperson Theresa Mirenda. They presented themselves as a married couple, and told her that they were interested in the advertised house. She described the house to them, and told them that it would be a nice home for them. She also told them that an offer to purchase the house had been made and that a response from the seller was being awaited.

Ms. Mirenda then proceeded to take Mr. Frederick and Ms. Meuwissen to the advertised house. On the way there Mr. Frederick told Ms. Mirenda that he had two children. On arrival at the house Ms. Mirenda unlocked the door with a key which she had in her possession.

5) On May 14, 1993, in response to the advertisement, as part of the test of the respondents' activities, Gloria Brockington, a black employee of the Department of State, telephoned the respondents' office and made an appointment to meet Ms. Lee at 1:30 P.M. on

May 16, 1993 along with Ms. Brockington's purported husband, Carlton Richards, also a black employee of the Department of State.

On arriving at the office Ms. Brockington and Mr. Richards spoke with Ms. Lee. They asked to see the advertised house, and, at some point in their conversations, Ms. Lee told them that it was in contract. She said that she had another appointment and could not meet with them immediately, but gave them two listings books to look through. Finally, after about 45 minutes, Ms. Lee attended to them. They told her that they had a combined income of between $60,000 and $70,000, and were looking for a three bedroom house in the $150,000 to $175,000 range, for which they had a down payment of $40,000 available.

Ms. Brockington and Mr. Richards told Ms. Lee that they had picked out from the listings books several houses in Franklin Square and Alden Terrace which they would like to see. In each case, after saying that she had attempted to contact the owner, Ms. Lee told them that the house was not available for viewing. Ms. Lee did take them to see two houses which she selected: 4 Dewitt Street, Valley Stream, a three bedroom house priced at $149,000, and 1325 Union Avenue, Elmont, a three bedroom house priced at $164,000.

6) On May 26, 1993 Ernita Ray-Gantt, a black employee of the Department of State, telephoned the respondents' office and spoke with Ms. Mirenda. Ms. Ray-Gantt told Ms. Mirenda that she was calling in response to the advertisement.

Ms. Ray-Gantt's call was made as a part of the test of the respondents' activities. To facilitate the test Ms. Ray-Gantt and Juanita Davis, her partner, who is also black, were given a profile pursuant to which they were to represent themselves as being sisters who worked as legal secretaries with a combined income of $65,000 a year, and with Ms. Ray-Gantt having a child. The profile provided that they had $40,000 available to be used as the down payment on the purchase of a house priced between $150,000 and $180,000.

An appointment was made for Ms. Ray-Gantt and Ms. Davis to meet Ms. Mirenda at the respondents' office sometime before noon on May 27, 1993,[1] and in accordance with that appointment they arrived at the office at approximately 11:50 AM on the 27th. Upon their arrival Ms. Ray-Gantt and Ms. Davis were greeted by Ms. Basile, who said that they were late. They told her that they were interested in the advertised house, and she said that she did not believe that the owners were home and would have to call to find out.

Ms. Basile told Ms. Ray-Gantt and Ms. Davis to have a seat, and she went to the back of the office, where she said that she would

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[1] Ms. Mirenda told Ms. Ray-Gantt that she would get back to her to confirm the appointment, but never did.

call the owner of the advertised house. During the following hour Ms. Basile spoke with Ms. Ray-Gantt and Ms. Davis several times and gave them a listings book to look through. Ms. Ray-Gantt located listings for two properties in Franklin Square and told Ms. Basile that she would like to see them, but received no response. Eventually Ms. Basile told Ms. Ray-Gantt and Ms. Davis that the owner of the advertised house was not available and that she would show them three other houses, two in Elmont and one in Valley Stream. She told them that the houses in Franklin Square did not fall within their price range, as any house priced at $180,000 would require repairs costing $50,000 to $70,000.

Ms. Basile took Ms. Ray-Gantt and Ms. Davis to see two houses in Elmont: 1649 Empire Street and 122 Belmont Avenue, both of which were priced at $169,000. She did not take them to the house in Valley Stream because, she said, she had another appointment. She added that she would show them that property if they came back another time.

7) On May 25, 1993 Department of State employee John Goldman, who is white, acting as part of the test of the respondents' activities, and in response to the advertisement, telephoned the respondents' office and made an appointment to meet Ms. Basile at 2:00 P.M. on May 27, 1993. When Mr. Goldman and Department of State employee Elizabeth Vincent, who is also white and was representing herself to be his wife, arrived at the respondents' office in accordance with the appointment Ms. Basile was out with Ms. Ray-Gantt and Ms. Davis. Shortly thereafter Ms. Basile, together with Ms. Ray-Gantt and Ms. Davis arrived and, after she had finished dealing with them, she directed her attention to Mr. Goldman and Ms. Vincent.

Mr. Goldman and Ms. Vincent told Ms. Basile that they were a married couple with a combined income of about $70,000, had one child, that they had $40,000 to put down on a house costing up to $180,000 and that they would like to see the advertised house. She told them that $170,000 was probably the top price that they could afford, and that although there were already several outstanding offers on the advertised house they could see it. Ms. Basile then took Mr. Goldman and Ms. Vincent to see the house. She also took them to see a house located at 1137 Norbay Street, Franklin Square, a three bedroom house in excellent condition priced at $179,000, and told them that there were other houses available in Franklin Square and in their price range, but that they would have to make an appointment to see them.

8) As of the 1990 census the relevant population figures of the areas in which the houses visited by the testers was as follows: 51 Rintin Street, Franklin Square (the advertised house), 98% white and .2% black (State's Ex. 16); 1137 Norbay Street, Franklin Square, .1% black and 96.9% white (State's Ex. 12); 1649 Empire Street, Elmont, 13% black and 74% white (State's Ex. 13); 122 Belmont Avenue, Elmont, 25% black and 59% white (State's Ex. 14); 4 Dewitt Street, Valley

Stream, 3.7% black and 88.3% white.[2] For the entire communities, the relevant populations were: Franklin Square, 97.4% white and .2% black; Elmont, 75.2% white and 14.3% black (State's Ex. 17)[3].

9) The advertised house had been directly listed with Bosco Realty, with Ms. Lee acting as listing agent (State's Ex. 18B) and having possession of the key. An offer to purchase the house had been received on May 8, 1993, and was accepted by the owner within the next day or two (State's Ex. 21).[4] A contract of sale was signed on June 29, 1993 (State's Ex. 22).

10) On May 16 and 27, 1993 there were available to the respondents listings for several houses in Franklin Square which met the stated requirements of both sets of black testers, were in good condition, and which, according to the information which they gave to Ms. Lee and Ms. Basile, the black testers were financially qualified to purchase (State's Ex. 19, 20, and 23).

OPINION

I- As the party which instituted the hearing, the burden is on the complainant to prove, by substantial evidence, that the respondents discriminated against black persons and steered them away from a predominately white neighborhood and into an integrated neighborhood. 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).

II- In order to establish that racial steering occurred, the complainant must show that Ms. Brockington and Mr. Richards, and Ms. Gantt and Ms. Davis were not shown a house or houses, or were steered to a house or houses, because of their race. The elements which must be shown by the complainant are:

1. The testers applied to purchase housing;

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[2] No documentary evidence was offered regarding the population in the area of 1325 Union Avenue, Elmont. State's exhibit 11, which bears a notation indicating that it relates to that address actually relates to Evans Avenue, Elmont.

[3] No evidence was offered regarding the overall population makeup of Valley Stream.

[4] As noted above, on May 16, 1993 Ms. Mirenda told Mr. Frederick and Ms. Meuwissen that the reply of the owner was being awaited.

2. The testers were, according to the information given to the respondent, financially qualified for the housing; and

3. The respondent rejected the testers or directed them to a particular property because of their race.

> "It cannot be expected that a case of discrimination will be proved easily and with entirely objective evidence. It is necessary to look at the totality of the situation and the reasonableness (or lack thereof) of any explanations. 'One intent on violating the Law Against Discrimination cannot be expected to declare or announce his purpose. Far more likely is it that he will pursue his discriminatory practices in ways that are devious, by methods subtle and elusive--for we deal with an area in which "subtleties of conduct...play no small part".' Holland v Edwards, 307 NY 38 (1954) (citation omitted)." Department of State v Herbert Schimkus, 29 DOS 87, conf'd. 143 AD2d 418, 532 NYS2d 564 (1988).

Two separate sets of black testers visited the respondents' office. In both cases they indicated that they wished to see houses that were for sale, and gave the salespersons with whom they dealt information that indicated that they were financially qualified.

On May 16, 1993, after white testers had been shown the advertised house, which was located in a census tract which was 98% white and only .2% black, Ms. Lee failed to show the house to black testers, telling them that it was in contract. Instead, she showed them a house in a census tract that was 88.3% white and 3.7% black, and another house in an area with an overall population that was 75.2% white and 14.3% black.

At first blush Ms. Lee's treatment of the black testers appears to have been racially motivated. Two other salespersons did show the advertised house, to white testers, after the signing of the binder, with Ms. Lee going along for one of those showings. However, Ms. Lee testified that, in her opinion, it would have been a waste of her time to show the house to the black testers because the house was already sold. Division of Licensing Services v Rubino, 36 DOS 95. She explained that it spite of that she had gone along with Ms. Basile when she showed the house to white testers because she felt that it was her obligation to the owners, who had expressed concern about how the house would be shown when they gave her the listing. In addition, the complainant offered no evidence to refute Ms. Lee's contention that none of the other houses in Franklin Square and Alden Terrace in which they had expressed interest were available for viewing at the time of the black testers' visit. Accordingly, I find

that the complainant has failed to establish that Ms. Lee's treatment of the black testers was racially motivated.

On May 27, 1993 Ms. Basile met with the other black testers, who also asked to see the advertised house. She told them that they could not see it because the owners were not home. In fact, the house was vacant and the key was available in the respondents' office. Later the same afternoon she in fact took white testers to that very house, accompanied by Ms. Lee. When the testers asked to see other houses in Franklin Square, Ms. Basile falsely told them that there were none available that would fall within their price range, which was both contrary to what she told the white testers and refuted by her showing those testers a house in Franklin Square priced at $179,000, which was in excellent condition.

Ms. Basile showed the black testers two houses, one in a census tract which was 74% white and 13% black, and the other in a census tract which was 59% white and 25% black.

In light of the overwhelming evidence that she engaged in discriminatory conduct and steered the black testers to an integrated area, Ms. Basile's claim that she would not discriminate against black persons in the sale of housing because one of her two adopted children is half black is unconvincing. Unfortunately, persons often do not follow in business the moral principles that they apply to their private lives. Ms. Basile's conduct in this matter was a violation of Executive Law §296[5][c][1] and, therefore, a demonstration of untrustworthiness. Department of State v Schimkus, supra. That conduct was particularly blatant and outrageous in that not only did she lie to the black testers about the advertised house, she also lied to them about the general availability of houses in Franklin Square.

III- As the broker with which Ms. Basile is associated, Bosco Realty may be responsible and vicariously liable for her good conduct in the real estate brokerage business, and may be penalized for her misconduct. However, the Court of Appeals has emphatically held that RPL §442-c prohibits the revocation or suspension of a broker's license absent "actual knowledge" of the violation. Roberts Real Estate. v Department of State, 80 NY2d 116, 123, 589 NYS2d 392, 395 (1992). Without such actual knowledge the broker may nevertheless still incur vicarious liability and be subject to a fine of up to $1,000. "(C)onsideration of an appropriate lesser sanction, if any, based on demonstrated untrustworthiness or incompetency, is necessary." Roberts, supra, 80 NY2d at 123, 589 NYS2d at 396 (emphasis supplied).

When seeking to impose such vicarious liability, the burden of proof remains on the complainant. Imposition of a monetary sanction, "if any," may only occur if that burden has been satisfied. In short, the vicarious liability of a broker is not absolute upon a finding of wrongdoing by a subordinate. Rather, it is a separate and

distinct issue requiring a separate and distinct finding of untrustworthiness or incompetency by the broker, albeit something short of actual knowledge.

Herein, the complainant presented no evidence on the issue of untrustworthiness or incompetency by Bosco Realty. Nothing was presented upon which a conclusion could be reached that Bosco Realty either failed to take steps to assure that its salespersons and associate brokers did not foster or encourage racial steering, or did anything which encouraged racial steering. Absent such proof, vicarious liability may not be imposed.

IV- There is no evidence that Ms. Bosco was aware of the misconduct. Since the responsibility of a representative broker for the misconduct of salespersons is even less extensive than that of the corporation which she represents, the charge that she is vicariously liable for that misconduct must also be dismissed. Division of Licensing Services v Roberts Real Estate, 51 DOS 91.

CONCLUSIONS OF LAW

1) The complainant has failed to establish by substantial evidence that Rita Lee engaged in racial steering or discrimination, and the charges against her should be dismissed.

2) By discriminating against black persons in the sale of real property, and by steering those persons away from housing in an area which was overwhelmingly white and to houses in more integrated areas because of their race, Anna Basile demonstrated untrustworthiness.

3) The complainant has failed to establish by substantial evidence any facts under which Bosco Realty and Silvana Bosco can be held vicariously liable for the misconduct of Rita Lee and Anna Basile, and, accordingly, the charges against them should be dismissed.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINEDTHAT Anna Basile has demonstrated untrustworthiness and, accordingly, pursuant to Real Property Law §441-c, her license as a real estate salesperson is revoked, effective immediately, and

IT IS FURTHER DETERMINED THAT the charges herein against Rita Lee, Silvana Bosco Realty Inc., and Silvana Bosco 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:

ALEXANDER F. TREADWELL
Secretary of State
By:

Michael E. Stafford, Esq.
Chief Counsel