

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-

PETER CAPPUCILLI,

Respondent.

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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 June 14, 1993 at the office of the Department of State located at 270 Broadway, New York, New York.

The respondent, of 5 Shirley Court, Farmingdale, New York 11735, did not appear.

The complainant was represented by Compliance Officer William Schmitz.

COMPLAINTS

The complaints allege that the respondent assigned certain commissions to a factor but failed to deliver those commissions to the factor upon receiving them; failed to satisfy a judgement against him obtained by the factor; wrongfully obtained a license as a real estate salesperson in association with a corporation of which he was an officer; and held himself out and acted as a real estate broker under a corporate name without being so licensed.

FINDINGS OF FACT

1) Notice of hearing together with copies of the complaints was mailed to the respondent at his home/office address and was also served in person on the respondent's wife (Comp. Ex. 1).

2) The respondent is duly licensed as a real estate broker in his own name with an office at his home located at 5 Shirley Court, Farmingdale, New York 11735 (Comp. Ex. 2). From at least June 23, 1986 until July 7, 1986, and again from February 7, 1987 until July 6, 1988 he was licensed as a real estate salesperson in association with

CRL Associates Inc. (CRL). From July 7, 1986 until February 7, 1987 he was licensed as a real estate salesperson in association with Andor Group, Inc. He has been licensed as a real estate broker in his own name since July 6, 1988 (Comp. Ex. 5).

3) On December 23, 1986 the respondent executed a corporate resolution which stated that he was secretary treasurer of CRL. On March 28, 1989 the respondent, purporting to be acting in the capacity of "broker" on behalf of CRL, assigned a \$4,500.00 commission to Realty Factors Ltd. (Factors). On August 1, 1989, purporting to be acting in the same capacity, he assigned a \$2,875.00 commission to Factors. He supported the assignments with a letter dated April 3, 1987 from the president of CRL in which it was stated that the respondent was secretary treasurer of that corporation. In return, Factors issued to CRL checks totalling \$6,736.25 (Comp. Ex. 3).

One of the sales for which a commission was assigned failed to close, and Factors was promised, but did not receive, a replacement. The other property, for which a commission of \$2,875.00 had been assigned, did close, but the respondent received, retained and spent the commission, failing to pay any part of it to Factors.

Factors sued CRL and the respondent in District Court, Nassau County, and on September 27, 1990 obtained a judgement against them in the amount of \$8,542.50, including interest and costs (Comp. Ex. 4). The judgement has not been satisfied.

OPINION

I- When the respondent assigned CRL's rights in the future commissions to Factors, he granted Factors equitable liens which attach "to the subject of it as soon as it comes into the ownership of the party." Kribbs v Alford, 120 NY 519, 524 (1890); see, also McCaffrey v Woodin, 65 NY 459 (1875); In re Black, 138 AD 562, 123 NYS 371 (1910). Such liens apply to the assignment of future earnings. Sheer v Family Finance Corporation, 46 NYS2d 398 (Supreme Court Bronx County, 1944).

The applicant's use for his own purposes of the commission received in the transaction which closed constituted the tort of conversion. Hussey v Flanagan, 237 NY 227 (1923); Britton v Ferrin, 171 NY 236 (1902); Wrynn v Pistor, 141 AD 104, 125 NYS 970 (1910); Clearview Assoc. v Clearview Gardens First Corp., 285 AD 969, 139 NYS2d 81 (1955). Whether the respondent had any wrongful intent is irrelevant. Boyce v Brockway, 31 NY 390 (1895); General Elec. Co. v American Export Isbrandtsen L., 37 AD2d 959, 327 NYS2d 93 (1971).

The commission by a real estate broker or salesperson of the tort of conversion is grounds for disciplinary action against him, cf., Department of State v Barth, 67 DOS 88. In particular, the commission of the tort of conversion through the retention and use of a commission

which was assigned to a factor has been held to be grounds to deny an application to renew a license as a real estate broker. Matter of the Application of Dayton, 12 DOS 90.

II- The failure to satisfy a lawfully obtained judgement without a showing that he is unable to do so is a demonstration of untrustworthiness by a real estate broker. Feldman v Dept of State, 81 AD2d 558, 440 NYS2d 541 (1981); Department of State v Stutz, 1 DOS 89; Department of State v Milk, 59 DOS 87; Department of State v Brown, 48 DOS 87. However, where that failure arises out of an inability to satisfy judgements because of a lack of funds, there is no untrustworthiness. Department of State v Carvelli, 60 DOS 86. In this case, the only evidence on the issue is the testimony of complainant's investigator that the respondent told him that he does not have the money to pay the judgement. Since the respondent did not appear, there is no evidence to support that statement or to show how the respondent has allocated what, if any, funds he has available. In any case, inasmuch as the respondent's lack of at least some of the money needed to pay Factors is the direct result of his having appropriated and spent the commission rather than having turned it over to Factors immediately upon its receipt, "(t)o permit his current lack of funds to excuse his improper use of that money would be to issue carte blanche to real estate brokers and others to engage in acts of conversion so long as they are able to spend the money quickly." Matter of the Application of Dayton, supra.

III- Real Property Law (RPL) §441-b(2) provides that a license as a real estate salesperson may not be issued to an officer of a corporation. The evidence establishes that the respondent was secretary treasurer of CRL as early as December 23, 1986. In view of the presumption of continuance, J. Prince and R. T. Farrell, Richardson on Evidence §74 (10th ed. 1973, 1985), and the fact that he held that same position as of April 3, 1987, I conclude that when on February 7, 1987 he obtained his license as a real estate salesperson associated with CRL the respondent was an officer of that corporation.

IV- RPL §441(1) requires that a person be licensed in the exact name under which he conducts business. The respondent, while licensed as a real estate broker in his own name, executed documents in which he purported to be acting as representative broker of CRL, thereby conducting business using a name under which he was not licensed.

V- Where a broker or salesperson has received money to which he is not entitled, he may be required to return it, together with interest. 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 failing to deliver to Factors the commission which he had assigned to it on behalf of CRL, and by retaining the money for his own purposes, the respondent committed the tort of conversion and demonstrated untrustworthiness as a real estate broker.

2) By failing to satisfy the judgement obtained by Factors against him the respondent demonstrated untrustworthiness as a real estate broker.

3) By obtaining a license as a real estate salesperson in association with CRL at a time that he was an officer of that corporation the respondent violated RPL §441-b(2) and demonstrated incompetency as a real estate salesperson.

4) By engaging in the real estate brokerage business under the name of CRL at a time that he was licensed in his individual name the respondent violated RPL §441(1) and demonstrated incompetency as a real estate broker.

5) As a condition of being licensed as a real estate broker or salesperson, the respondent may be required to satisfy the judgement obtained against him by Factors.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Peter Cappuccilli has violated Real Property Law §§441(1) and 441-b(2) and has demonstrated untrustworthiness and incompetency, and accordingly, pursuant to Real Property Law §441-c, his license as a real estate broker is revoked, effective immediately, and

IT IS FURTHER DETERMINED THAT should Peter Cappuccilli ever reapply for a license as a real estate broker or salesperson such application shall not be considered until he shall have presented proof satisfactory to the Department of State that he has fully satisfied the judgement obtained against him in Realty Factors Ltd. v CRL Associates Inc. and Peter Cappuccilli, District Court, County of Nassau, Index No. 8631/90, including all interest accrued to the date of satisfaction.

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