

STATE OF NEW YORK  
DEPARTMENT OF STATE  
OFFICE OF ADMINISTRATIVE HEARINGS

-----X

In the Matter of the Complaint of

**DEPARTMENT OF STATE  
DIVISION OF LICENSING SERVICES,**

Complainant,

**DECISION**

-against-

**CITYLIFE REALTY INC., JAY L. SILLER,  
ROSEANN LETTIERI, and PETER LINDENBAUM,**

Respondents.

-----X

The above noted matter came on for hearing before the undersigned, Roger Schneier, on October 21, 1998 at the office of the Department of State located at 270 Broadway, New York, New York.

The respondents were not present.

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

Prior to the hearing the complainant and respondents Jay L. Siller and Roseann Lettieri executed a consent order in which they agreed to make restitution to certain of the persons whose complaints to the complainant underlie the charges herein (State's Ex. 1). Accordingly, only Citylife Realty Inc. (hereinafter "Citylife") and Peter Lindenbaum remain as respondents.

**COMPLAINT**

The complaint, as it applies to the remaining respondents, alleges that: Citylife entered into an agreement to be the exclusive rental agent for a landlord; pursuant to the agreement Citylife was to receive a specified commission, tenants were not to pay commissions, and advertisements were to reflect that they were for no fee apartments; respondents' improperly collected commissions from both tenants and the landlord; respondents improperly retained a deposit on an apartment which subsequently became unavailable to the payor of that deposit, and made a refund only after the intervention of the complainant's investigator.

**FINDINGS OF FACT**

1) On May 29, 1998 notices of hearing together with copies of the complaint were sent to the respondents by certified mail addressed to them at their last known business addresses, and were returned by the Postal Service marked "unclaimed" (State's Ex. 2). Those notices misstated the scheduled date of the hearing as being May 21, 1998, the date on which the notices were prepared, so by letters dated June 4, 1998 the respondents were notified that the correct date was August 5, 1998 (State's Ex. 3). On July 3, 1998 additional notices of hearing, with the correct hearing date, and copies of the complaint were mailed to the respondents at the last known business address of Citylife by both certified and regular first class mail, and the certified mailings were again returned marked "unclaimed" (State's Ex. 4). On July 30, 1998 notices of adjournment were sent to the respondents by regular first class mail addressed to them at Citylife's last known business address (State's Ex. 5). I take official notice that those notices of adjournment were not returned by the Postal Service.

2) From at least October 12, 1990 until February 28, 1998 Peter Lindenbaum was duly licensed as a real estate broker representing Citylife with a business address of 1501 3rd Avenue, New York, New York 10028. Since April 13, 1998 he has been licensed as a real estate broker in his own name with a business address of 170 East 83rd Street, New York, New York 10028 (State's Ex. 6).

3) Roseann C. Lettieri, formerly Roseann C. Lindenbaum, is, and at all times hereinafter mentioned was, duly licensed as a real estate broker representing Citylife at 1501 3rd Avenue, New York, New York 10028 (State's Ex. 7). I take official notice of the records of the Department of State that she is also licensed as a real estate broker in association with Prince Property, LLC, 1407 First Avenue, New York, New York 10021.

4) From November 18, 1991 until February 18, 1998 Jay L. Siller was a real estate broker licensed in association with Citylife at 1501 3rd Avenue, New York, New York 10028 (State's Ex. 8).

5) In or about 1989 or 1990 Roseann Lindenbaum, acting on behalf of Citylife, entered into an agreement with Hal A. Fetner, who was acting on behalf of E.R.T. Management Corp. (hereinafter "E.R.T."), of which he was President, for Citylife to act as rental agent for certain E.R.T. owned apartments located at 1725 York Avenue and 245 East 8th Street, New York, New York. Citylife agreed to accept a commission of 75% of one month's rent in compensation for its services and not to collect any commissions from the tenants (State's Ex. 15).

6) In April, 1993 Carol and Jeffrey Cohen were seeking to rent an apartment. Mrs. Cohen learned from a friend that there were some empty apartments at 1725 York Avenue. She went to the building and spoke with the doorman, who gave her the key to an empty apartment which she inspected. She asked the doorman with whom she could get in touch to negotiate for the apartment, and he gave her Mr. Fetner's office telephone number.

Mrs. Cohen called Mr. Fetner's office and spoke with Helen Byron, the assistant to the manager, who told him that Citylife had an exclusive agreement to show the apartment, and that she should call Roseann Lindenbaum. Mrs. Cohen followed that advice, and met with Mrs. Lindenbaum and Mr. Siller the following week in the respondents' office.

Mr. Siller took Mrs. Cohen to 1725 York Avenue, where he showed her three apartments, and Mrs. Cohen offered to rent number 32F. After a period of negotiations and several conversations with Mrs. Lindenbaum an agreement as to rent and a move in date was reached. Mr. Siller said that he would prepare the leases, and, subsequently, he met Mrs. Cohen with them outside the building.

Mr. Siller told Mrs. Cohen that Mr. Fetner was not happy paying the entire commission, and that she would have to pay a portion of it. He presented her with a commission agreement, but Mrs. Cohen refused to sign it because it only stated that she and her husband were to pay \$1,675.00, and there was nothing on it about E.R.T.'s share of the commission. At that point, Mr. Siller gave her the leases, but she did not give him a check.

About one week later Mrs. Cohen again met with Mr. Siller. He presented her with a commission agreement indicating that the total commission was \$4,187.50, with E.R.T. to pay \$2,512.50. The agreement was not signed by Mr. Fetner, and Mr. Siller said that was so because Mr. Fetner refused to sign it, at which point Mrs. Cohen signed the agreement (State's Ex. 9 and 10) and gave Mr. Siller a teller's check dated May 27, 1993 payable to Citylife in the amount of \$1,625.00 (State's Ex. 11). (Mrs. Cohen is unable to explain the \$50.00 discrepancy between the amount called for in the agreement and the amount actually paid).

On June 1 and August 19, 1993 Mrs. Lindenbaum, acting on behalf of Citylife, submitted bills to E.R.T. for a commission of \$2,512.50 for the rental to the Cohens (State's Ex. 13). Having learned that the Cohens had already paid a commission, Mr. Fetner refused to pay the bills (State's Ex. 14).

When Mrs. Cohen learned from Mr. Fetner that she was not supposed to have been charged a commission she went to see Mrs. Lindenbaum and told her that she wanted a refund. Mrs. Lindenbaum became upset, screamed at Mrs. Cohen that she could charge whatever

she wanted, said that it was none of Mr. Fetner's business, and demanded that Mrs. Cohen leave.

7) On or about February 2, 1993 Mr. Nishimura Itaru, using the services of Citylife, rented Apt. 3E at 245 East 87th Street, an apartment owned by E.R.T., and paid Citylife, at the request of salesperson "Cynthia" (State's Ex. 18), a commission of \$400.00 (State's Ex. 17). Mr. Nishimura was unaware that E.R.T. was also to pay a commission. On the same date Mrs. Lindenbaum, acting on behalf of Citylife, billed E.R.T. for a commission of \$1,012.50 for the rental, a charge which was paid in full on March 24, 1993 (State's Ex. 14 and 16).

8) On February 5, 1996 Scott Widener visited the respondents' office, dealt with their salesperson Sean Haber with regards to the proposed rental of apartment 1FW at 418 East 73rd Street, New York, New York, and paid a \$300.00 deposit. Pursuant to the receipt issued by Mr. Haber on behalf of Citylife, the deposit, less \$25.00 for a credit check, was to be refunded if the application was rejected. Subsequently, upon being advised by Mr. Haber that the apartment had been rented to someone else, Mr. Widener asked for a refund. However, the refund was not made at that time because the bookkeeper was not available at the time of the request. Subsequently the apartment again became available, and because the refund had not yet been made Mrs. Lindenbaum took the position that one was no longer required. However on August 27, 1996, after the intervention of the complainant's investigator, a refund of \$275.00 was finally made to Mr. Widener (State's Ex. 19).

#### OPINION AND CONCLUSIONS OF LAW

I- The holding of an ex parte quasi-judicial administrative hearing was permissible, inasmuch as there is evidence that notice of the place, time and purpose of the hearing was properly served. Real Property Law §441-e[2]; *Patterson v Department of State*, 36 AD2d 616, 312 NYS2d 300 (1970); *Matter of the Application of Rose Ann Weis*, 118 DOS 93.

II- Being an artificial entity created by law, Citylife can only act through its officers, agents, and employees, and it is, therefore, bound by the knowledge acquired by and is responsible for the acts committed by its various salespersons, associate brokers, and representative brokers within the actual or apparent scope of their authority. *Roberts Real Estate, Inc. v Department of State*, 80 NY2d 116, 589 NYS2d 392 (1992); *A-1 Realty Corporation v State Division of Human Rights*, 35 A.D.2d 843, 318 N.Y.S.2d 120 (1970); *Division of Licensing Services v First Atlantic Realty Inc.*, 64 DOS 88; RPL § 442-c.

III- A real estate broker is obligated to supervise the real estate brokerage activities of the salespersons and associate

brokers associated with him or her. RPL §§440[2] and 441[1][d]. That supervision must consist of

"regular, frequent and consistent personal guidance, instruction, oversight and superintendence by the real estate broker with respect to the general real estate brokerage business conducted by the broker, and all matters relating thereto." 19 NYCRR 175.21(a).

That duty has been affirmed judicially, *Division of Licensing Services v Giuttari*, 37A DOS 87, conf'd. 535 NYS2d 284 (AD 1st Dept. 1988); *Friedman v Paterson*, 453 NYS2d 819 (1982), aff'd. 58 NY2d 727, 458 NYS2d 546, and has been restated in numerous determinations of the Department of State. *Division of Licensing Services v Misk*, 64 DOS 92; *Division of Licensing Services v Gelinis*, 38 DOS 92; *Division of Licensing Services v Levenson*, 52 DOS 91; *Division of Licensing Services v Capetanakis*, 42 DOS 90; *Division of Licensing Services v Shulkin*, 4 DOS 90. However, while he or she has a duty to be aware of the activities of the corporation with which he is associated, a representative broker of a corporate real estate broker has no obligation to supervise the conduct of the other representative brokers of the corporation.

Arising out of the duty to supervise salespersons and associate brokers is a vicarious liability on the part of a representative broker for the misconduct of such persons, which liability is limited only to the extent of the penalty which may be imposed in a case where the complainant fails to establish actual notice of the misconduct at the time of its commission or the retention, after receipt of notice of the misconduct, of benefits arising from such misconduct. *Roberts Real Estate, Inc. v Department of State, supra*.

IV- Citylife had an agreement with E.R.T that it would obtain tenants to rent E.R.T's apartments, and that in return it would look solely to E.R.T for its commissions. In spite of that agreement, in both the Cohen and Itaru transactions it demanded and received commissions from the tenants, and then, in the Cohen transaction, refused to make a properly demanded refund. In the Cohen transaction the demand for the commission was made by associate broker Siller, and in the Itaru transaction the demand was made by a salesperson. In both cases, as noted above, Mr. Lindenbaum, as one of Citylife's representative brokers, is vicariously liable for the misconduct in making the improper demands, which demonstrated both untrustworthiness and incompetency, as did, in the case of Citylife itself, the refusal of Mrs. Lindenbaum to make a refund to the Cohens.

V- Scott Widener made an offer to rent an apartment through Citylife, and paid a \$300.00 deposit. By the terms of Citylife's agreement, the deposit, less a \$25.00 credit check fee, was to be

refunded if Mr. Widener's application was rejected by the landlord. Mr. Widener was subsequently advised by Citylife, acting through its salesperson, that the application was rejected because the apartment was not available. As a result of that rejection the landlord no longer had the right to accept Mr. Widener's offer to rent the apartment. A. Corbin, *Corbin on Contracts*, One Volume Edition §94 (1952). Thus, pursuant to the terms of his agreement with Citylife, Mr. Widener became absolutely entitled to a refund. By failing to make such a refund until the complainant intervened, Citylife, acting through Mrs. Lindenbaum, one of its representative brokers, demonstrated untrustworthiness and incompetency.

VI- Where a broker has received money to which he, she, or it is not entitled, the broker may be required to return it, together with interest, as a condition of retention of his, her, or its 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).

It is clear that Citylife has received and retained money to which it is not entitled. It should be required to make full restitution as a condition of the retention of its license. There is, however, no substantial evidence that Mr. Lindenbaum ever received or retained any of the money in question. Accordingly, he may not be ordered to make a refund, and, because no evidence establishing that he was aware of any wrongdoing at the time of its occurrence was presented, any penalty to be imposed upon him must, pursuant to *Roberts Real Estate, Inc. v Department of State, supra*, be restricted to a fine.

#### DETERMINATION

**WHEREFORE, IT IS HEREBY DETERMINED THAT** Citylife Realty Inc. has demonstrated untrustworthiness and incompetency, and accordingly, pursuant to Real Property Law §441-c it shall pay a fine of \$2,000.00 to the Department of State on or before December 31, 1998, and should it fail to pay the fine its license as a real estate broker shall be suspended for a period commencing on January 1, 1999 and terminating three months after the receipt by the Department of State of its license certificate, and upon payment of the fine or termination of the suspension its license shall be further suspended until such time as it shall submit proof satisfactory to the Department of State that it has refunded the sums of: \$1,625.00 plus interest at the legal rate for judgements (currently 9%) from May 27, 1993 to Carol and Jeffrey Cohen; \$400.00 plus interest at the legal rate for judgements from February 2, 1993 to Nishimura Itaru; and \$1,012.50 plus interest at the legal rate for judgements from March 24, 1993 to E.R.T. It is directed to submit payment of the fine and proof of the ordered restitution, or its license certificate to Diane Ramundo, Customer

Service Unit, Department of State, Division of Licensing Services, 84 Holland Avenue, Albany, NY 12208, and

**IT IS FURTHER DETERMINED** that Peter Lindenbaum has demonstrated untrustworthiness and incompetency, and accordingly, pursuant to Real Property Law §441-c he shall pay a fine of \$1,000.00 to the Department of State on or before December 31, 1998. He is directed to submit payment of the fine to Diane Ramundo, Customer Service Unit, Department of State, Division of Licensing Services, 84 Holland Avenue, Albany, NY 1220.

Roger Schneier  
Administrative Law Judge

Dated: November 13, 1998