

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

-against-

MICHAEL DEVANEY and DEVANEY REALTY, INC.

Respondents.

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on September 12, 1996 at the New York State Office Building located on Veterans Memorial Highway, Hauppauge, New York.

The respondents, of 434 Sunrise Highway, West Islip, New York 11795, were represented by Harvey Goldstein, Esq., 1719 North Ocean Avenue, Medford, New York 11763.

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

COMPLAINT

The complaint before the tribunal alleges: that Valmore C. James listed property which he owned (hereinafter "the property") for sale with the respondents; that although the property was zoned residential in a high priority industrial corridor Devaney advertised it in the commercial property for sale section of "Newsday" without stating that it was residential; that some, but not all, of the respondents' advertisements represented the property as "subject to rezone"; that Devaney showed the property to Kenneth Ormandy, a prospective, purchaser, to whom he gave a property description sheet which stated "GREAT LOCATION, GREAT OPPORTUNITY FOR JUST ABOUT ANY BUSINESS THAT NEEDS LOCATION" and "BEST USE; THE SKY IS YOUR LIMIT"; that Devaney told Ormandy that he could easily have the property rezoned commercial, although he knew or should have known that such rezoning was very difficult, if not impossible, to obtain; that based on Devaney's representations Ormandy entered into a contract to purchase the property; that the property did not have a certificate of compliance or a certificate

of occupancy, and was thereby rendered virtually unmarketable, a fact of which Devaney was or should have been aware but which he failed to disclose to Ormandy and which Ormandy did not discover until the day before the closing; that after the closing Ormandy was unsuccessful in his attempts to have the property rezoned; and that by reason of the foregoing the respondents have engaged in fraud and/or a fraudulent practice, have engaged in false and/or misleading advertising, have made misrepresentations and/or improper or inadequate disclosures, have failed to deal honestly, openly and fairly with the public, and have demonstrated untrustworthiness and/or incompetence.

FINDINGS OF FACT

1) Notice of hearing together with a copy of the complaint was served on the respondents by certified mail (State's Ex. 1).

2) Michael Devaney is, and at all times hereinafter mentioned was, duly licensed as a real estate broker representing Devaney Realty, Inc. (hereinafter "Realty, Inc.") (State's Ex. 2).

3) On a date not appearing in the record the respondents obtained from Valmore James an exclusive agency listing to offer for sale his property located at 1174 Veterans Memorial Highway, Hauppauge, New York. The property, although located in a heavily commercial area, was zoned residential.

4) Some time in July, 1993 Devaney, acting on behalf of Realty, Inc., began placing advertisements for the property in the "Commercial Property for Sale" section of the classified advertisements in "Newsday." The earliest advertisements included the language "sold subject to rezone comm prime corner lot!" However, later advertisements did not contain that language, although they still appeared in the "Commercial Property for Sale" section. None of the advertisements stated that the property was zoned residential (State's Ex. 4 and 13).

5) Sometime in September, 1993, Kenneth J. Ormandy saw one of the advertisements which did not contain the language about rezoning (State's Ex. 4) and telephoned the respondents. He spoke with Devaney, who telefaxed him a fact sheet and copies of plat maps. The fact sheet described the property as consisting of 1.1 acres containing a three bedroom residential home and a garage, and included the following statements: "ZONED: RESIDENTIAL PRESENTLY. WILL SELL SUBJECT TO BEING REZONED COMMERCIAL"; "REMARKS: GREAT LOCATION, GREAT OPPORTUNITY FOR JUST ABOUT ANY BUSINESS THAT NEEDS LOCATION"; "BEST USE: THE SKY IS YOUR LIMIT!!" (State's Ex. 3).

Ormandy met with Devaney at the property and inspected it with him. He told Devaney that he was interested in the property for use as a gift shop and as a base of operations for his pest control

business. Devaney told him that he would have no problem in obtaining the necessary changes in zoning because he (Devaney) knew people in the town government.

6) The asking price for the property was \$295,000.00, and Ormandy made an offer of \$165,000.00, which was rejected. After some negotiations a price of \$195,000.00 was agreed upon, and on November 14, 1993 was memorialized in a written purchase offer containing the language "Subject for operating a dry good & exterminating business" (State's Ex. 5). Several days later Devaney telephoned Ormandy and told him that while offer had been accepted, in light of the reduced price the seller was unwilling to wait for the rezoning to be completed. Ormandy responded that he would not buy the property unless he could use it for the shop, and that the deal was going to die. Devaney told him that he shouldn't worry, that he would pick up the papers for the zoning change and would talk to the people from the town.

The offer was eventually countersigned by Mary Ann James (acting on behalf of the seller) who first deleted the language regarding the exterminating business and added the statements "Owner requests that contracts to (sic) be signed by Dec 1st close by Jan 1st of 1994 or before & purchaser to buy as-is" and "subject to attorneys (sic) approval" (State's Ex. 9).

On November 16, 1993 Devaney telefaxed to Ormandy a copy of the tax bill for the property bearing the designation "homestead" (State's Ex. 6). At some point he also provided Ormandy with a copy of a checklist for the process to obtain a change in zoning (State's Ex. 7), and the required application form (State's Ex. 8).

Ormandy was still unsure about the deal because of the zoning issue. Devaney, however, repeatedly assured him that he had no need to worry, and said that he had talked to his contact in the town planning department who had confirmed that he would have no trouble obtaining the rezoning. In fact, Devaney had no such contact. He said that all that was needed was for Ormandy to submit the required paper work.

In January, 1994 Ormandy and his wife Carole, who were represented by an attorney, entered into a more formal contract to purchase the property. That contract contained no rezoning contingency, and represented that the property was a legal one-family dwelling for which the sellers would deliver a certificate of occupancy or certificate of existing use (Resp. Ex. A).

A closing was eventually scheduled for March 17, 1994. On March 16, 1994 Ormandy learned from his attorney that the property had no certificate of occupancy or certificate of compliance. When he told Devaney, Devaney was surprised, but said not to worry, that everything would be taken care of with a change of zoning, and that

he knew that the seller had an application for a certificate of occupancy pending, which was not true. He repeated those assurances the next day at the closing, and because of those assurances Ormandy went forward with the closing.^{1,2}

Devaney had recommended to Ormandy an attorney whom he said could handle the zoning application. However, when Ormandy learned that the attorney had been unsuccessful in an application to rezone a site which was located diagonally across the road from the property, he decided not to use that attorney.³

After the closing Ormandy applied for a certificate of occupancy. However, he was advised by town personnel that he could not obtain one because the house was not in compliance with the residential set-back requirements (State's Ex. 12), and that rather than apply for a variance he should apply for the zoning change, since the house was in compliance with the commercial set-back requirements. Accordingly, on June 3, 1994 Ormandy submitted an application for a change from residential to commercial zoning (State's Ex. 8).

The application for the change in zoning was denied. Ormandy then applied for a variance to operate a shop in a residential zone, which application was also denied. He appealed the denials

¹ I do not find credible Devaney's assertions that he never expressed an opinion regarding the possibility of rezoning the property. The question of rezoning was central to the entire transaction, and it is not reasonable to believe that Ormandy would have gone forward with the transaction without some assurances from Devaney, or that Devaney would have failed to express some opinion in his attempts to market the property.

² The respondents contend that Ormandy closed on the property because he did not want to lose his deposit. However, in light of the seller's inability to comply with the provision of the contract requiring the that he produce a certificate of occupancy or a certificate of existing use, Ormandy could have cancelled the contract and obtained the return of his deposit.

³ Although the unsuccessful application was for a rezoning to a different classification than Ormandy was seeking, the reasons for the rejection, particularly that it would constitute a unwarranted further perpetuation of business development on Route 454 (Veteran's Memorial Highway), would tend to establish a precedent for further such down-zonings, and was inconsistent with the "Community Identity Plan" which designates the area for residence purposes (State's Ex. 10), support his unease with the suggested attorney.

in a CPLR Article 78 proceeding and lost. His attempts to re-sell the property have been to no avail.

OPINION

I- The property in question in this matter was zoned for residential use. In spite of that, the respondents advertised it in the commercial property section of the classified ads, and failed to state in the advertisements that the property was zoned residential. While in some cases the advertisements indicated that the lot was subject to rezoning, in others, including the one to which Ormandy responded, there was no such reference. Those latter advertisements were misleading on their face.

Real estate brokers have a fundamental duty to deal honestly with the public. *Division of Licensing Services v John Linfoot*, 60 DOS 88, conf'd. *sub nom Harvey v Shaffer*, 156 AD2d 103, 549 NYS2d 296 (1989). The publishing of a misleading advertisement is a violation of that duty, and a demonstration of untrustworthiness. *Division of Licensing Services v Rabizedeh*, 27 DOS 92.

Not only did Devaney, acting on behalf of Realty, Inc., place misleading advertisements, he also directly misled Ormandy with regards to the question of rezoning. Devaney untruthfully told Ormandy that because of his (Devaney's) contacts in the town government there would be no problem in having the property rezoned. Those assurances caused Ormandy to go forward with the transaction without a rezoning contingency in the contract, and even without a certificate of occupancy or a certificate of compliance. The direct result is that Ormandy now owns a piece of property which is essentially unusable. That Ormandy, and perhaps his attorney⁴, acted rashly in this matter by not insisting on the proper contractual protection is without doubt. That, however, does not excuse Devaney's untrustworthy conduct in convincing him to make the purchase under the existing circumstances.

II- So long as the issue has been fully litigated by the parties, and is closely enough related to the stated charges that there is no surprise or prejudice to the respondent, the pleadings may be amended to conform to the proof and encompass a charge which was not stated in the complaint. This may be done even without a formal motion being made by the complainant. *Helman v Dixon*, 71 Misc.2d 1057, 338 NYS2d 139 (Civil Ct. NY County, 1972). In ruling on the motion, the tribunal must determine that had the charge in question been stated in the complaint no additional evidence would have been forthcoming. *Tollin v Elleby*, 77 Misc.2d 708, 354 NYS2d

⁴ There is no evidence in the record as to what, if any, advice Ormandy received from his attorney on the question of whether the contract should contain a contingency provision.

856 (Civil Ct. NY County, 1974). What is essential is that the "matters were raised in the proof, were actually litigated by the parties and were within the broad framework of the original pleadings." *Cooper v Morin*, 91 Misc.2d 302, 398 NYS2d 36, 46 (Supreme Ct. Monroe County, 1977), mod. on other grnds. 64 AD2d 130, 409 NYS2d 30 (1978), aff'd. 49 NY2d 69, 424 NYS2d 168 (1979).

The complainant has moved to amend the pleadings to include a charge that the respondents engaged in the unauthorized practice of law by using improper purchase offer contracts. The complaint, however, contains no references whatsoever to the purchase offer contracts, and is entirely restricted to questions regarding the permitted uses of the property. A charge of unauthorized practice of law is in no way related to the charges in the complaint. Accordingly, the motion must be, and is, denied.

The complaint, is, however, amended by the tribunal *sua sponte* to encompass charges that the respondents made misrepresentations to Ormandy regarding the effect of the lack of a certificate of occupancy and whether there was an application pending for the issuance of one. Those issues were fully litigated and are directly related to the charges in the complaint.

The evidence clearly establishes that Devaney told Ormandy not to worry about the lack of the certificate, and falsely told that there was a pending application for one. Those statements were a further demonstration of untrustworthiness.

III- By knowingly making false factual representations to Ormandy with regards to the rezoning of the property and the purported pending application for a certificate of occupancy, with the intent to deceive Ormandy and cause him to act on those representations, and with the result that Ormandy did so act to his injury, Devaney, and through him Realty, Inc., engaged in acts of fraud (60 NY Jur2d, Fraud and Deceit §11), as well as in fraudulent practices, which, "...as used in relation to the regulation of commercial activity, is often broadly construed, but has generally been interpreted to include those acts which may be characterized as dishonest and misleading." *Allstate Ins. Co. v Foschio*, 93 A.D.2d 328, 464 N.Y.S.2d 44, 46-47 (1983) (citations omitted). A single fraudulent practice may be the basis for the imposition of disciplinary sanctions. *Division of Licensing Services v Linfoot*, *supra*.

IV- The complainant offered in evidence documents regarding a complaint which Ormandy filed against the respondents with the Long Island Board of Realtors (hereinafter "LIBOR") (State's Ex. 14-17), and seeks to have the decision in that complaint proceeding granted the effect of collateral estoppel in these proceedings.

In order for collateral estoppel to apply, it must be shown that there is an identity of issues, that there was a full and fair opportunity to litigate the issue at bar, that the respondents had the opportunity to employ procedures in the earlier proceeding which were substantially similar to those employed by this tribunal, and that they were allowed to avail themselves of the expertise of competent counsel. Cf. *John Clemens v Henry R. Apple*, 65 NY2d 746, 492 NYS2d 20 (1985). The complainant, however, has presented no evidence regarding either the procedures used by LIBOR in its hearing or the level of proof required by it. Further, in its decision LIBOR states that Devaney requested and was denied an adjournment to allow his attorney to be present and was, therefore, required to proceed *pro se* against his will. The LIBOR decision will not, therefore, be granted collateral estoppel effect, and will be disregarded.

V- As the party which initiated the hearing, the burden is on the complainant to prove, by substantial evidence, the truth of the allegations in the complaint. 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). The evidence on the question of whether Devaney knew or should have known prior to the day before the closing that the property did not have a certificate of compliance or a certificate of occupancy does not meet that standard. Nothing was presented to rebut his testimony that he learned of the lack of a certificate of occupancy or of compliance only the day before the closing.

VI- Being an artificial entity created by law, Realty, Inc. 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 representative broker, Devaney, within the actual or apparent scope of his 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.

VII- In determining what penalty to impose for the respondents' conduct, I have considered the fact that on December 13, 1993 Devaney entered into a consent order in which he plead *nolo contendere* to charges that included, among other things, an allegation that he placed a misleading advertisement, and that as a result he paid a \$750.00 fine.

CONCLUSIONS OF LAW

1) By placing misleading advertisements Devaney, and through him Realty, Inc., demonstrated untrustworthiness as real estate brokers.

2) By misleading Ormandy with regards to the ease with which he could have the property rezoned, and by misrepresenting to Ormandy the effect of the lack of a certificate of occupancy and whether there was an application pending for the issuance of one, Devaney, and through him Realty, Inc., demonstrated untrustworthiness as real estate brokers, and engaged in acts of fraud and in fraudulent practices.

3) The charge that Devaney was or should have been aware prior to the day before the closing that the property lacked a certificate of occupancy or a certificate of compliance and failed to disclose that fact to Ormandy was not established by substantial evidence, and should be dismissed.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Michael Devaney and Devaney Realty, Inc. have demonstrated untrustworthiness, and have engaged in acts of fraud and in fraudulent practices, and accordingly, pursuant to Real Property Law §441-c, their license as a real estate broker is suspended for a period of one year, commencing on November 1, 1996 and terminating on October 31, 1997, both dates inclusive. They are directed to immediately send their license certificates and pocket cards to Thomas F. McGrath, Revenue Unit, Department of State, Division of Licensing Services, 84 Holland Avenue, Albany, NY 12208.

Roger Schneier
Administrative Law Judge

Dated: October 17, 1996