

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-

**BARRY ENG,**

Respondent.

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on December 29, 1998 at the office of the Department of State located at 270 Broadway, New York, New York.

The respondent did not appear.

The complainant was represented by Litigation Counsel Laurence Soronen, Esq.

**COMPLAINT**

The complaint alleges that the respondent, a licensed real estate broker: Commingled and converted funds of his principal; engaged in fraudulent business practices; failed to account to and maintain records of his principal; issued a check to his principal without sufficient funds; failed to cooperate with the complainant's investigation; and demonstrated untrustworthiness and incompetency.

**FINDINGS OF FACT**

1) Notices of hearing together with copies of the complaint were served on the respondent by certified mail delivered at his last known business address on December 2, 1998 (State's Ex. 1).

2) The respondent is a duly licensed real estate broker d/b/a Kenwood Realty, with a licensed premises located at 37-07 Main Street, Room 210, Flushing, Queens 11354 (State's Ex. 1).

3) For a period of time prior to May 7, 1997 the respondent was managing agent of a rental building located at 80-34 47th Avenue, Elmhurst, New York owned by Cen Guo Sheng. The respondent has acknowledged that as a result of that management he collected \$45,585.77 in rent from tenants which he did not properly apply, and on May 7, 1997

he agreed to pay \$44,000.00 plus \$5,000.00 interest to Mr. Sheng as a result (State's Ex. 1).

Pursuant to his agreement with Mr. Sheng the respondent was to make an initial payment of \$1, 500.00 on May 30, 1997, with subsequent payments of \$700.00 to be made on or before the tenth of each month commencing on July 1, 1997, and with monthly payments of \$1,000.00 to be made starting on January 1, 1998. The initial payment was, in fact, made by check dated June 3, 1997, but was dishonored due to insufficient funds (State's Ex. 1). No further payments were made (State's Ex. 2).

4) In the course of his investigation License Investigator Stephen Cavota made numerous written attempts to contact the respondent to get his response to Mr. Sheng's complaint. The respondent either failed to respond to the letters sent to him or, in other instances, did not claim certified letters which Mr. Cavota sent to him (State's Ex. 4, 6, and 7).

#### OPINION

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 (RPL) §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- In managing Mr. Sheng's building, the respondent became Mr. Sheng's agent. The relationship of agent and principal is fiduciary in nature, "...founded on trust or confidence reposed by one person in the integrity and fidelity of another." *Mobil Oil Corp. v Rubinfeld*, 72 Misc.2d 392, 339 NYS2d 623, 632 (Civil Ct. Queens County, 1972). Included in the fundamental duties of such a fiduciary are good faith and undivided loyalty, and full and fair disclosure. Such duties are imposed upon real estate licensees by license law, rules and regulations, contract law, the principals of the law of agency, and tort law. *L.A. Grant Realty, Inc. v Cuomo*, 58 AD2d 251, 396 NYS2d 524 (1977). The object of these rigorous standards of performance is to secure fidelity from the agent to the principal and to insure the transaction of the business of the agency to the best advantage of the principal. *Department of State v Short Term Housing*, 31 DOS 90, conf'd. *sub nom Short Term Housing v Department of State*, 176 AD 2d 619, 575 NYS2d 61 (1991); *Department of State v Goldstein*, 7 DOS 87, conf'd. *Sub nom Goldstein v Department of State*, 144 AD2d 463, 533 NYS2d 1002 (1988).

Among the fiduciary duties assumed by a real estate broker when acting as managing agent of a rental building is that of handling his client's funds with the utmost scrupulousness. *Department of State v Mittleberg*, 61 DOS 86, conf'd *sub nom Mittleberg v Shaffer*, 141 A.D.2d 645, 529 N.Y.S.2d 545 (1988); *Division of Licensing Services v Pellittieri*, 77 DOS 92; *Division of Licensing Services v Tripoli*, 96 DO 91. That duty is implemented through, among other things, 19 NYCRR 175.2, which requires that a broker account for trust funds, which regulation was violated by the respondent when he failed to pay to Mr. Sheng money which he collected in the management of the Mr. Sheng's

building. The purpose of that regulation "is to assure that the rights of the lawful owners of escrow funds are not jeopardized by an agent's mismanagement of funds entrusted to the agent's care" *Division of Licensing Services v Pozzanghera*, 141 DOS 93, 7, and its violation is a demonstration of untrustworthiness and incompetency warranting the revocation of the broker's license. *Lawrence Black, Inc. v Cuomo*, 65 A.D.2d 845, 410 N.Y.S.2d 158 (1978), aff'd. 48 N.Y.2d 774, 423 N.Y.S.2d 920. "The imposition of any lesser penalty would unduly jeopardize the welfare of any persons who might do business with the respondents in the future." *Division of Licensing Services v Pellittieri*, supra at p. 3.

III- Fraudulent practices "...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. Since the purpose of such restrictions on commercial activity is to afford the consuming public expanded protection from deceptive and misleading fraud, the application is ordinarily not limited to instances of intentional fraud in the traditional sense. Therefore, proof of an intent to defraud is not essential." *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*, 60 DOS 88, conf'd. sub nom *Harvey v Shaffer*, 156 A.D.2d 1013, 549 N.Y.S.2d 296 (1989). By collecting rent and then failing to properly account for it the respondent engaged in a fraudulent practice and further demonstrated untrustworthiness.

IV- The respondent issued a bad check in purported payment of the first installment of the restitution which he had agreed to make to Mr. Sheng. That is a further demonstration of untrustworthiness and incompetency. *Division of Licensing Services v Laymon*, 214 DOS 97; *Division of Licensing Services v The Coopers Realty Consultants, Inc.*, 38 DOS 91; *Department of State v Janus*, 33 DOS 89; *Department of State v Vitelli*, 50 DOS 88; *Department of State v Milk*, 59 DOS 87.

V- RPL §442-e[5] states:

"The secretary of state shall have the power to enforce the provisions of this article and upon complaint of any person, or on his own initiative, to investigate any violation thereof or to investigate the business, business practices and business methods of any person, firm or corporation applying for or holding a license as a real estate broker or salesman, if in the opinion of the secretary of state such investigation is warranted. Each such applicant or licensee shall be obliged, on request of the secretary of state, to supply such information as may be required concerning his or its business, business practices or business methods, or proposed business practices or methods."

Pursuant to RPL §442-j the Secretary of State has the authority to delegate to employees of the Department of State the above powers to compel a licensee to supply information.

The respondent failed to comply with the complainant's requests that he cooperate with its investigation of Mr. Sheng's complaint when he did not respond to, or in some cases did not claim, Investigator Cavota's letters. That non-cooperation was a violation of RPL 442-e[5]. *Division of Licensing Services v Lawson*, 42 DOS 93.

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

**DETERMINATION**

**WHEREFORE, IT IS HEREBY DETERMINED THAT** Barry Eng has violated Real Property Law §442-e[5], has demonstrated untrustworthiness and incompetency, and has engaged in a fraudulent practice, and accordingly, pursuant to Real Property Law §441-c, his license as a real estate broker is revoked, effective immediately. Should he ever re-apply for a license as a real estate broker or real estate salesperson no action shall be taken on such application until he shall have produced proof satisfactory to the Department of State that he has fully complied with his agreement of May 7, 1997 to pay the sum of \$49,000.00 to Cen Guo Sheng. In determining whether there has been such compliance, additional interest at the legal rate for judgements (currently 9% per year) shall be assessed against the respondent on each late installment payment, calculated from the original due date of such installments.

Roger Schneier  
Administrative Law Judge

Dated: December 29, 1998