

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-

**JULIA B. FEE, INC., JACKSON B. BROWNING,
FLORENCE ALKALAY, and SANDRA ADLER-KUSINITZ,**

Respondents.

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on August 12, 1997 at the office of the Department of State located at 270 Broadway, New York, New York.

The respondents were represented by Frederick James Onorato, Esq., 12 East 41st Street, 17th Floor, New York, New York 10017.

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

COMPLAINT

The complaint, as amended on the record with the consent of the respondents, alleges that: In 1993 Ms. Adler-Kusinitz, acting in the capacity of a real estate broker associated with Julia B. Fee, Inc. (hereinafter "Fee"), entered into a listing agreement for the sale of real property, and that Fee thereby became agent for the owners; four months after taking the listing Ms. Adler-Kusinitz presented the owners with, and obtained their signatures on, the disclosure forms mandated by Real Property Law (hereinafter "RPL") §443; the disclosure form listed the owners as prospective buyers, not as prospective sellers; three offers for the property were received; when the first two offers were withdrawn, Ms. Alkalay, a real estate salesperson associated with Fee, was asked by the makers of the third offer why the two prior deals died when the property was inspected; the makers of the third offer offered to purchase a copy of either prior inspection report; Ms. Alkalay untruthfully told the makers of the third offer that there were no written inspection reports; although Ms. Alkalay knew or should have known the results of the inspections and the reason for the

previous purchasers for not going forward, she misrepresented and/or failed to adequately or otherwise inform the makers of the third offer of the results of the inspection; an inspection conducted on behalf of the makers of the third offer revealed problems with the foundation and exterior walls of the property, but the respondents represented to them that there was no problem with the foundation and that they had the right to withhold the results of the prior inspections; the third offer was withdrawn; upon the subsequent sale of the property Fee, Ms. Alkalay, and Ms. Adler-Kusinitz shared in a commission; from November 2, 1990 to June 1, 1994 Ms. Adler-Kusinitz was not licensed as a real estate salesperson or broker but held herself out as a broker associated with Fee. It is further alleged that by reason of the foregoing: The respondents engaged in fraud and/or a fraudulent practice failed to deal honestly, accurately and fairly with members of the public, violated RPL §443, accepted and retained an unearned commission, and demonstrated untrustworthiness and/or incompetence; Mr. Browning, the licensed representative broker of Fee, employed an unlicensed real estate broker and/or permitted Ms. Adler-Kusinitz to act and hold herself out as a real estate broker associated with Fee although she was not so licensed; and Ms. Adler-Kusinitz violated RPL §§440-a and 441.

FINDINGS OF FACT

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

2) Jackson B. Browning is, and at all times hereinafter mentioned was duly licensed as a real estate broker in his individual capacity and as representative of Fee. Florence Alkalay is, and at all times hereinafter mentioned was, duly licensed as a real estate salesperson associated with Fee. Since June 1, 1994 Sandra Adler-Kusinitz has been licensed as a real estate broker in association with Fee. She was licensed neither as a real estate salesperson nor as a real estate broker from November 3, 1990 through March 31, 1994 (State's Ex. 2), although during that period of time she worked in the capacity of a real estate broker in association with Fee, taking listings, negotiating sales, and receiving commissions.

3) Sometime in 1990 Steve Kanney and his wife Florence Kanney engaged the services of Ms. Alkalay, acting in her capacity as a salesperson associated with Fee, to attempt to sell their apartment and to find a house to purchase. In late November, 1993 Ms. Alkalay showed them a house located at 155 Evandale Road, Scarsdale (hereinafter "the house"), which had been listed for sale by Mr. and Mrs. William Lighthall, and the exclusive right to sell listing for which had been taken on behalf of Fee by Ms. Adler-Kusinitz on August 16, 1993 (State's Ex. 4).

Ms. Alkalay told the Kanneys that there were several offers outstanding on the house. The Kanneys decided not to make an offer by the deadline given to them by Ms. Alkalay, but, when the first deal fell through after an inspection by an engineer, Ms. Alkalay advised them that they had another opportunity to make an offer. Thus, on or about November 30, 1993 the Kanneys made an offer to purchase the house for \$495,000. However, they were subsequently advised by Ms. Alkalay that an offer of \$499,000 had been accepted.

Sometime in December, 1993 the house was inspected again, and, once again, the deal fell through. Ms. Alkalay then telephoned the Kanneys and asked them if they were still interested and, if so, at what price. They told her that they were interested, but that they were concerned that the prior deals had fallen through after inspections by engineers, and that they wanted to know what the problem was. She checked with Ms. Adler-Kusnitz, and then told the Kanneys that the inspections had nothing to do with the prior deals falling through. In fact, Ms. Adler-Kusnitz had told Ms. Alkalay that the inspections had revealed a problem with the foundation.¹ The respondents, however, although they did not so tell the Kanneys, relied on the Lighthall's belief, based on reports they had received, that the house was sound, and abided by the Lighthall's wish that if the Kanneys were concerned they could get their own engineer (State's Ex. 7). Mr. Kanney told Ms. Alkalay that he would be willing to pay for copies of the inspection reports, but she said that there were no written reports.

The Kanneys then arranged to have the house inspected by John Cotugna of Carnell Associates Inc. at a cost to them of approximately \$515.00. The inspection was conducted on December 10, 1993 (State's Ex. 3). Mr. Cotugna expressed concern about the fact that the foundation walls did not extend to the ceiling of the basement and that one of those walls was bowed outward, a condition which might have occurred since the construction of the house. He said that the condition should be monitored, and consideration should be given to reinforcing the walls. He indicated that an alternative would be to jack up the building and add four feet to the height of the foundation walls, a procedure which, he said, would cost approximately \$15,000.

¹ In her written statement (State's Ex. 7), Ms. Alkalay said: "I asked the listing agent for the reports -- but as I had explained to Mr. Kanney, the reports, if they ever existed, were the property of the prospective buyers and not the seller or the selling agent, Julia B. Fee. Upon further investigation, I found out that one engineer orally had discussed the construction of the basement wall and a second engineer found a water condition emanating from the neighbor's property but made no mention of the wall....All this occurred before December 8, 1993."

Mr. Kanney told Ms. Alkalay about Mr. Cotugna's findings, and asked her if anyone in her organization was aware of the problem with the foundation. She said she was not aware of it, and they told her that as a result of the inspection they would not purchase the house.

On or about February 28, 1994 the house was sold to a different purchaser. Fee received a commission of \$12,250.00 as the listing broker (State's Ex. 6), and Ms. Adler-Kusinitz, who was still not licensed at the time, was paid \$6,125.00 by Fee as her share of the commission for having obtained the listing.

OPINION

I- The respondent's have objected to this proceeding on the grounds that they received a letter dated January 10, 1995 from District Manager Stephen Warden in which they were advised that DLS was contemplating no further action and was closing the file (Resp. Ex. A). However, inasmuch as estoppel is not available to preclude a governmental entity from discharging its statutory duties, *Parkview Associates v City of New York*, 71 NY2d 274, 525 NYS2d 176 (1988), that letter did not bar the subsequent bringing of charges against the respondents.

The respondents have also interjected as a defense a claim that this proceeding is barred by the statute of limitations contained in the Criminal Procedure Law. However, these proceedings, which are civil in nature, are governed by the State Administrative Procedure Act (SAPA), which, in §301(1), provides that "(i)n an adjudicatory proceeding all parties shall be afforded an opportunity for a hearing within reasonable time."

In order to show that a hearing has not been held within a reasonable time, the respondents must show substantial prejudice arising out of the delay. *Correale v Passidomo*, 120 AD2d 525, 501 NYS2d 724 (1986); *Geary v Com'r of Motor Vehicles*, 92 AD2d 38, 459 NYS2d 494 (1983); cf. *Eich v Shaffer*, 136 AD2d 701, 523 NYS2d 902 (1988). Such a showing can be made with a demonstration by the respondents that their ability to present defense witnesses with a clear and detailed recollection of the events has been hampered by the delay. *Walia v Axelrod*, 120 Misc.2d 104, 465 NYS2d 443 (Supreme Ct. Erie County, 1983). However, the respondents must show that the delay significantly and irreparably handicapped them in preparing a defense, *Reid v Axelrod*, 164 AD2d 973, 559 NYS2d 417 (1990); *Gillette v NYS Liquor Authority*, 149 AD2d 927, 540 NYS2d 61 (1989), which they have failed to do.

II- Real estate brokers and salespersons 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 1013, 549 NYS2d 296 (1989). In violation of that obligation Ms. Alkalay, after having been told by Ms. Adler-

Kusnitz that a prior inspection of the house had disclosed a problem with the foundation, told the Kanneys that the inspections had nothing to do with the prior sales falling through. Mr. Browning has attempted to justify that clear act of dishonesty with the argument that since the Lighthalls had received other opinions indicating that there was nothing wrong with the house, and because none of the respondents had personal knowledge regarding the soundness of the house, they had a fiduciary duty to the Lighthalls not to stigmatize the house.

Mr. Browning's argument entirely misses the point. The charge is not that Ms. Alkalay misrepresented the condition of the house, but that she misrepresented the reasons for the previous purchasers not going forward with their transactions. In order to disclose that the sales had fallen through because of the results of the prior inspections Ms. Alkalay did not need to know or believe that there was something wrong with the house, and she had no more right than did the Lighthalls to misrepresent the reasons for the failure of the prior sales. Cf. Restatement, Second, Agency §348.

The complainant has failed to establish that Ms. Alkalay's conduct was an act of fraud. Although it established that she knew that her representation as to the reasons for the failure of the prior sales was false, and that she intended that the Kanneys should act on that misrepresentation, it failed to establish that knowledge of the contents of the prior inspection reports would have deterred the Kanneys from having their own inspection conducted.

The complainant did, however, establish that Ms. Alkalay engaged in a fraudulent practice. 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*, *supra*.

III- The respondents are charged with having violated RPL §443 by having the Lighthalls sign the required agency disclosure form four months after the listing was obtained, and because the Lighthalls were listed on the disclosure form as prospective buyers. To support that charge the complainant offered in evidence a disclosure form dated December 27, 1993 which was signed by the Lighthalls in the space for the buyers (State's Ex. 5). However, the complainant failed to establish that the form was the one that

related to the sale of their house by the Lighthalls and not, as claimed by the respondents, the one that related to their purchase of another house. Accordingly, the complainant failed to prove that charge by substantial evidence, State Administrative Procedure Act §306, and the respondents' motion to dismiss it was granted at the close of the complainant's case.

IV- The complaint, as amended, contains two allegations regarding the license status of Ms. Adler-Kusinitz. In ¶5 it is alleged that "at all times mentioned herein (she) was licensed as a real estate broker associated with Julia B. Fee, Inc...." In ¶17 it is alleged that from 11/2/90 to 6/1/94 she "was not licensed by DLS as either a real estate salesperson or broker...." Thus, there is an inconsistency in the complaint. It is clear, however, that the complaint charges Ms. Adler-Kusinitz with unlicensed activity, and that it charges Fee and Mr. Browning with employing an unlicensed broker. It is significant that in spite of the obvious inconsistency the respondents never requested a more definite statement (State Administrative Procedure Act §301[2]), clearly understood what the charge was,² and did not raise the issue until the complainant had rested its case. I find, therefore, that the complaint gave the respondents sufficient notice of the charges against them.

A real estate broker who or which has an unlicensed salesperson or broker associated with him or it is guilty of demonstrating incompetency. *Doherty v Cuomo*, 64 AD2d 847, 407 NYS2d 337 (1978), app. disp. 45 NY2d 960, 411 NYS2d 566; *Division of Licensing Services v Fishman*, 153 DOS 92. Such an association is also a violation of RPL §440-a.

The record clearly establishes that Ms. Adler-Kusinitz was employed by Fee as broker during a period of time in which she was not licensed, and that in the course of that unlicensed employment she obtained the listing for sale of the Lighthall house and shared in the commission received by Fee as a result of her having obtained that listing. Mr. Browning seeks to excuse that violation of law with the explanation that he relied on unofficial lists of licensees supplied to him by the Westchester County Board of Realtors, Inc., a private membership organization. Such reliance was clearly misplaced, and was a demonstration of incompetency.

As the representative broker for Fee, Mr. Browning has a duty to assure the lawful operation of the corporation, as it is through him that the corporation meets the requirements for licensure. RPL §§441[1] and 441-b[2]; 19 NYCRR 175.20[b]. Pursuant to RPL §441-

² At the commencement of the proceedings the respondents consented to an amendment to ¶17 of the complaint, which had alleged that Ms. Adler-Kusinitz was unlicensed from 11/2/90 to 6/1/96.

a[4], the license of a real estate broker must be conspicuously displayed in his or her principal place of business at all times, and an expired license may not be displayed. Had Mr. Browning, in the course of his supervision of Fee's operations, assured that current licenses were posted for all salespersons and brokers associated with Fee he would have realized that Ms. Adler-Kusinitz was not licensed.

Ms. Adler-Kusinitz's unlicensed activities were, of course, a violation by her of RPL §440-a, which provides that no person may act as a real estate broker without being so licensed,³ as well as a demonstration of incompetency.

V- Fee and Ms. Adler-Kusinitz shared in a commission which arose out of her unlicensed activity. That commission was, therefore, unearned. Where a broker or salesperson has received money to which the broker or salesperson is not entitled, the broker and/or salesperson may be required to return that money, together with interest, as a condition of retention of its, his, or her 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).

VI- As discussed above, as the representative broker of Fee Mr. Browning is responsible for seeing to the lawful conduct of that corporation, and he is vicariously liable for the misconduct of the salespersons and associate brokers subject to his supervision. RPL§442-c; *Roberts Real Estate, Inc. v Department of State*, 80 NY2d 116, 589 NYS2d 392 (1992). Being an artificial entity created by law, Fee 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, salespersons and associate brokers within the actual or apparent scope of their authority. *Roberts Real Estate, Inc. v Department of State*, supra; *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.

CONCLUSIONS OF LAW

1) The complainant is not estopped from bringing this proceeding.

2) This proceeding is not barred by any statute of limitations.

³ A real estate broker is, among other things, a person who, for consideration, lists property for sale. RPL §440[1].

3) By telling the Kanneys that the failure of the prior sales to be concluded was not the result of the inspections Ms. Alkalay, and through her Mr. Browning and Fee, engaged in a fraudulent practice and demonstrated untrustworthiness.

4) The complainant failed to prove by substantial evidence that the respondents violated RPL §443, and that charge was properly dismissed at the close of the complainant's case.

5) Mr. Browning, and through him Fee, demonstrated incompetency through the employment of Ms. Adler-Kusinitz as a real estate broker at a time when she was not licensed.

6) Ms. Adler-Kusinitz violated RPL §440-a by acting as a real estate broker when not so licensed, and thereby also demonstrated incompetency. She did not violate RPL §441, which merely sets forth the procedures and requirements for a license application, and that charge should be, and is, dismissed.

7) Fee and Ms. Adler-Kusinitz should be required to refund to the Lighthalls the unearned commission which was received by them as a result of Ms. Adler-Kusinitz's unlicensed activity.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Julia B. Fee, Inc. and Jackson B. Browning have engaged in a fraudulent practice and have demonstrated untrustworthiness and incompetency as real estate brokers, and accordingly, pursuant to Real Property Law §441-c, they shall pay a fine of \$1,000.00 to the Department of State on or before October 31, 1997, and should they fail to pay the fine, then their licenses as real estate brokers shall be suspended for a period commencing on November 1, 1997 and terminating two months after the receipt by the complainant of their license certificates and pocket cards. Upon payment of the fine or termination of the suspensions in lieu thereof their licenses shall be further suspended until they shall submit proof satisfactory to the Department of State that they have refunded the sum of \$6,125.00, together with interest at the legal rate for judgements (currently 9%) from November 1, 1997 to Mr. and Mrs. William Lighthall, and

IT IS FURTHER DETERMINED THAT Florence Alkalay has engaged in a fraudulent practice and has demonstrated untrustworthiness as a real estate salesperson, and accordingly, pursuant to Real Property Law §441-c, she shall pay a fine of \$1000.00 to the Department of State on or before October 31, 1997, and should she fail to pay the fine, then her license as a real estate salesperson shall be suspended for a period commencing on November 1, 1997 and terminating two months after the receipt by the complainant of her license certificate and pocket card, and

IT IS FURTHER DETERMINED THAT Sandra Adler-Kusinitz has violated Real Property Law §440-a and has demonstrated incompetency, and accordingly, pursuant to Real Property Law §441-c, she shall pay a fine of \$500.00 to the Department of State on or before October 31, 1997, and should she fail to pay the fine, then her license as real estate broker shall be suspended for a period commencing on November 1, 1997 and terminating one month after the receipt by the complainant of her license certificate and pocket card. Upon payment of the fine or termination of the suspension in lieu thereof her license shall be further suspended until she shall submit proof satisfactory to the Department of State that she has refunded the sum of \$6,125.00, together with interest at the legal rate for judgements from November 1, 1997 to Mr. and Mrs. William Lighthall.

The respondents are directed to submit payment of the fines and/or their license certificates and pocket cards and, where applicable, proof that the required refunds have been made, to Diane Ramundo, Customer Service Unit, Department of State, Division of Licensing Services, 84 Holland Avenue, Albany, NY 12208.

Roger Schneier
Administrative Law Judge

Dated: September 10, 1997