

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-

GERALD FINKE,

Respondent.

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on January 19, 1999 at the office of the Department of State located at 41 State Street, Albany, New York.

The respondent, having been advised of his right to be represented by an attorney, chose to represent himself.

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

COMPLAINT

The complaint alleges that: The respondent, a licensed real estate broker, having become the agent of William Bulmer for the sale of Mr. Bulmer's commercial property, represented to Mr. Bulmer that should Mr. Bulmer agree to hold a second mortgage from Mark Farinella, a prospective purchaser of the property, that mortgage could be sold at a discount; the respondent obtained Mr. Bulmer's agreement to have himself and Richard Rowlands hold a first mortgage on the property, thereby becoming a dual agent and/or principal and agent in the same transaction without disclosing to Mr. Bulmer all of the relevant facts and implications thereof; the respondent placed his own interests above those of his principal; having become aware of negative information regarding Mr. Farinella's credit worthiness and/or financial condition and that a mortgage from him would be unsalable and/or valueless on the secondary market, the respondent failed to inform Mr. Bulmer of that information; the respondent received a \$3,500.00 commission from Mr. Bulmer on the sale of the property and subsequently exchanged his mortgage on the property for another mortgage held by

Mr. Rowlands' partner, Albert J. Feldman; Mr. Farinella defaulted on the mortgage payments on the property and Mr. Rowlands and Mr. Feldman foreclosed on the first mortgage; by reason of the respondent's misconduct Mr. Bulmer suffered pecuniary and other damages.

FINDINGS OF FACT

1) Notice of hearing together with a copy of the complaint was served on the respondent by certified mail delivered on July 3, 1998 (State's Ex. 1).

2) The respondent is, and at all times hereinafter mentioned was, a duly licensed real estate broker d/b/a Gerald Finke Real Estate at Ravine Mill Road, P.O. Box 743, Coeymans, New York 12045 (State's Ex. 2).

3) In February, 1993 William T. Bulmer spoke with the respondent about selling commercial property which Mr. Bulmer owned at 37-43 Ida Street, Troy, New York (hereinafter "the property"). The respondent prepared, signed, and had Mr. Bulmer sign, a listing agreement dated February 1, 1993 granting him an exclusive right to sell agency (State's Ex. 13). Subsequently, on March 25, 1993, the respondent gave Mr. Bulmer an agency relationship disclosure form stating that the respondent was acting in the capacity of seller's agent (Resp. Ex. B).

4) The property was occupied by a tenant, Mark E. Farinella d/b/a Rainbow Glass, who had previously expressed some interest in purchasing it. With the knowledge and consent of Mr. Bulmer the respondent approached Mr. Farinella about the possibility of Mr. Farinella buying the property, and Mr. Farinella expressed interest in such a transaction.

5) The respondent was able to put together a deal for Mr. Farinella to purchase the property for \$35,000.00. Financing would be provided through a \$15,000.00 first mortgage and Mr. Bulmer taking back a \$20,000 second mortgage. The respondent was to be one of two co-mortgagees holding the first mortgage. The other co-mortgagee was to be Richard Rowlands, Esq., who had previously arranged financing for the respondent with other lenders.

6) At no time did the respondent discuss with or explain to Mr. Bulmer the significance of the respondent's becoming a principal in a transaction in which he was already an agent.

7) The respondent told Mr. Bulmer that the second mortgage could easily be sold to an investor at a discount, and that he could arrange such a sale. At first he told Mr. Bulmer that the mortgage could be sold for \$18,000.00, but in subsequent conversations stated lower amounts.

8) On April 14, 1993 Mr. Bulmer and Mr. Farinella executed a contract of purchase and sale for the property on a form provided and prepared by the respondent (State's Ex. 14). On the same date the respondent provided Mr. Farinella with an agency relationship disclosure form stating that the respondent was the seller's agent (State's Ex. C).

9) Sometime in April, 1993 the respondent spoke with Charles Cefalu of Capital Mortgage Discount, Inc. d/b/a Capital Investment Group (hereinafter "Capital") about the possibility of Capital purchasing the \$20,000.00 mortgage. Mr. Cefalu did a thorough analysis of the details provided by the respondent and of Farinella's credit history, and advised the respondent that the mortgage note, even as a first mortgage, would be unsalable either to his company or to private investors. The respondent never advised Mr. Bulmer of this.

10) The sale closed on May 6, 1993. The respondent and Mr. Rowlands received a \$17,600.00 first mortgage, apparently covering the share of the purchase price which they were to provide plus the closing costs which Mr. Farinella had agreed to assume. Mr. Rowlands gave Mr. Bulmer \$7,500.00 in cash. The respondent gave Mr. Bulmer a \$4,000.00 mortgage on his personal residence (which the respondent eventually, if belatedly, paid off), and took a \$3,500.00 credit for his 10% commission. Mr. Bulmer took back a \$20,000.00 second mortgage (State's Ex 7, 8, 9, and 15).

11) On or about August 19, 1993 the respondent assigned his interest in the first mortgage to Albert J. Feldman, Mr. Rowlands' wife's uncle, in exchange for a mortgage of equivalent face value held by Mr. Feldman (State's Ex. 3).

12) About a month after the closing Mr. Bulmer spoke with Mr. Cefalu about selling the second mortgage. Mr. Cefalu told Mr. Bulmer that the respondent had previously spoken to him about that possibility, and refused to purchase the mortgage. Sometime thereafter the respondent boasted to Mr. Cefalu about how well he (the respondent) had done on the deal.

13) Mr. Farinella made four or five payments on the mortgages until, in or about September, 1993, he defaulted on both of them and closed his business. Mr. Rowlands and Mr. Farinella commenced a foreclosure proceeding (State's Ex. 4), and, on August 15, 1994, were granted a judgement of foreclosure and sale which, among other things, wiped out Mr. Bulmer's interest in the property (State's Ex. 5). They then successfully bid for the property at the foreclosure sale, offering the amount of their lien, and then assigned their bid to a joint venture, Feldman-Rowlands Management Co. (State's Ex. 6). Shortly thereafter they re-sold the property for approximately \$35,000.00.

OPINION AND CONCLUSIONS OF LAW

I- The respondent was Mr. Bulmer'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 Rubenfeld*, 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).

Prior to the closing the respondent had information strongly indicating that, contrary to what he had told Mr. Bulmer, the second mortgage which Mr. Bulmer would be taking back from Mr. Farinella would not be able to be re-sold. The respondent breached his fiduciary duties by not disclosing that information to Mr. Bulmer, and thereby demonstrated untrustworthiness and incompetency as a real estate broker. It is reasonable to conclude that he did that so as to cause the transaction to be completed, thereby assuring that he would receive a commission and be able to participate in a lucrative mortgage financing opportunity. In so doing he wrongfully placed his interests above those of his principal, a further demonstration of untrustworthiness and incompetency. *Division of Licensing Services v Loffredo*, 83 DOS 95, confirmed *sub nom Loffredo v Treadwell*, 235 AD2d 541, 653 NYS2d 33 (1997). The direct result of the respondent's misfeasance was that Mr. Bulmer ended up holding a worthless second mortgage and, except for the portions of principal which were returned in the few mortgage payments which he received, suffered the loss of his \$20,000.00.

II- Once it was agreed that the respondent would participate in the financing of transaction he became a principal in an aspect of that transaction.

"A real estate broker may act concurrently as an agent and as a principal in a transaction on disclosing all relevant facts fully and completely to his or her principal. A fact is relevant if it is one which the agent should realize would be likely to affect the judgement of the principal in giving his or her consent

to the agent to enter into the particular transaction on the specified terms....The agent's duty of fair dealing is satisfied only if he or she reasonably believes that the principal understands the implications of the transaction. The burden of proof is on the agent to show that all the duties required have been satisfied." *Division of Licensing Services v Marotta*, 73 DOS 95 (citations omitted).

The respondent has failed to meet his burden of proof on this issue. The evidence is clear that at no time did he explain to Mr. Bulmer the implications of his acting as both agent and principal in the transaction. Significantly, he did not explain to Mr. Bulmer that in holding a first mortgage on the property his position would be superior to that of Mr. Bulmer, who was to hold a second mortgage, and, therefore, that the respondent would be in a position to wipe out Mr. Bulmer's interest should there be a foreclosure. The fact that the respondent did not, because he had traded his interest in the mortgage, participate in the foreclosure eventually came to pass certainly does not in any way lessen his culpability. His failure in this regard is a yet another demonstration of untrustworthiness and incompetency.

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).

The respondent engaged in a fraudulent practice when he placed his interests ahead of those of Mr. Bulmer when he failed to advise him that his previous advice about selling the mortgage might be wrong.

IV- The respondent received a \$3,500.00 commission as a result of his misconduct in the sale of the property. That misconduct so taints the transaction as to eliminate any entitlement which he might have to that commission.

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 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). The respondent should be required to make such a refund to Mr. Bulmer.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Gerald Finke 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 suspended for a period commencing on March 1, 1999 and terminating six months after the receipt of his license certificate and pocket card by the complainant. Upon completion of the suspension said license shall be further suspended until such time as the respondent has submitted proof satisfactory to the Department of State that he has refunded the sum of \$3,500.00 plus interest at the legal rate for judgements (currently 9%) from May 6, 1993 to William T. Bulmer. The respondent is directed to send his license certificate and pocket card to Usha Barat, Customer Service Unit, Department of State, Division of Licensing Services, 84 Holland Avenue, Albany, NY 12208.

Roger Schneier
Administrative Law Judge

Dated: February 19, 1999