

STATE OF NEW YORK
DEPARTMENT OF STATE

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In the Matter of the Application of

STANLEY L. FRIED

DECISION

For Renewal of a License as a Real
Estate Broker

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Pursuant to the designation duly made by the Hon. Gail S. Shaffer, Secretary of State, the above noted matter came on for hearing before the undersigned, Roger Schneier, on November 10, 1994 at the office of the Department of State located at 270 Broadway, New York, New York.

The applicant, of 292 Harbor Drive, Lido Beach, New York 11562, having been advised of his right to be represented by an attorney, appeared pro se.

The Division of Licensing Services was represented by Supervising License Investigator Michael Coyne.

ISSUE

Issue before the tribunal is whether the applicant should be denied renewal of his license as an associate real estate broker because he fraudulently misled a client/tenant into lending him monies to be repaid out of commissions to be earned, when he knew that he owed the broker with whom he was associated an amount in excess of those commissions and, therefore, the commission money would not be available for repayment of the loan.

FINDINGS OF FACT

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

2) At all times hereinafter mentioned the applicant was duly licensed as an associate broker in association with Sholom, Zuckerbrot, Wellins & Evans of Long Island, Inc. (hereinafter "Sholom"). That license expired and was not renewed on October 18, 1992 (State's Ex. 6).

3) On October 1, 1992 the Division of Licensing Services sent the applicant a notice of violation advising him that he was charged with having:

"(f)raudulently misled his client/tenant to advance him monies on the strength that it would be repaid with commissions he was to earn on that and other rentals when he knew that at those times he owed the broker money in excess of the commissions and the commission money would not be available for repayment of the monies advanced." (State's Ex. 8 and 9).

The applicant pled "not guilty" to the charge, acknowledging that he understood that the matter would be scheduled for a personal appearance. However, presumably because the license expired shortly thereafter, no further action was taken until the applicant submitted a renewal application dated November 30, 1993 (State's Ex. 2).

After an investigation, by letter dated June 27, 1994, the applicant was advised by the Division of Licensing Services that it proposed to deny his application because of the outstanding complaint. By letter dated July 19, 1994 the applicant requested an administrative review. By letter dated August 2, 1994 the applicant was advised that the Division of Licensing Services continued to propose to deny the application. By letter dated August 8, 1994 the applicant requested an administrative hearing (State's Ex. 1).

4) Sometime in 1990 the applicant was acting as agent for American Preferred Prescription, Inc. (hereinafter APP), assisting it in locating and leasing office space. Those efforts were expected to result in the eventual payment to the applicant of a share of a brokerage commission to be paid by the landlord. The applicant, however, needed money then, and he prevailed on the management of APP to have the corporation advance the money to him with repayment to be made when the transaction was completed.

There is a dispute as to how much money was advanced. The only documentation produced deals with the sum of \$19,457.51, as stated in a promissory note of October 17, 1990 (State's Ex. 13) and with interest subsequently accrued on the note (State's Ex. 14, 16 and 17). The note was executed sometime after the making of the loan and, therefore, is for an amount which includes accrued interest. There may also have been an additional loan of \$2,000.00 which was not reflected in the note because of its prior repayment¹.

On August 15, 1990, prior to the execution of the promissory note, the applicant had given APP a check for \$6,600.00, with the understanding that it would be held until December 26, 1990. On that date the check was to be deposited, and the balance of the loan, plus interest, was to become due (State's Ex. 16). However, when the check was deposited it was dishonored because of insufficient funds

¹ The uncertainty regarding the amount of the loan or loans arises out for the failure of the Division of Licensing Services to produce a copy or copies of the check or checks by which payment of the loan or loans was made.

(State's Ex. 15). APP notified the applicant, and demanded immediate payment of the balance due on the loan, which it calculated to be \$20,290.47 as of January 11, 1991 (State's Ex. 17). Three days later, on January 14, 1991, the applicant executed an assignment to APP of all commissions due to him from Sholom (State's Ex. 14). The broker, however, declined to make any payments to APP, apparently because it too was owed money by the applicant.

5) In his dealings with APP, the applicant represented himself to be the Executive Vice President of Sholom (State's Ex. 12). He did not disclose to APP that he had outstanding debts owing to the broker for commission advances he had received.

6) On December 21, 1990 the applicant filed a petition under Chapter 11 of the Bankruptcy Law (State's Ex. 7). He did not list the loan by APP on his schedule of debts.

OPINION

I- At the time the applicant requested and received the loan from APP he was acting as its agent, the agency relationship having been created when he agreed to assist APP in obtaining office space. Restatement (Second) of Agency §1. 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).

The applicant had the obligation to be open and forthright with APP. Therefore, when he requested the loan he was required to disclose any factors which would have an effect on his ability to repay it. Unfortunately, he failed to disclose that the commission with which he said he would repay the loan was already encumbered by debts arising out of advances received from Sholom. That failure to disclose was a breach of the applicant's fiduciary duties to APP and a fraudulent practice.²

² Fraudulent practices "...as used in relation to the regulation
(continued...)

II- The Division of Licensing Services has failed to establish that the applicant's representation to APP that he was the Executive Vice President of Sholom was false. While, as an Associate Broker, it would have been unlawful for the applicant to be an officer of Sholom (Real Property Law [RPL] §§440[2] and 441-b[2]), the applicant might have obtained his license without disclosing to the Department of State his status as a corporate officer.

III- The applicant contends that he has not satisfied his debt to APP because he does not have the ability to do so. As evidence of that he acknowledges that he owes the money and points to the fact that he did not schedule the debt in his bankruptcy proceeding because, he says, he did not want the debt discharged. He testified that he wishes to pay APP, but that without a license as a real estate broker he will be unable to earn the money to do so.

Were this merely a case of a failure to pay a debt, the applicant's argument would be persuasive. Cf. Division of Licensing Services v Bigness, 85 DOS 94; Division of Licensing Services v Carvelli, 60 DOS 86. However, the added element of the applicant's breach of his fiduciary duties and fraudulent practice in obtaining the loan negates that argument.

IV- If the only issue before this tribunal was how to obtain for APP the money which it is owed by the applicant, perhaps a way of issuing the license contingent upon his repaying the loan could be devised. However, although while as the result of proceedings before this tribunal complaining witnesses often receive restitution,³ this

²(...continued)
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).

³ 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
(continued...)

tribunal is not a civil court constituted with the purpose of obtaining financial redress for individuals or organizations. That result is only incidental to the primary purpose of both the licensing law and these proceedings: the protection of members of the public from inept, inexperienced or dishonest persons who might perpetrate frauds on them. Dodge v Richmond, 5 AD2d 593, 173 NYS2d 786 (1958).

The applicant's current difficulties arise out of his lack of openness and probity in obtaining a loan from a client in a situation where the likelihood of his ability to repay that loan was questionable. While there is no reason to doubt that he needed the loan, he has provided nothing on which to base the conclusion that given similar need in the future he wouldn't engage in the same type of conduct. He has, therefore, failed to meet his burden of establishing that he is sufficiently trustworthy to be licensed as a real estate broker. RPL §441[1][d]; State Administrative Procedure Act (SAPA) §306[1].

CONCLUSIONS OF LAW

The applicant has engaged in a fraudulent practice, and has failed to establish that he is now sufficiently trustworthy to be licensed as a real estate broker. Accordingly, pursuant to RPL §441[1][d] and SAPA §306[1], his application for renewal of his license as a real estate broker should be denied.

³(...continued)
A.D.2d 764, 227 N.Y.S.2d 987 (1962). Such a requirement is often imposed in addition to a fine or suspension of a license.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT, pursuant to Real Property Law §§441[1][d] and 441-e and State Administrative Procedure Act §306[1], the application of Stanley L.Fried for renewal of his license as a real estate broker is denied.

These are my findings of fact together with my opinion and conclusions of law. I recommend the approval of this determination.

Roger Schneier
Administrative Law Judge

Concur and So Ordered on:

GAIL S. SHAFFER
Secretary of State
By:

James N. Baldwin
Executive Deputy Secretary of State