

STATE OF NEW YORK
DEPARTMENT OF STATE

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In the Matter of the Complaint of

**DEPARTMENT OF STATE
DIVISION OF LICENSING SERVICES,**

Complainant,

DECISION

-against-

**YORAM GAFNI and LAWYERS FUNDING
GROUP, INC.,**

Respondents.

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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 January 4, 1994 at the office of the Department of State located at 270 Broadway, New York, New York.

The respondent, of 12 East 41 Street, Suite 1005, New York, New York 10017, an attorney at law, appeared pro se.

The complainant was represented by Scott NeJame, Esq.

COMPLAINT

The complaint in the matter alleges that the respondents, licensed real estate brokers illegally retained deposit monies and/or converted monies not belonging to them and/or retained an unearned commission, engaged in fraud, and engaged in a fraudulent practice, in a transaction in which they were retained to obtain a commercial mortgage.

FINDINGS OF FACT

1) Notice of hearing together with a copy of the complaint was served on the respondents by certified mail on August 6, 1993 (Comp. Ex. 1).

2) Yoram Gafni is, and at all times hereinafter mentioned was, duly licensed as a real estate broker representing Lawyers Funding Group, Inc. (Comp. Ex. 2).

3) On July 14, 1992 Leger J. Philippe and his wife, Juslene J. Philippe, entered into a contract to purchase a property consisting of 12 stores located in Mount Vernon, New York for \$990,000.00, subject to their being able to obtain a mortgage in the amount of \$800,000.00 (Comp. Ex. 3).

On July 27, 1992 Mr. Philippe spoke with Gafni, with whom he had previously met, about the respondents assisting him in obtaining the mortgage. Pursuant to that conversation the Philippes entered into an agency agreement with the respondents and paid them a \$5,000.00 fee (Comp. Ex. 17) for "expedited processing", which fee was to cover the obtaining of credit reports and appraisal of the property. Although Mr. Philippe claims that Gafni told him that the fee would be returned if a mortgage commitment was not obtained, the agreement was amended by hand to state that the fee was non-refundable, and both of the Philippes initialled that change (Comp. Ex. 18 and Resp. Ex. A). At the same time, using a terminal in their office, the respondents obtained a TRW credit report on Mr. Philippe (Resp. Ex. B).

In addition to the \$5,000.00 the agreement provided for a payment to the respondents of 2½ mortgage points as a commission. With regards to that fee, the agreement contained the following language:

"I further agree and understand that your mortgage brokerage fee is earned at the time of commitment. I understand that it will be necessary for me to cooperate fully with you in supplying documentation for the loan application. It is understood that I will be responsible should the lender refuse to issue a commitment because I fail to supply the requested documentation and that all fees will be deemed earned in such a case." (Comp. Ex. 18 and Resp. Ex. A).

The respondents did not have the property appraised. Rather, Gafni spoke with potential lenders who had persons drive by the property to estimate its value before they would they would make loan propositions. The lenders advised the respondents that, based on the income of the property, the maximum possible loan would be approximately \$620,000.00, and the respondents so advised the Philippes on September 1, 1992 (Comp. Ex. 5).

The Philippes and their lawyer entered into new negotiations with the sellers and their lawyer, with the result that on November 4, 1992 it was agreed that the price of the property would be reduced to \$850,000.00, with a mortgage contingency of \$620,000.00 (Comp. Ex. 6 and Resp. Ex. D).

The respondents contacted various lenders and mortgage brokers and obtained several quotes for mortgages of varying amounts and terms. On January 8, 1993 the Philippes' attorney wrote to the

respondents and requested proposals (Comp. Ex. 7), and on January 11, 1993 the respondents sent Mr. Philippe a letter containing the details of three possible mortgages (Comp. Ex. 8). Mr. Philippe and his attorney spoke with Gafni and decided to proceed with one of the proposals, and by letter agreement, dated January 13, 1993 and accepted by Mr. Philippe, the respondents confirmed the terms of that proposal (Comp. Ex. 9). That letter makes reference to "a preliminary loan quote," and states that it "is subject to issuance of a loan commitment by a lender...." At no time did the respondents advise the Philippes or their attorney that there was an actual commitment. At the same time Mr. Philippe gave the respondents a "good faith deposit" of \$12,400.00 (Comp. Ex. 17), which amounted to 2 mortgage points.

When the Philippes entered into the agency agreement with the respondents they gave Gafni two partial bank statements. One, for the National Bank of Canada, had Mr. Philippe's name and address handwritten, rather than computer generated (Resp. Ex. E). The other, for Manufacturers Hanover Trust was for an account in the name of a laundromat and was addressed in care of Mr. Philippe (Resp. Ex. G). They never complied with his request for full bank statements. In addition, the Philippes were supposed to supply copies of leases for all of the stores in the property, but failed to produce two of those leases and produced one lease which, according to Gafni, was considered suspicious by the proposed lender because it involved a lease by the seller to himself and had a handwritten address which had been crossed out and changed (Resp. Ex. I), which led the lender to think that there might be some undisclosed side agreement. As a result, and in spite of his letter to the lender requesting one (Comp. Ex. 19), no loan commitment was obtained.

However, in addition to the previously quoted language regarding responsibility for payment of a commission to the respondents by the Philippes, the January 13, 1993 letter confirming the terms of the agreed upon loan proposal states the following:

"This offer is conditioned upon our receiving and approving the following:

An additional MAI Appraisal of the building and the plans, if needed.

General verification of all information supplied and submitted.

Title being cleared to the exclusive satisfaction of the lender and its attorneys."

It makes no reference to copies of leases or bank statements.

Subsequently, Mr. Philippe and his attorney made several unsuccessful requests of the respondents for a commitment. When one was not forthcoming, the return of the monies paid to the respondents was requested. That request has not been complied with.

Gafni has considered the application dead since the Philippes filed a complaint against him with the Departmental Disciplinary Committee.¹ The Philippes have since applied for a mortgage elsewhere.

OPINION

I- The theory of the complaint is essentially that the respondents misled the Philippes into paying them the initial \$5,000.00 by telling that it was refundable, obtained an additional payment of \$12,400.00 by misleading them again by telling them that a mortgage commitment had been obtained, and have wrongfully retained those payments in spite of the fact that they have been unable to obtain a commitment.

The evidence establishes that the Philippes were told, by way of a handwritten change to the agency agreement, which they initialed, that the \$5,000.00 fee was not refundable. It also establishes that neither the Philippes nor their attorney were told that a commitment had been obtained. That, however, does not dispose of the matter.

Pursuant to the terms of the agency agreement, the initial \$5,000 fee was to cover the cost of a credit report and appraisal of the property. No appraisal was done. While a credit report was obtained by the respondents on their TRW terminal, and although there is no evidence on the record as to the cost to the respondents of that report, it can be said with a great degree of certainty that such an instantaneously generated computer report cannot have cost anything approaching what the Philippes paid.

The major item for which the \$5,000.00 was paid, the appraisal, was not obtained. In a situation where a party has received money in anticipation of providing something to or doing something for the payor but has not done so and, therefore, would unjustly benefit, it is inequitable for the payee to retain that money, and restitution must be made. Grombach Productions v Waring, 293 NY 616 (1944); Naimoli v Massa, 81 Misc.2d 431, 366 NYS2d 573 (City Court of Geneva, 1975). Therefore the retention of that money by the respondents after its return was demanded was an act of untrustworthiness. In view of the respondents' failure to provide the appraisal, and of Gafni's testimony that in fact the

¹ After an investigation the Committee declined to take any action.

cost of an appraisal would not be covered by what the Philippes had paid, it was also a fraudulent practice.

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. 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).

In such a situation, the retention by the respondents of their licenses may be conditioned on the return of the money to its rightful owners. 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 \$12,400.00 must be dealt with differently, although with the same result. That money was an advance partial payment of the agreed upon \$15,500 commission. Pursuant to the terms of agency agreement, that commission was to be earned upon issuance of a commitment by a lender or upon the Philippe's failure to provide documentation requested to facilitate such issuance.

"It is fundamental that the parties to a contract have the right to insert any stipulation to which they may agree, provided it is not unconscionable or contrary to public policy, and no rule of law forbids them from agreeing between themselves with respect to the amount of the damages which it is anticipated will be occasioned by the failure of one or the other to perform or complete the contract according to its terms and obligations ...when they do so, and the measure prescribed is not such as to shock the moral sense, the courts will hold the parties to their agreement." 36 NY Jur2d Damages, §155.

The agency agreement was, however, modified by the terms of the January 13, 1993 letter memorializing the terms of the mortgage for which a commitment was to be sought. That letter set only three conditions: an additional appraisal, with building plans if needed; general verification of information supplied; and a clear title, and there is no evidence that the respondents ever made a request to the Philippes or their lawyer for those items (presum-

ably the verification would be undertaken by the lender). The letter did not say that additional bank statements or leases were needed. Where there is such a conflict between the terms of an original agreement and its modification, the new terms control. 22 NY Jur2d Contracts, §412. Therefore, as of January 13, 1993 the respondents waived their right to require that the Philippes produce additional bank statement or leases and, thereby, waived their right to claim a commission if, because of the failure to provide such documents, a mortgage commitment could not be obtained.

After January 13, 1993 the respondents were asked several times to produce a mortgage commitment so that a closing could be held. They never told the Philippes or their lawyer that a commitment would not be forthcoming, and considered the agency agreement dead when the complaint was filed with the Departmental Disciplinary Committee, but have retained the commission, thereby again engaging in a fraudulent practice and demonstrating untrustworthiness.

II- Being an artificial entity created by law, Lawyers Funding Group, Inc. can only act through its officers, agents, and employees, and it is, therefore, responsible for the acts committed by its representative broker, Gafni, 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.

CONCLUSIONS OF LAW

1) By retaining the full \$5,000.00 paid to them by the Philippes for credit reports and appraisal of the property, when all that was done for the money was to obtain a simple computer generated TRW report, the respondents demonstrated untrustworthiness and engaged in a fraudulent practice.

2) By retaining the \$12,400.00 paid to them by the Philippes as an advance payment toward their commission for obtaining a mortgage commitment when no commitment was forthcoming, the respondents demonstrated untrustworthiness and engaged in a fraudulent practice.

3) As a condition of retaining their licenses as real estate brokers the respondents should be required to return to the Philippes all of the money which the Philippes paid, less the cost of the TRW credit report obtained on July 27, 1992.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Yoram Gafni and Lawyers Funding Group, Inc. have demonstrated untrustworthiness and have engaged in fraudulent practices and accordingly, pursuant to Real Property Law §441-c, they shall each pay fines of \$1,000.00 to the Department of State on or before February 28, 1994, and should they fail to pay the fines then their licenses as real estate brokers shall be suspended for a period of two months, commencing on March 1, 1994 and terminating on April 30, 1994, both dates inclusive, and

IT IS FURTHER DETERMINED THAT upon payment of the fines or termination of the license suspensions the respondents' licenses as real estate brokers shall be further suspended until such time as they have produced proof satisfactory to the Department of State that they have refunded to Leger J. Philippe and Juslene J. Philippe the sum of \$17,400.00 less the actual cost of the TRW credit report of July 27, 1992, together with interest at the legal rate for judgements (currently 9% per year) from March 1, 1994.

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