

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-

**OLLIE R. GORR**

Respondent.

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on May 11, 2000 at the office of the Department of State located at 123 William Street, New York, New York.

The respondent did not appear.

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

The matter had originally be calendared for December 22, 1999, but was adjourned at the request of the complainant to February 29, 2000. It was subsequently adjourned at the request of the respondent's then attorney, Peter A. Karl, III, Esq., to May 11, 2000.

By letter dated March 8, 2000 Mr. Karl withdrew as the respondent's attorney (State's Ex. 2). By undated letter addressed to Mr. NeJame and received on April 24, 2000 the respondent requested that the venue of the matter be changed to the Poughkeepsie area, and by letter dated April 26, 2000 Mr. NeJame advised the respondent that the Department of State does not have an office in the Poughkeepsie area at which a hearing can be conducted and, in any case, that her request must be made in writing to the tribunal (State's Ex. 1). On May 15, 2000 (four days after the hearing) the tribunal received a photocopy of a letter from the respondent, dated May 4, 2000 and contained in an unpostmarked envelope bearing the respondent's return address but not bearing any postage, in which letter the respondent disputed the charges and asked that the matter be settled.

**COMPLAINT**

The complaint alleges that the respondent, a licensed real estate broker: Failed to present the seller of real property listed with her on a disclosure form, and failed to obtain the seller's signature on such a form, in violation of Real Property Law (RPL) §443; failed to make clear for whom she was acting, in violation of 19 NYCRR 175.7; together with another person formed a corporation for the purchase of listed property and then acted negligently and/or incompetently and/or improperly in the preparation to purchase the property; failed to

sufficiently capitalize or contribute sufficient funds to the foregoing corporation; acted as a principal and agent in the same transaction without full, proper, or adequate disclosure to the seller; failed to disclose to the seller all facts which the respondent knew or should have known would reasonably affect the seller's judgement; failed to produce a buyer ready, willing, and able to purchase the property; contributed no funds at the closing other than the payment of certain attorney's fees; and demanded the payment of a commission from the seller without any proper basis for doing so and/or without any adequate basis for believing she was due such payment. The complaint also alleges that subsequent to the closing the corporation failed to make any payments on the purchase money mortgage which had been taken back by the seller.

#### **FINDINGS OF FACT\**

1) Notices of hearing together with copies of the complaint were served on the respondent by certified mail delivered on October 12 and 13, 1999 (State's Ex. 3).

2) The respondent is, and at all times hereinafter mentioned was, duly licensed as a real estate broker d/b/a Ollie R. Gorr Realty, with a current address of P.O. Box 3573, Poughkeepsie, New York 12603. She is also currently licensed as a real estate broker in association with Terry Euell Real Estate, Inc., 38 Montgomery Street, Rhinebeck, New York 12572 (State's Ex. 4).

3) Sometime in 1994 the respondent contacted Lovelia Albright, secretary/treasurer and a 25% shareholder of Mackay Trucking Corp. (hereinafter "Mackay"), the owner of a (at the time non-operational) horse breeding farm of approximately 231 acres located in Germantown, New York. Along with the agricultural buildings there were also two, two family houses and one single family residential house on the property. Mackay had been attempting to sell the property by itself, and the respondent represented to Ms. Albright that she had customers, the names of whom she would not disclose, who were interested in purchasing the farm. Accordingly, she and Mackay entered into an agreement for the respondent to act as its agent in the sale of the farm. There was never a written agency agreement (although there was a written memorandum as to the terms of the respondent's prospective commission (State's Ex. 22)), the respondent never specifically stated for whom she was acting as agent, and at no time did the respondent give Mackay an agency disclosure form.

4) At the time of the granting of the agency there was an existing contract of sale for the farm. However, because of zoning problems involving a proposed new use for the farm there was concern that the sale would not be consummated (State's Ex. 6), as, in fact, it eventually was not.

5) On May 7, 1994 Peter A. Karl, Esq., who was representing the respondent, sent to John Steingart, Esq., the attorney for Mackay, a letter setting forth the terms of the transaction proposed by the respondent (State's Ex. 5). The letter stated that the respondent "represents an investment group" interested in purchasing the farm for \$1,850,000.00, with the respondent to receive a commission of \$150,000.00. The buyers were to pay cash sufficient to pay the

substantial tax arrears on the property, with Mackay to take back a 15 year promissory note with a ten year balloon payment, secured by a first mortgage.

6) On August 3, 1994 Mr. Steingart sent Mr. Karl a letter memorializing a conversation which they had previously had (State's Ex. 7). The letter stated that Mackay was willing to sell the farm to the respondent's buyers for \$1,850,000.00, payable as follows: \$50,000 cash; assumption by the buyers of \$650,000.00 in real estate tax liability; and a purchase money mortgage of \$1,150,000.00, with the cash to be adjusted based on the exact balance of taxes due. The mortgage would be payable as follows: 8% interest only for the first two years and fixed payments of \$9,619.06 monthly commencing with the 25th month after closing and continuing for eight years, with those payments applied first to interest at 8% and then to a reduction in the principal. There would be a balloon payment of the remaining principal on the tenth anniversary of the closing. The respondent would receive a commission of \$150,000.00 payable \$50,000.00 at closing and the balance at a rate of \$7,666.67 monthly, such payments to be made from the interest payments on the mortgage. The terms of the commission were eventually modified, as memorialized in a letter to Mr. Steingart from Mr. Karl dated April 7, 1995 (State's Ex. 9[C]). Pursuant to that modification, the respondent was to receive \$25,000.00 at closing, with the balance, subject to 8% interest, paid in monthly installments equal to the interest paid on the mortgage. Those payments were secured by an irrevocable direction to pay which provided that the buyers were to make their initial mortgage payments to the respondent (State's Ex. 10).<sup>1</sup>

In his letter Mr. Steingart asked for the names and addresses of the purchasers so that he could prepare a contract, and he was eventually advised that it was ORG Realty Corp. (hereinafter "ORG").

7) Eventually, in October, 1994, a contract of sale between Mackay and ORG was executed. The respondent signed as president of ORG (State's Ex. 9[B]). The terms of the contract were essentially as provided for in Mr. Steingart's letter of August 3, 1994. At or about the same time the parties also entered into an agreement pursuant to which ORG was given immediate possession of the farm (State's Ex. 9[D]).

8) When Mr. Steingart drew up the contract, he did not know who the principals of ORG were, and he thought that the corporation was merely being used as a nominee. He believed, based on conversations with the respondent and Mr. Karl, that the investors were coming from South America.

9) Although the contract provided for only very limited repairs to be made to one of the buildings on the farm, in the face of repeated and persistent demands by the respondent (State's Ex. 13 and 14) Mackay caused very extensive, and expensive, repairs to be made to various buildings.

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<sup>1</sup> The irrevocable direction to pay was, for some reason, executed prior to the closing, and was for only \$100,000. It was, however, modified at the closing to reflect the actual amounts paid.

10) When it became evident that the respondent was a principal of ORG Mr. Steingart suggested that rather than her receiving a commission from Mackay the purchase price should be reduced by \$150,000.00 and she should collect from ORG, but she refused to agree to that.

11) The principals of Mackay had told Mr. Steingart, and he had relayed to the respondent through Mr. Karl, that they did not wish to have any dealings with a man named Richard Barrett, with whom they had previously had unsatisfactory dealings in which Mr. Barrett had held up a sale or lease of the property for about a year and then, after having induced Mackay to take the property off the market, failed to sign the contract of purchase and sale or a lease, and that Mr. Barrett was not to enter upon the farm. (At the time of the respondent's initial contact with Ms. Albright she was asked if Mr. Barrett was one of the prospective buyers and the respondent had assured her that he was not). Mr. Barrett had purportedly been advising the respondent on the transaction and had repeatedly appeared at the farm. Unbeknownst to Mr. Steingart and Mackay, Mr. Barrett was, in fact, a 50% owner of ORG (the other 50% being owned by the respondent), something which they did not learn until the closing, the respondent having acted affirmatively to conceal Mr. Barrett's involvement (State's Ex. 24).

9) Closing of title occurred on March 29, 1996. The purchase price of \$1,850,000.00 was reduced by ORG's assumption of outstanding real estate taxes owed to Columbia County. The remaining balance of \$50,000.00 was paid by three checks issued by Mr. Barrett on the account of Fresh Meadow Farm, one for \$25,000.00 payable to the respondent, one for \$10,000.00 payable to the Commissioner of Taxation and Finance in part payment of the capital gains tax, and the third for \$15,000.00 (certified) payable to Mr. Barrett with a notation that it was also for the capital gains tax (State's Ex. 15 and 16). The check to the Commissioner of Taxation and Finance was subsequently returned unpaid by the bank, as were all of the other checks other than the certified check issued to Mr. Barrett (State's Ex. 18), and the State sought payment of the full tax from Mackay. The respondent did, however, eventually receive \$23,000.00 through other payments made by Mr. Barrett and his wife (State's Ex. 23 and 24). The only payment toward the purchase made by the respondent was of some legal fees.

10) ORG never made any payments on the mortgage and defaulted on the real estate tax payments (State's Ex. 17, 18, and 21), but the respondent repeatedly demanded payment of the commission (State's Ex. 19).

11) Columbia County eventually foreclosed on its lien for real property taxes (State's Ex. 20), and sold the property for approximately \$475,000.00, an amount less than the that of the unpaid taxes.

#### **OPINION AND CONCLUSIONS OF LAW**

I- When the respondent entered into her arrangement with Mackay pursuant to which she purportedly undertook to negotiate the sale of the property to the buyers which she claimed to have available, she became the agent of Mackay and Mackay became her principal. 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).

II- Pursuant to RPL §443 a real estate broker must, prior to entering into a listing agreement with a seller of residential real property, provide that seller with a real estate agency relationship disclosure form. In the course of the investigation of this matter the respondent contended that the statute does not apply to the subject transaction because it involved the sale of a farm and not, therefore, of residential property. Her interpretation of the scope of the statute is overly restrictive. *Division of Licensing Services v Deppoliti*, 77 DOS 95.

RPL §4439(f) defines "residential real property" as meaning real property improved by a one to four family dwelling used or occupied or intended to be used or occupied, wholly or partly, as the home or residence of one or more persons. That definition is different from that found in 19 NYCRR 175.24, which restricts the definition of "residential property" to the homes themselves. Therefore, although the subject property was a (at the time non-working) farm, the fact that it was improved with residential dwellings brought it within the scope of the statute, and the respondent was, as alleged in the complaint, required to deliver a disclosure form to Mackay, which she did not do. That failure was not only a violation of the statute, but also a demonstration of untrustworthiness and incompetency.

A related requirement is encompassed in 19 NYCRR 175.7, which provides that a real estate broker must make it clear for which party he or she is acting.

"The regulation places a heavy burden on the broker: 'to make it clear what the state of facts are. It is the broker's responsibility to be sure that the person with whom he or she is dealing understands....' *Department of State v Almo*, 24 DOS 87 at 3.

In confirming that decision, the Appellate Division wrote that the regulation "requires that real estate brokers clearly state for which party they are acting." *Almo v Shaffer*, 149 AD2d 417, 539 NYS2d 765 (1989).

When she entered into the oral listing agreement with Mackay the respondent did not tell any of the persons representing that corporation whom she was representing. Rather, she falsely claimed to be representing a group of investors whom she refused to name, untruthfully claimed that Richard Barrett was not one of the two

investors, and concealed the fact that she was the other investor. She thereby breached her fiduciary duties of good faith and undivided loyalty and of full and fair disclosure, violated 19 NYCRR 175.7, and further demonstrated untrustworthiness and incompetency.

III- The respondent acted both as agent and principal in the 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 her burden of proof on this issue. The evidence is clear that at no time did she tell anyone acting on behalf of Mackay that she was one of the purchasers of the property, a fact which began to emerge only at the time of the preparation and execution of the contract and which did not become evident until the time of the closing of title. Her failure in this regard is a yet another demonstration of untrustworthiness and incompetency.

IV- In spite of the facts that she was an undisclosed principal in the purchase of the property, that the checks issued at the closing in payment of the purchase price bounced, and that the corporation of which she was half owner failed to meet its obligations under the purchase money mortgage, the respondent still demanded a commission to which, in light of her breaches of fiduciary duty and her failure to produce a buyer which was actually able to purchase the property, she was clearly not entitled. The claiming of an unearned commission is a demonstration of untrustworthiness. *Division of Licensing Services v Loffredo*, 83 DOS 95, conf'd. *sub nom Loffredo v Treadwell*, 235 AD2d 541, 653 NYS2d 33 (1997). In a case such as this, where the respondent clearly should have realized that she was not entitled to the commission and acted in the face of a contract the terms of which her corporation had not fulfilled, such untrustworthiness is particularly egregious.

V- The evidence is insufficient to support a conclusion on the question of whether, as alleged in the complaint, the respondent was aware prior to the closing that ORG Realty Corp. was financially unable to fulfill its obligations in the purchase of the property, and that she failed to contribute sufficient funds to it. It may be, as she contended in the course of the investigation, that she relied on Mr. Barrett to provide the necessary funds, and was not aware until after the closing that he was unable to do so.

**DETERMINATION**

**WHEREFORE, IT IS HEREBY DETERMINED THAT** Ollie R. Gorr has violated Real Property Law §443 and has demonstrated untrustworthiness and incompetency, and accordingly, pursuant to Real Property Law §441-c, all licenses issued to her as a Real Estate Broker are revoked effective July 1, 2000, and she is directed to send her license certificates and pocket cards 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: June 21, 2000