

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-

**ELIZABETH FARRIELLA HARRIS and E.F.
REALTY INC.**

Respondent.

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on October 5, 1998 at the office of the Department of State located at 270 Broadway, New York, New York.

The respondents did not appear.

The complainant was represented by Litigation Counsel Laurence Soronen.

COMPLAINT

The complaint alleges that the respondents commingled and converted funds by placing contingent brokerage commissions in the business operating account, and that they refused to refund unearned commissions.

PRIOR PROCEEDING

The identical issues as are present in this proceeding were litigated in prior proceeding which resulted in the issuance of a hearing decision on July 20, 1998. *Division of Licensing Services v E.F. Realty Inc., Elizabeth Farriella Harris, Jay Ray Realty Inc. d/b/a/ E. F. Realty, and Ida Farriella, 172 DOS 98.* In that decision the charges against all of the respondents other than Ida Farriella were dismissed for lack of personal jurisdiction. In this proceeding the complainant seeks, based on the record and decision in the prior proceeding, to hold Elizabeth Farriella Harris and E.F. Realty Inc. liable for the misconduct of Ida Farriella which was established in the prior proceeding.

FINDINGS OF FACT

1) On August 21, 1998 notice of hearing together with a copy of the complaint was sent to the respondents by certified mail at their last known business address. When that mailing was returned marked "refused" a second notice and complaint were sent to the respondents at the same address by regular first class mail, and were also returned as refused (State's Ex. 1, 2, and 3).

2) From at least June 3, 1990 until July 22, 1997 Elizabeth Farriella Harris was duly licensed as a real estate broker representing E.F. Realty Inc., a corporation of which she was President, Secretary, and sole shareholder (State's Ex. 1). She is no longer licensed, and has moved out of state, apparently to Kentucky.

3) From April 21, 1992 until March 10, 1997, when she became licensed as an associate real estate broker with another firm, Ida Farriella, the mother of Elizabeth Farriella Harris, was licensed as a real estate salesperson in association with E.F. Realty Inc. (State's Ex. 1).

4) On Sunday, August 21, 1994, Wendy McLaughlin was shown an apartment by Ida Farriella, acting in her capacity of salesperson for E.F. Realty Inc., which represented the landlord. Ida Farriella told Ms. McLaughlin that if she rented the apartment she would have to pay a brokerage fee. Ms. McLaughlin stated that she was interested, but said that a rental would be contingent on the approval of her fiance, Timothy O'Keefe, who could not view the apartment until August 24, 1994.

Ida Farriella agreed to hold the apartment if Ms. McLaughlin would sign a rental binder agreement, fill out an application for herself and Mr. O'Keefe, and give her three checks, each in amount of \$850.00, which Ms. McLaughlin did.

The rental binder agreement included a provision that the fee would become non-refundable upon acceptance of the agreement by the landlord, and provided for the signing of a formal lease on September 1, 1994. Two of the checks were payable to the landlord, while the third was made payable to E.F. Realty Inc and was deposited in its operating account.

Mr. O'Keefe viewed the apartment on August 24, 1994. He decided not to rent it and, therefore, returned to Ida Farriella the set of keys which she had given to Ms. McLaughlin. Ida Farriella then showed him other apartments which he also rejected. In a telephone conversation on the same date Ida Farriella told him that the rental binder fee was non-refundable, but that an attempt would be made to obtain the return of the other checks, which had already been sent to the landlord. Although one of those checks

had been cashed, the landlord eventually returned the \$1,700.00 to Ms. McLaughlin.

At no time was a lease signed or was the apartment occupied by Ms. McLaughlin or Mr. O'Keefe, and they never received either oral or written notice that the landlord had agreed to the rental, and no records establishing such an agreement have been produced.

In a telephone conversation in October 1994 with the complainant's investigator Elizabeth Farriella Harris refused to return the \$850.00 fee paid by Ms. McLaughlin.

5) Barbara and Joseph DeSantis were shown an apartment by Ida Farriella, whom they met at E.F. Realty Inc. On July 19, 1996 both Mr. and Mrs. DeSantis completed rental applications which called for the payment of a \$1,370.00 broker's fee, which would be non-refundable if the landlord approved the applications. On July 22, 1996 they gave Ida Farriella a check in that amount payable to E.F. Realty Inc.

Mrs. DeSantis had not have further contact with E.F. Realty Inc. until 9 AM on July 29, 1996 when, having learned that negotiations for the sale of her home would not be successful, she telephoned E.F. Realty Inc. and told Ida Farriella to cancel the application. Ms. Farriella replied that such a cancellation was impossible. Three hours later Ms. DeSantis received a telephone call from E.F. Realty Inc. and was told that her credit had been approved. Later, she learned that the check for the commission had been deposited in E.F. Realty Inc.'s operating bank account.

Mr. and Mrs. DeSantis never executed a lease for the premises, which they never occupied, and were never notified that the landlord had approved their applications. In spite of that, Ida Farriella refused to return the commission.

The complainant presented no evidence that the respondents were in any way aware of the DeSantis transaction.

OPINION

I- Pursuant to Real Property Law (RPL) §441-e, before a real estate broker can be subjected to disciplinary sanctions written notice of the charges the broker must be given written notice of the charges against her. Such notice may be served by, among other methods, mailing it by certified mail to the broker's last known business address. Therefore, inasmuch as there is evidence that notice of the place, time and purpose of the hearing was properly served, the holding of an ex parte quasi-judicial administrative hearing was permissible. *Patterson v Department of State*, 36 AD2d 616, 312 NYS2d 300 (1970); *Matter of the Application of Rose Ann Weis*, 118 DOS 93.

II- The expiration or surrender of the respondents' license does not divest this tribunal of jurisdiction, as the alleged acts of misconduct occurred while the respondent was licensed, and they still have the right to renew their license by the mere submission of an application (RPL §441[2]). *Brooklyn Audit Co., Inc. v Department of Taxation and Finance*, 275 NY 284 (1937); *Albert Mendel & Sons, Inc. v N.Y. State Department of Agriculture and Markets*, 90 AD2d 567, 455 NYS2d 867 (1982); *Main Sugar of Montezuma, Inc. v Wickham*, 37 AD2d 381, 325 NYS2d 858 (1971). *Senise v Corcoran*, 146 Misc.2d 598, 552 NYS2d 483 (Supreme Ct., NY County 1989).

III- Being an artificial entity created by law, E.F. Realty Inc. 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 licensed salesperson, Ida Farriella, within the actual or apparent scope of her 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.

IV- A real estate broker is obliged to supervise the real estate brokerage activities of the salespersons associated with her or the firm which she represents. RPL §441[1][d]. That supervision must consist of "regular, frequent and consistent personal guidance, instruction, oversight and superintendence by the real estate broker with respect to the general real estate brokerage business conducted by the broker, and all matters relating thereto." 19 NYCRR 175.21[a]; *Friedman v Paterson*, 453 NYS2d 819 (1982), *aff'd.* 58 NY2D 727, 458 NYS2d 546; *Division of Licensing Services v Misk*, 64 DOS 92.

The broker's duty to supervise is accompanied by vicarious liability for the misconduct of her salespersons, limited only with regards to penalty in cases where the broker lacked actual knowledge of misconduct or did not retain any benefit derived from that misconduct, which limiting factors are not present in this matter. RPL §442-c.

V- The record clearly establishes, as was found in the prior proceeding, the Ida Farriella, acting on behalf of the respondents herein, refused to refund unearned commissions, an act which is a demonstration of untrustworthiness. *Division of Licensing Services v Short Term Housing*, 31 DOS 90, *conf'd.* 176 AD2d 619, 575 NYS2d 61 (1991). In the McLaughlin/O'Keefe transaction the payment of the commission was, as agreed to by the parties and notwithstanding any language in the agreement presented by Ida Farriella, clearly conditioned on Mr. O'Keefe's satisfaction with the apartment, which satisfaction was not forthcoming. Further, in both transactions the non-refundability of the commissions was to come into effect

only upon acceptance of the prospective tenants by the landlords, while in neither transaction was such acceptance communicated to the prospective tenants prior to their withdrawal of their offers to rent the apartments.

VI- Where a broker has received money to which she is not entitled, she may be required to return it, together with interest, as a condition of retention or re-issuance of 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).

VII- The complaint contends that by depositing the commissions in E.F. Realty Inc.'s operating account the respondents improperly converted and commingled trust funds. The complainant is, however, estopped on that issue by the finding in the prior proceeding that such did not occur.

VIII- A copy of this decision should be provided to the licensing authorities in the State of Kentucky for appropriate action in the event that the respondents have obtained or applied for real estate brokerage licenses in that state.

CONCLUSIONS OF LAW

1) The tribunal had both personal and subject matter jurisdiction over the respondents so as to enable it conduct these proceedings.

2) Both E.F. Realty Inc. and Elizabeth Farriella Harris are liable for the untrustworthiness demonstrated by their salesperson, Ida Farriella, when she refused to refund unearned brokerage commissions.

3) It is proper to condition the future issuance of any licenses as real estate brokers or salespersons to the respondents on their submitting proof that the entire commissions paid in the McLaughlin/O'Keefe and DeSantis transactions, together with interest from the date of the demands for refunds, have been refunded to the payers.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT by reason of their liability for the misconduct of their salesperson the respondents have demonstrated untrustworthiness, and accordingly, pursuant to Real Property Law §441-c, should either or both of the respondents ever submit an application for a license as a real estate broker or salesperson, no action shall be taken on such application(s) until they have paid a fine of \$1,000.00 to the Department of State and

proof satisfactory to the Department of State has been submitted to the complainant establishing that the commissions in the McLaughlin/O'Keefe and DeSantis transactions have been fully refunded to the payers together with interest at the legal rate for judgements (currently 9% per year) from the dates of the original demands for refunds.

Roger Schneier
Administrative Law Judge

Dated: October 8, 1998