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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-

LORRAINE JACOB and CENTURY 21 MARIDON
REALTY OF FRANKLIN SQUARE 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 July 27, 1993 at the office of the Department of State located at 270 Broadway, New York, New York.

The respondents, of 939 Hempstead Turnpike, Franklin Square, New York 11010, were represented by Howard W. Goldson, Esq., Goldson & Radin, P.C., 861 Larkfield Road, Commack, New York 11725.

The complainant was represented by Scott Nejame, Esq.

COMPLAINTS

The complaints in the matter allege that the respondents: entered into an exclusive listing agreement without having attached thereto or printed on the reverse side thereof and signed by the homeowner the explanation required by 19 NYCRR 175.24[b]; entered into a multiple listing agreement without giving the homeowner a list of the names and addresses of all member brokers, in violation of 19 NYCRR 175.24[c][1]; breached their fiduciary duties to their principal by having the principal sign a statement acknowledging receipt of a list of multiple listing service member brokers when that was not true; engaged in dishonest and misleading advertising by making promises to a homeowner which were not kept; and failed to provide proper supervision of an associate broker, in violation of 19 NYCRR 175.21[a].

FINDINGS OF FACT

1) Notices of hearing together with copies of the complaints were served on the respondents by certified mail (Comp. Ex. 1).

2) Lorraine Jacob is, and at all times hereinafter mentioned was, duly licensed as a real estate broker in her own name and as a representative broker of Century 21 Maridon Realty of Franklin Square Inc. (Century 21), both at 939 Hempstead Turnpike, Franklin Square, New York 11010 (Comp. Ex. 2).

3) On May 16, 1992 Century 21, acting through associate broker Joseph M. Record, entered into an exclusive right to sell agency agreement with Charles and Patricia Wodicka for the sale of their house located at 823 Willow Road, Franklin Square, New York (Comp. Ex. 3). Printed on the reverse side of the agreement, provided by Century 21 with the knowledge of Jacob,[1] was the following language:

"**I/WE HEREBY ACKNOWLEDGE RECEIPT OF A COPY OF THIS AGREEMENT:**

The following explanations are provided for your review and signature:
(1) The Multiple Listing Service of Long Island, Inc. only accepts Exclusive Agreements. An 'EXCLUSIVE RIGHT TO SELL' listing means that if you, the owner of the property, find a buyer for your house, or if another broker finds a buyer, you must pay the agreed commission to the present broker.
(2) An 'EXCLUSIVE AGENCY' listing means that if you, the owner of the property, find a buyer, you will not have to pay a commission to the broker. However, if another broker finds a buyer, you will owe a commission to both the selling broker and your present broker.
(3) I have received a list of the participating Realtors in the Multiple Listing Service of Long Island, Inc.
(4) The listing agreement gives the homeowner the option of having all negotiated offers to purchase the listed residential property submitted either through the listing broker or submitted through the selling broker.
(5) If the listing agreement is for a rental, you represent that 'such unit has been approved as a separate rental unit by local authorities.'" Mr. Wodicka signed the document in the space following that language.

At the same time that the Wodickas signed the agency agreement Record gave them a document entitled "CENTURY 21® SELLER SERVICE PLEDGE™" (Comp. Ex. 4). That document listed twelve services which Century 21 agreed to provide to the Wodickas, and contained the following proviso:

> "In the event of any breach under the terms of this SELLER SERVICE PLEDGE, the seller (as a sole and exclusive remedy) may terminate the exclusive right to sell agreement, provided that our CENTURY 21 office is given ten days (10) written

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[1] While, as discussed below, Jacob had no direct dealings in the subject transaction, the agency agreement was a standard form used by the respondents with her knowledge and under her supervision.

> notice of the reason for termination and an opportunity to cure the default during the notice period."

Record discussed the condition of the house with the Wodickas, and told them that it did not require any repairs. He also gave them a "Competitive Market Analysis" showing houses similar to that of the Wodickas and the prices at which they had been sold or were listed (Resp. Ex. A) (he also discussed this document with them), a "personal marketing plan" which discussed how Century 21 would go about marketing the house (Comp. Ex. 6), a "Century 21 Maridon Realty marketing plan" listing the various steps to be taken in marketing the house and providing spaces for indicating when those steps were scheduled and completed (Comp. Ex. 7), a list of "21 questions that help make a house sell faster" indicating steps that a seller can take to help in the sale of a house (Resp. Ex. B), a brochure entitled "Painting and Redecorating for home sellers" provided by a paint company and suggesting possible improvements that a home owner can make to increase the salability of a house (Resp. Ex. C), and a brochure entitled "It's Time To Show Off" containing suggestions for improving the salability of a house (Resp. Ex. D).

The evidence is conflicting on whether the Wodickas were given a list of the broker members of the multiple listing service. Such a list is normally contained in the package of documents which Century 21 gives to its clients (Resp. Ex. E and F), and according to Record was contained in the package given to the Wodickas. According to the Wodickas they did not read all of the documents given to them, but they insist that they did not receive a list of brokers. Under these circumstances, I find that the evidence is insufficient to support a finding as to whether such a list was, in fact, given to the Wodickas.

4) During the ensuing several months the house was shown to several potential purchasers (Resp. Ex. J). As a result of those showings Record and other persons in the Century 21 office had several conversations with the Wodickas, in which the Wodickas were advised that it appeared that they were asking too much for the house (the asking price was $219,950.00, approximately $20,000.00 more than Record had originally suggested to the Wodickas). The Wodickas, however, declined to reduce the price.

5) On September 9, 1992 the Wodickas sent a letter to Michael Schindel, one of Century 21's representative brokers, in which they voiced dissatisfaction with the service that they had received, and requested an unconditional release from the agency agreement (Comp. Ex. 5). They did not offer any opportunity to rectify what they viewed as Century 21's breaches, and refused Schindel's telephone request, made subsequent to the September 11, 1992 receipt of the letter, that they allow Record to meet with them to discuss the problem and arrange to do whatever was necessary to satisfy them. Schindel, in turn, refused to grant a release, but did cease marketing the property.

6) The Wodickas never met with or spoke to Jacob, who had no involvement in the listing. The house has not been sold, and the respondent's have not been paid any money by the Wodickas.

OPINION

I- 19 NYCRR 175.24(b), as of the time in question, stated:

> "In all commission agreements obtained by a broker which provide for an exclusive listing of residential property, the broker shall have attached to the listing or printed on the reverse side of the listing and signed by the homeowner or the homeowner's agent the following explanation in type size of not less than six point:
>
> **'EXPLANATION:**
>
> An 'exclusive right to sell' listing means that if you, the owner of the property, find a buyer for your house, or if another broker finds a buyer, you must pay the agreed commission to the present broker.
>
> An 'exclusive agency' listing means that if you, the owner of the property find a buyer, you will not have to pay a commission to the broker. However, if another broker finds a buyer, you will owe a commission to both the selling broker and your present broker'."[2]

The respondents are charged with entering into an agreement without the explanation affixed to or printed on the reverse side of that agreement.[3] The complainants argue that although the explanatory language was printed on the reverse side of the agreement, since it was accompanied by and combined with other language, and since it was the intent of the regulation that the explanation be set off by itself from the rest of the agreement, the respondents failed to comply with the

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[2] The regulation has since been amended to eliminate the requirement that the explanation, if printed on the listing agreement, be on the reverse side of the agreement.

[3] The charge against Jacob and Century 21 is both that by entering into an agreement using the form in question they violated 19 NYCRR 175.24[b], and that by allowing Record to use the agreement they failed to provide proper supervision of him, in violation of 19 NYCRR 175.21[a].

regulation. I agree. In addition, it should be noted that the document used by the respondents omits the required opening of the explanation, specifically the capitalized word "EXPLANATION."

The layout used by the respondents, besides being incomplete, clearly provides less emphasis on the explanation than was intended by the regulation, in that it combines and surrounds that explanation with additional verbiage. Even under the regulation as it now stands such a melange would not be permissible. It cannot be said that the respondents properly provided the required explanation when what they provided did not comply with the specifications set by the regulation. However, the seriousness of the violation is mitigated somewhat by the fact that the respondents made an attempt to comply with the regulation.

II- As the party which initiated the hearing, the burden is on the complainant to prove, by substantial evidence, the truth of the charges contained in the complaint. State Administrative Procedure Act (SAPA), §306(1). Substantial evidence is that which a reasonable mind could accept as supporting a conclusion or ultimate fact. Gray v Adduci, 73 N.Y.2d 741, 536 N.Y.S.2d 40 (1988). "The question...is whether a conclusion or ultimate fact may be extracted reasonably--probatively and logically." City of Utica Board of Water Supply v New York State Health Department, 96 A.D.2d 710, 465 N.Y.S.2d 365, 366 (1983)(citations omitted).

Applying the above standard, the evidence is insufficient to support findings that the respondents failed to give the Wodickas a list of the broker members of the multiple listing service and breached their fiduciary duty to the Wodickas by having them sign an acknowledgement of receipt of such a list.

III- The charge of dishonest and misleading advertising by making promises which were not kept relates to the "CENTURY 21® SELLER SERVICE PLEDGE™." The complainant alleges that the pledge amounts to false advertising because Century 21 allegedly failed to perform on all of its promises to the Wodickas. The respondents argue that they did perform, and the record does establish that there was performance of at least a substantial portion of the respondent's obligations under the pledge. In that light, the respondents' argument that they cannot be held to have violated the pledge because the Wodickas refused to give them ten days to cure any defaults, as provided for in the pledge, is persuasive.

The Wodickas entered into an agreement pursuant to which the respondents had an obligation to perform certain acts, and under which the Wodickas had a corresponding obligation to give the respondents a reasonable chance to cure any defaults. In a case such as this, where the respondents have substantially performed, the homeowner has refused

to allow them their contractual right to remedy any defaults, and there has been no showing of damages, it would be unwise for the Department of State to inject itself into the matter.[4]

IV- A real estate broker is obligated to supervise the real estate brokerage activities of the salespersons associated with him or it. 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).

That duty has been affirmed judicially, Division of Licensing Services v Giuttari, 37A DOS 87, conf'd. 535 NYS2d 284 (AD 1st Dept. 1988); Friedman v Paterson, 453 NYS2d 819 (1982), aff'd. 58 NY2d 727, 458 NYS2d 546, and has been restated in numerous determinations of the Department of State. Division of Licensing Services v Misk, 64 DOS 92; Division of Licensing Services v Gelinas, 38 DOS 92; Division of Licensing Services v Levenson, 52 DOS 91; Division of Licensing Services v Capetanakis, 42 DOS 90; Division of Licensing Services v Shulkin, 4 DOS 90. Since associate brokers are treated as salespersons (RPL §440[2]), that duty applies to the supervision of them as well.

In this case there was no showing that Jacob and Century 21 failed to supervise Record. Rather, it was shown that they permitted him to use a standard office form provided by them and containing an improper explanation of exclusive listings. Therefore, while they can be held directly responsible for the use of the form, knowingly allowing improper actions does not amount to lack of supervision.

V- Neither the respondents nor the complainants made any request for leave to submit post hearing arguments or memoranda. Therefore, the post hearing written submission by the respondents and the complainant's response thereto have not been considered by this tribunal. Richards v Steven Lincoln-Mercury, Supreme Court, Kings County, NYLJ 9/14/93, p.24.

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[4] The complainant's implied argument that the respondent's breached the pledge when then ceased marketing the property and failed to provide any more of the promised services, ignores the fact that the Wodickas had told Schindel that they no longer wished to sell the house.

CONCLUSIONS OF LAW

1) By entering into an exclusive listing agreement which did not have attached to it or printed on the reverse side the correct, free-standing explanation of exclusive listings, the respondents violated 19 NYCRR 175.24[b] and thereby demonstrated incompetency.

2) The charges that the respondents violated 19 NYCRR 175.24[c][1] by failing to give the Wodickas a list of the member brokers of the multiple listing service, breached their fiduciary duties to the Wodickas by having them sign an acknowledgement of receipt of such a list, engaged in dishonest and misleading advertising, and failed to provide proper supervision of Record should be dismissed.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Lorraine Jacob and Century 21 Maridon Realty of Franklin Square Inc. have demonstrated incompetency, and accordingly, pursuant to Real Property Law §441-c, they shall pay a fine of $250.00 to the Department of State on or before November 30, 1993, and upon failure to pay the fine their licenses as real estate brokers shall be suspended for a period of one month, commencing on December 1, 1993 and terminating on December 31, 1993.

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