

STATE OF NEW YORK
DEPARTMENT OF STATE

-----X

In the Matter of the Complaint of

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

Complainant,

DECISION

-against-

**LORRAINE JACOB, MICHAEL B. SCHINDEL,
and CENTURY 21 MARIDON REALTY OF
FRANKLIN SQUARE, INC.**

Respondents.

-----X

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 September 10, 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, 861 Larkfield Road, Commack, New York 11725.

The complainant was represented by Scott Nejame, Esq.

COMPLAINT

The complaint in the matter alleges that the respondents, acting through a real estate salesperson licensed in association with them, arranged the rental of an apartment by clients, that the clients could not legally occupy the apartment, that the salesperson then showed the clients other apartments which could not be lawfully occupied, that the corporate respondent was charged with four zoning violations for promoting the use of an illegally zoned apartment and Schindel plead guilty to all four violations, that the respondents have failed and refused to refund the \$750.00 commission which was received for the rental, and that by reason of the above the respondents have illegally retained deposit monies, converted monies not belonging to them and/or retained an unearned commission, breached their duty to deal openly, honestly and fairly with the public, and promoted the rental of illegal apartments, thereby demonstrating untrustworthiness and/or incompetency.

FINDINGS OF FACT

1) Notices of hearing together with copies of the complaint were served on the respondents by certified mail delivered on April 3, 1993 (Comp. Ex. 1).

2) Lorraine Jacob and Michael B. Schindel are duly licensed as real estate brokers in their own names and representing Century 21 Maridon Realty of Franklin Square, Inc., with an office at 939 Hempstead Turnpike, Franklin Square, New York 11010. At all times hereinafter mentioned, and until July 27, 1989, they were also duly licensed as a real estate brokers representing Century 21 Maridon Realty of New Hyde Park, Inc. (Century 21), located at 1314 A Jericho Turnpike, New Hyde Park, New York 11040 (Comp. Ex. 2). Century 21 ceased doing business on May 1, 1989.

3) On April 17, 1990 Schindel, acting on behalf of Century 21, entered guilty pleas to charges of four violations of the zoning ordinance of the Town of Hempstead (Comp. Ex. 7). The informations to which the pleas were entered alleged that Century 21 and its salesperson, Val Carubia, permitted the use of real property as two family dwellings in violation of the local zoning ordinance (Comp. Ex. 6). The guilty pleas resulted in the imposition of four, \$100.00 fines, which were paid by Century 21 (Comp. Ex. 3 and 7, Resp. Ex. B).

The charges arose out of transactions in which Carubia, a real estate salesperson licensed in association with Century 21 under the name Valasia Gialaboukis (Comp. Ex. 2), arranged for the rental to Carol Van Ostrand and Larry Aufiero of certain apartments owned by Kenneth R. Nodalny, for which Century 21 was paid a commission of \$750.00 by the Nassau County Department of Social Services. In March, 1991 Senior License Investigator William Zullo met with Schindel, who expressed the intention of not returning the commission.

Prior to arranging the rentals the respondents made no efforts to determine whether the apartments were in compliance with the zoning ordinance. There is no evidence on the record, however, that they had any reason to believe that the apartments were illegal.

OPINION

I- 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).

II- Conduct by a licensed real estate broker which has the effect of violating or which encourages violation of local zoning and occupancy regulations has, on several occasions, been held to be a demonstration of untrustworthiness and incompetency. Department of State v Delza B. Smith, 150 DOS 80, conf'd. sub nom Smith v Paterson, 88 A.D.2d 917, 450 N.Y.S.2d 577 (1982); Division of Licensing Services v Rabizadeh, 27 DOS 92; Division of Licensing Services v J.R. Valino Your Realty Co., Inc., 19 DOS 90; Division of Licensing Services v Frank Dell'Accio, Jr., 15 DOS 88. However, in order to support a charge of such misconduct the complainant must establish that the broker knew or should have known of the illegality of the occupancy Division of Licensing Services v Zuckerman, 151 DOS 92, or at least acted without making necessary inquiries in a situation in which he or she should have suspected that the occupancy might be unlawful. Division of Licensing Services v Parenti, 94 DOS 93.

In this case, while the complainant has established that the rentals were unlawful, it failed to prove that the respondents had the necessary knowledge, or failed to take what would have been in the circumstances reasonable steps to obtain such knowledge, so as to be blameable for effectuating unlawful rentals.^{1,2}

III- Century 21 received a commission of \$750.00 for brokering the rental of an apartment. Implicit in the agreement to pay such a commission was the condition that the rental be lawful and that, therefore, the tenants would be able to remain in occupancy. The rental agreement entered into by the tenants, the landlord, and Century 21's salesperson provided for the entering into of a rental of one year, in return for which Century 21 would receive the commission. Since the rental was unlawful and, therefore, not enforceable, A.L. Corbin, Corbin on Contracts §1343 (1952), the commission was unearned.

¹ This is not to be read as an endorsement of the respondents' avowed practice of not concerning themselves with the legality of an occupancy where the apartment rented occupies only the first floor of a house. If a broker is aware that in a particular area the houses are zoned for one family occupancy (a fact not established in this case), that broker may not close his or her eyes to the fact that in the house in which the rental is being made there are more floors than just the one the rental of which the broker is arranging, and must make reasonable inquiries to determine what use is being made of the other floors. Division of Licensing Services v Parenti, supra.

² It should be noted that the guilty pleas which were entered to the charges of zoning violations where, while entered by Schindel in his capacity as a corporate officer, the pleas of only Century 21 Maridon Realty of New Hyde Park, Inc., which is not a respondent in this proceeding, and that there is no evidence of any guilty pleas or other convictions of any of the named respondents.

Schindel testified, in asserting an affirmative defense to the charge of failing to refund the commission, that the payor, the Department of Social Services, did not want the commission returned. No other evidence was offered by the respondents to support that position, and I find Schindel's self serving testimony to be insufficient to support a contention so lacking in credibility.

A real estate broker acts improperly when he or she retains an unearned commission. Department of State v Medina, 73 DOS 86; Department of State v Lincoln, 32 DOS 86. That proposition clearly derives from Real Property Law (RPL) §442-c, which allows for the imposition upon a broker of liability for acts of which the broker was not aware at the time of their commission, so long as the broker retains the financial benefits of those acts after becoming aware of them. It is supported by the holdings of the courts that where a broker or salesperson has received money to which he or she is not entitled, the broker may be required to return the money, together with interest, as a condition of retention of his or her license. 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).³

Inasmuch as a real estate broker is obligated to supervise the activities of the corporation which he or she is licensed to represent, RPL §§441 and 441-b[2], Division of Licensing Services v Shulkin, 4 DOS 90, Jacob and Schindel can and should be held responsible for Century 21's retention of the unearned commission.

IV- The respondents have moved for dismissal of the complaint based on an alleged violation of (SAPA) §301[1], which provides that "(i)n an adjudicatory proceeding all parties shall be afforded an opportunity for a hearing within reasonable time," a requirement which is mandatory, not discretionary. Maxwell v Commissioner of Motor Vehicles, 109 Misc.2d 62, 437 NYS2d 554 (Supreme Ct. Erie County, 1981).

In order to show that a hearing has not been held within a reasonable time, the respondents must show substantial prejudice arising out of the delay. Correale v Passidomo, 120 AD2d 525, 501 NYS2d 724 (1986); Geary v Com'r of Motor Vehicles, 92 AD2d 38, 459 NYS2d 494 (1983); cf. Eich v Shaffer, 136 AD2d 701, 523 NYS2d 902 (1988). Such a showing can be made with a demonstration by the respondents that their ability to present defense witnesses with a clear and detailed recollection of the events has been hampered by the delay. Walia v Axelrod, 120 Misc.2d 104, 465 NYS2d 443 (Supreme Ct. Erie County,

³ In this particular case, a requirement the respondents return the money now is not justified, inasmuch as the evidence only establishes that it was paid to Century 21 Maridon Realty of New Hyde Park, Inc., and does not establish that it ever came into the personal possession of the respondents.

1983). However, the respondent must show that the delay significantly and irreparably handicapped him in preparing a defense. Reid v Axelrod, 164 AD2d 973, 559 NYS2d 417 (1990); Gillette v NYS Liquor Authority, 149 AD2d 927, 540 NYS2d 61 (1989).

The complainant first learned of this matter in 1989, and appears to have concluded its investigation in October, 1991, approximately seventeen months before the complaint was served. The respondents, however, have failed to demonstrate that they have been prejudiced in any way by the delay. On the sole issue on which I have found liability, the retention of an unearned commission, there has been no representation or showing that, were it not for the passage of time, the respondents would have had relevant documents or would have been able to present clearer testimony.⁴ To the contrary, while on other issues Schindel's recollection was often incomplete and faulty, he was absolutely clear on the failure to refund the commission after entering the guilty pleas on behalf of the corporation.

CONCLUSIONS OF LAW

1) The complainant has failed to prove by substantial evidence that the respondents negotiated the rental of real property in violation of a local zoning ordinance either knowingly or as a result of an improper failure to inquire. Accordingly, the charges that they improperly promoted the rental of illegal apartments should be dismissed. SAPA §306[1].

2) By failing to have the corporation of which they were representative brokers refund the \$750.00 commission after admitting to its guilt by entering guilty pleas to the charges of zoning violations, Jacob and Schindel became guilty of retaining an unearned commission, thereby demonstrating incompetency as real estate brokers.

3) Inasmuch as there is no evidence on the record to show that Century 21 Maridon Realty of Franklin Square, Inc. was in any way involved in the subject matter of this proceeding, the charges against it should be dismissed. SAPA §306[1].

4) The respondents have failed to establish that they were prejudiced by the delay in the bringing of this proceeding, and, therefore, their motion to dismiss by reason of such delay should be denied.

⁴ I have not considered the representations made by Mr. Goldson in his letter of October 20, 1993 which was written in response to Mr. Nejame's affidavit in opposition to the respondents' motion to dismiss. While during the hearing Mr. Nejame had sought and been granted leave to submit the affidavit, Mr. Goldson never sought, and therefore was not granted, leave to reply. Richards v Steven Lincoln-Mercury, Supreme Court, Kings County, NYLJ 9/14/93, p.24.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Lorraine Jacob and Michael B. Schindel have demonstrated incompetency as real estate brokers, and accordingly, pursuant to Real Property Law §441-c, they shall each pay fines of \$750.00 to the Department of State on or before December 31, 1993, and upon failure to pay the fines all licenses issued to them as real estate brokers shall be suspended for a period of one month, commencing on January 1, 1994 and terminating on January 31, 1994, and

IT IS FURTHER DETERMINED THAT the charges herein against Century 21 Maridon Realty of Franklin Square, Inc. are dismissed.

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