

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-

**MARY ANN LANA, LANTHORN REALTY, INC.
d/b/a LANTHORN ANNE STEELE, and
ELANA JACOBI,**

Respondents.

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This matter came on for hearing before the undersigned, Roger Schneier, on May 26 and July 20, 1995 at the office of the Department of State located at 270 Broadway, New York, New York.

Mary Ann Lana and Lanthorn Realty, Inc., of 2743 Shore Road, Merrick, New York 11566, were represented by John G. Poli, III, Esq., Raskin, Haas & Poli, 34 Dewey Street, Huntington, New York 11743.

Elana Jacobi, of Coldwell Banker Dennis Brown Realty, 1982 Broadway, Woodmere, New York 11516, was represented by Edward J. Wolf, Esq., 300 Motor Parkway, Hauppauge, New York 11788.

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

COMPLAINT

The complaint alleges that Jacobi, at the time a real estate salesperson associated with Lanthorn Realty, Inc. (hereinafter "Lanthorn"), wrongfully told potential purchasers of property that the seller (her and Lanthorn's principal), would accept about \$100,000.00 less than his asking price; that Lana disobeyed the seller's instructions to inform the potential purchasers that he wished to negotiate directly with them; that Lana lied to her purchaser when she told him that she had informed the purchasers of his wish to negotiate directly and that they were not comfortable with such negotiations; that when the potential purchasers told Lana that they wished to negotiate directly with the seller she

told them that all contacts had to be through her, and she failed to inform the seller of the purchasers' wishes; that when Lana and the potential purchasers entered into an agreement for Lanthorn to act as the potential purchasers in the sale of their property they became double agents representing both parties to a mutually dependent transaction; and that by reason thereof all the respondents breached their fiduciary duties and demonstrated untrustworthiness and/or incompetence, and Lana and Lanthorn engaged in fraud or a fraudulent practice.

MOTION

Prior to the hearing Mr. Poli moved to stay the proceedings pending the outcome of a prior civil action involving the same transactions. That motion was denied. The civil action involves a claim by Lanthorn for a commission, that is, a question of contract law, while this proceeding involves allegations of misconduct brought pursuant to the provisions of Real Property Law (RPL) Article 12A, a licensing statute. Therefore, a finding by the Court in favor of the respondents would not be dispositive of the issues before, or binding on, this tribunal. Department of State v Fitzsimons (1972), conf'd. sub nom Fitzsimons v Department of State, 40 AD2d 843, 337 NYS2d 499 (1972).¹

FINDINGS OF FACT

1) Notices of hearing together with copies of the complaint, and a subsequent amended complaint, were served on the respondents by certified mail (State's Ex. 1 and 2).

2) Since May 5, 1993 Mary Ann Lana has been duly licensed as a real estate broker in association with Prudential Long Island Realty located at 2314 Merrick Road, Merrick, New York 11566. From August 18, 1989 until May 25, 1993 she was also licensed as a real estate broker representing Lanthorn Realty, Inc. d/b/a Lanthorn Anne Steele at 1844 Merrick Road, Merrick, New York 11566 (State's Ex. 3).

From April 28, 1990 until December 10, 1990, and from May 14, 1992 until May 16, 1993, Elana Jacobi was licensed as a real estate salesperson in association with Lanthorn. She is currently licensed as a real estate broker in association with Dennis Brown Realty Associates, Inc. d/b/a Coldwell Banker Dennis Brown Realty at 1082 Broadway, Woodmere, New York 11516 (State's Ex. 3).

¹ It should be noted that since the Department of State is neither a party to the law suit nor in privity with a party, it cannot be affected to any collateral estoppel or res judicata effect arising out of it. 73 NY Jur2d, Judgements, §397.

3) On or about April 19, 1992 Craig and Monica Parker entered into a listing agreement with Lanthorn for the sale of their house located at 2291 Shore Road, Merrick, New York, with an asking price of \$649,000.00 and an expiration date of December 31, 1992 (State's Ex. 4). The listing was renewed on January 10, 1993, with an asking price of \$589,000.00 and an expiration date of February 28, 1993, and on February 7, 1993 the expiration dated was extended to April 30, 1993 (State's Ex. 5).²

4) In late March, 1993, Jacobi showed the house to Donna Kent, a potential purchaser who had already seen the house and wished to see it again. Then, during the last week of the month Jacobi presented Mr. Parker with an offer from Donna and Andrew Kent to purchase the house for \$450,000.00. Unbeknownst to Mr. Parker, Jacobi had told the Kents that she believed that they would be able to purchase the house for around \$500,000.00. He responded that the offer of \$450,000.00 was too low, and that he needed to get about \$560,000.00. Jacobi answered that he should drop his price by \$60,000.00 (which would have placed it at \$529,000.00), that the Kents were good, financially responsible buyers, and appeared upset by Mr. Parker's response to the offer.

Mr. Parker refused to make a \$60,000.00 reduction, but told Jacobi that, since she had been dealing with the buyers, he would rely on her to make a counter offer of between \$540,000.00 and \$560,000.00.

A few days later Mr. Parker got a telephone call from Jacobi, who told him that the Kents had raised their offer to \$475,000.00. He rejected that offer.

Several days later Jacobi again telephoned the Parkers and told them that she would like to come over with still another offer. However, it was Lana who went to the Parker home and presented them with an offer of \$490,000.00 from the Kents. Mr. Parker told Lana that the offer was still low, and asked her if they could get it increased. Lana responded that she thought that was as high as the Kents would go. Mr. Parker then told Lana that he wanted to negotiate further.

The evidence is equivocal as to whether Mr. Parker told Lana that he would like to negotiate directly with Ms. Kent, as he contends, or asked Ms. Lana for her advice as to whether it would be productive for him to engage in such negotiations, to which she responded that she thought not, as she contends. It is also unclear as to whether Ms. Kent ever specifically requested to talk directly with Mr. Parker.

² The Parkers had previously listed the house with Lanthorn on January 4, 1991, with an asking price of \$679,000.00. That listing expired on April 7, 1992 (Resp. Ex. B).

Two or three days later Mr. Parker spoke with Lana, who told him that she had spoken with the Kents, and that they had raised their offer to \$500,000.00. He asked her if she thought that they would go any higher. She replied that she didn't think so, but would do her best. He said that if she needed to she could offer to split the difference in order to get an offer of \$512,500.00. He went on to say that before a final offer was made they would have to discuss commissions. Lana replied that she could not do that at the time, but assured him that commissions would not get in the way of closing the transaction.

Ultimately, Lana presented an offer of \$510,000.00 from the Kents, which was their absolute limit, and the Parkers accepted the offer on April 9, 1993 (State's Ex. 6). In return, Lana agreed to accept a commission of \$12,500.00.

5) The Kent's had entered into a listing agreement with Lanthorne for the sale of their house on March 28, 1993 (State's Ex. 8), with the understanding that they would be given time to sell the house by themselves before the listing became active. It was submitted to the multiple listing service by a secretary who, in error, prematurely entered the listing into a computer. No work was done on the listing, and it was cancelled on April 3, 1993 (Resp. Ex. A). Mr. Parker was unaware of the listing prior to his conversation with Ms. Kent.

6) On or about April 21, 1993 the Parkers and Ms. Kent³ entered into a contract for the purchase and sale of the house for \$510,000.00. In an attached rider the Parkers agreed to indemnify the Kents in the Parkers' dispute with Lanthorn regarding a commission. The Kents did not request that the contract be contingent on the sale of their home, and no such provision was added to the contract (State's Ex. 7). Title subsequently closed on July 12, 1993.

7) In July, 1993 Lanthorn commenced suit against the Parkers seeking a \$25,000.00 commission.

OPINION

I- As the party which initiated the proceedings, the burden is on the complainant to prove, by substantial evidence, the truth of the allegations 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

³ Mr. Kent was not a party to the final contract.

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- So long as the issue has been fully litigated by the parties, and is closely enough related to the stated charges that there is no surprise or prejudice to the respondent, the pleadings may be amended to conform to the proof and encompass a charge which was not stated in the complaint. This may be done even without a formal motion being made by the complainant. Helman v Dixon, 71 Misc.2d 1057, 338 NYS2d 139 (Civil Ct. NY County, 1972). In ruling on the motion, the tribunal must determine that had the charge in question been stated in the complaint no additional evidence would have been forthcoming. Tollin v Elleby, 77 Misc.2d 708, 354 NYS2d 856 (Civil Ct. NY County, 1974). What is essential is that the "matters were raised in the proof, were actually litigated by the parties and were within the broad framework of the original pleadings." Cooper v Morin, 91 Misc.2d 302, 398 NYS2d 36, 46 (Supreme Ct. Monroe County, 1977), mod. on other grnds. 64 AD2d 130, 409 NYS2d 30 (1978), aff'd. 49 NY2d 69, 424 NYS2d 168 (1979).

The complaint alleges that Jacobi, without the authorization of Mr. Parker, told the Kents that the property would probably sell for \$480,000.00 to \$490,000.00, or about \$100,000.00 less than the asking price. The evidence establishes that she told them that the house would probably sell for around \$500,000.00, or around \$89,000.00 less than the asking price. The issue was fully litigated, and the complaint should be, and is, amended to conform to this minor deviation in the proof.

III- In attempting to arrange the sale of the Parker property Jacobi became their agent. 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 the obligations to act solely for the benefit of the principal in all matters connected with the agency, Restatement (Second) of Agency, §387, and not to disclose confidential information to the injury of her principal, Restatement (Second) of Agency, §395. 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).

When Jacobi told Ms. Kent that the Parkers were anxious to sell, and that they could probably purchase the property for around \$500,000.00, she breached her duties of confidentiality and of acting solely in the interests of her principals. The effect of those statements could very well have lead the Kents to believe that they could take the position that \$510,000.00 was their final offer with confidence that the Parkers, who had originally sought \$679,000.00, would have to accept an offer which was \$89,000.00 less than what they were then seeking.

The respondents offered no explanation for Jacobi's conduct, and it would be improper for the tribunal to speculate on what her motivation might have been. Accordingly, it is not possible to find any factors mitigating the seriousness of this fundamental breach of fiduciary duties.

IV- Pursuant to RPL §442-c, a real estate broker may be held liable for the misconduct of an associated salesperson only where it appears that the broker had actual knowledge of the violation or, having subsequently been placed on notice of such violation, retains the benefits, profits or proceeds of that misconduct. There is no evidence in this proceeding upon which such liability on the part of Lana or Lanthorn can be predicated.

V- On March 28, 1993 Lanthorn entered into an agreement with the Kents, pursuant to which it would represent them in the sale of their home. The complainant alleges that at that point Lana and Lanthorn became double agents representing both parties to a mutually dependent transaction. That charge fails for two reasons: The agency never actually came into existence, since it was cancelled prior to its planned effective date, and, since there is no evidence that the Kents needed to sell their house prior to purchasing the Parkers' house, there is no proof that there was a mutually dependent transaction.

CONCLUSIONS OF LAW

1) By telling Ms. Kent that the Parkers were anxious to sell, and that should could probably purchase their house for substantially less than the asking price, Jacobi breached her fiduciary duties of loyalty and confidentiality, and demonstrated untrustworthiness and incompetency as a real estate salesperson.

2) Inasmuch as the complainant failed to establish that Lana and Lanthorn had actual knowledge of Jacobi's misconduct, or that having been placed on notice of such misconduct they retained the benefits, profits or proceeds of that misconduct, they cannot be held responsible for that misconduct.

3) The complainant failed to establish: that Lana and Lanthorn disobeyed Mr. Parker's instructions to inform Ms. Kent that he wished to negotiated directly with her; that Lana lied to Mr.

Parker about whether Ms. Kent wished to negotiate directly with him; that Lana wrongfully told Ms. Kent that she could not negotiate directly with Mr. Parker; or that Lana and Lanthorn improperly became double agents in a mutually dependent transaction.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Elana Jacobi has demonstrated untrustworthiness and incompetency and, accordingly, pursuant to Real Property Law §441-c, her license as a real estate broker is suspended for a period of two months, commencing on October 1, 1995 and terminating on November 30, 1995, both dates inclusive, and

IT IS FURTHER DETERMINED THAT the charges herein against Mary Ann Lana and Lanthorn Realty, 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:

ALEXANDER F. TREADWELL
Secretary of State
By:

Michael E. Stafford, Esq.
Chief Counsel